

ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN CHEMISTRY COUNCIL,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY and LISA P. JACKSON,
Administrator, U.S. Environmental
Protection Agency,

Respondents.

)
)
)
) Case No. 10-1167
) (Consolidated with
) Case Nos. 10-1168,
) 10-1169, 10-1170,
) 10-1173, 10-1174,
) 10-1175, 10-1176,
) 10-1177, 10-1178,
) 10-1179, 10-1180)
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**PETITIONERS' OPPOSITION TO
RESPONDENTS' MOTION TO DISMISS**

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INTRODUCTION

In this case, Petitioners challenge EPA's 30-year-old interpretation of the permitting requirements of the Clean Air Act. EPA argues that Petitioners are too late. But Congress wants EPA and courts to review longstanding EPA interpretations whenever new grounds arise for challenging them, which is why Section 307(b)(1) of the Act authorizes petitions for review of EPA actions filed within 60 days after such grounds arise. *See* 42 U.S.C. § 7607(b)(1). Sixty days before Petitioners filed their petitions for review, EPA finalized a new rule that, because of the older interpretation Petitioners now challenge, causes their members and thousands of other sources to be exposed to an onerous permitting program for the first time. The massive expansion transforms the permitting program, which Congress designed for only a small number of very large sources. EPA's new rule provides the new grounds that make Petitioners' challenges timely because it both ripened Petitioners' claims (by causing the older interpretation to injure their members for the first time) and created a new challenge that did not previously exist (by rendering the older interpretation absurd). While the Court does not have to decide that Petitioners' challenges will succeed in order to hold that their petitions are timely, a brief explanation of the differences in Petitioners' and EPA's interpretations of the Act helps show why the petitions are premised on new grounds and must not be dismissed.

A pillar of the Clean Air Act is the National Ambient Air Quality Standards program (Part A of Title I) for regulating so-called criteria pollutants. For each criteria

pollutant, EPA sets a national ambient air quality standard (NAAQS); for each NAAQS, EPA designates areas of the country as either in attainment or in nonattainment with the NAAQS.¹ 42 U.S.C. § 7407(d). Because the designations are NAAQS-specific, a single area may be in attainment with one NAAQS while in nonattainment with another. Congress wanted each area to be in attainment with each NAAQS. Among Congress's several means for achieving that goal are two complementary permitting programs. To improve air quality in areas not in attainment with a NAAQS, Congress required certain stationary sources in those areas to obtain nonattainment new source review permits that impose the "lowest achievable emissions rate" to control emissions of the pollutant whose NAAQS the area is not attaining. *See* 42 U.S.C. §§ 7501(3), 7502. To prevent air quality in areas in attainment with a NAAQS from worsening to the point that they are no longer in attainment, Congress sought to manage growth by requiring certain stationary sources in those areas to obtain prevention of significant deterioration permits (PSD permits) that impose the "best available control technology" to control emissions. *See* 42 U.S.C. §§ 7471–7479.

Petitioners and EPA disagree over *which* stationary sources must obtain PSD permits. As Petitioners interpret the Act and EPA's regulations, a stationary source

¹ An area also may be designated as "unclassifiable" for a given NAAQS. For all relevant purposes, an unclassifiable area is the same as an attainment area, which is why both have long been lumped together and called "clean air areas." *Alabama Power Co. v. Costle*, 636 F.2d 323, 343 n.2 (D.C. Cir. 1980). For convenience, this brief refers to attainment and unclassifiable areas together as simply "attainment areas."

must obtain a PSD permit if it is located in an area in attainment with the NAAQS for a criteria pollutant and if it will have major emissions (more than 100 or 250 tons per year, depending on the source) of *that criteria pollutant*. As EPA interprets the Act and its regulations, a stationary source must obtain a PSD permit if it will have major emissions of *any pollutant* subject to regulation under the Act—even a *noncriteria pollutant for which there is no NAAQS* (Resp'ts Mot. To Dismiss (MTD) at 1). In effect, EPA's interpretation severs the link between the PSD program and NAAQS attainment.

EPA's broader interpretation of the triggers for PSD permitting was originally announced in the preamble to regulations EPA adopted in 1980. *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676, 52,677 (Aug. 7, 1980). Yet no court has ever scrutinized EPA's interpretation for its consistency with the Clean Air Act.

Petitioners have members who, like the vast majority of industry, have thus far not been affected by the requirement that sources with major emissions of only noncriteria pollutants obtain PSD permits. Without cognizable harm for them to allege, any challenge they would have brought to the overbreadth of EPA's interpretation would have been rejected as unripe and based on hypothetical surmise.

That all changed on May 7, 2010. On that date, EPA finalized a regulation under Section 202(a) of the Act to regulate automobile emissions of a new class of noncriteria pollutants, greenhouse gases (GHGs). *Light-Duty Vehicle Greenhouse Gas Emissions Standard and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg.

25,324 (May 7, 2010). EPA has determined that, when the so-called Tailpipe Rule takes effect on January 2, 2011, GHGs will become subject to regulation under the Act. *See, e.g., Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010). Thenceforth, under EPA's interpretation of the PSD permitting triggers, stationary sources that emit major amounts of GHGs will have to obtain preconstruction PSD permits (even if they are not major emitters of any criteria pollutant) and stationary sources that emit major amounts of any criteria pollutant will have to obtain new PSD permits if their GHG emissions increase. Those are not small consequences: GHGs are emitted in major amounts by thousands of stationary sources, and even EPA recognizes that, because of the Tailpipe Rule, permitting agencies will be overwhelmed reviewing thousands of PSD permit applications for stationary sources that emit major amounts of GHGs *but not major amounts of any criteria pollutants*. *See Tailoring Rule*, 75 Fed. Reg. at 31,603.

The Tailpipe Rule provides Petitioners two new grounds for challenging EPA's overbroad interpretation of the PSD permitting triggers, both of which arose only with the Tailpipe Rule's finalization. *First*, because Petitioners' members now have to obtain PSD permits solely because of major emissions of noncriteria pollutants—GHGs—the Tailpipe Rule made a speculative injury concrete and thereby ripened their individual claims. *See La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996) (hereinafter, *LEAN*). *Second*, the Tailpipe Rule “essentially create[d] a challenge that did not previously exist,” *Eagle-Picher Industries Inc. v. EPA*, 759 F.2d

905, 913 (D.C. Cir. 1985), by rendering EPA's interpretation absurd, unreasonable, and inconsistent with Congress's goals for the Act and the PSD program. In short, Petitioners satisfy Section 307(b)(1) because the Tailpipe Rule opened a new review period and also provided a new substantive basis for vacating EPA's interpretation.

To avoid review of its interpretation, EPA argues that Petitioners' claims ripened before the Tailpipe Rule was finalized because Petitioners should have anticipated that EPA was going to regulate GHGs (MTD 16–20). That argument perverts the ripeness doctrine. A claim is not ripe when harmful regulation is merely being contemplated; a contingent prospect of regulation causes “no hardship at present or in the near future.” *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999) (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)). Only when the Tailpipe Rule was finalized did it become certain that Petitioners' members would face hardship and that they would face it in the near future—at the start of 2011, to be exact, when the Tailpipe Rule goes into effect.

EPA also argues that Petitioners' challenges to its interpretation of the PSD permitting triggers are no different than challenges they could have brought years ago (MTD 13–15). EPA misconceives Petitioners' challenges. Petitioners do not challenge EPA's interpretation just because it is inconsistent with the Clean Air Act. They contend that recent events—the Tailpipe Rule's regulation of GHGs—have created extreme “unexpected difficulties” that show the unreasonableness of EPA's interpretation and magnify its inconsistency with the Act. *Nat'l Mining Ass'n v. Dept. of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995) (hereinafter, *NMA*).

EPA's other contentions are obvious nonstarters—like its contention that the Supreme Court's 1984 decision in *Chevron* ripened Petitioners' claims (along with, presumably, the claims of everyone affected by every pre-*Chevron* regulation) (MTD 16 n.15). They serve no purpose other than to reveal just how desperate EPA is to keep the Court from reviewing its interpretation of the PSD permitting triggers, the foundation for the expansion of its authority over the nation's stationary sources. But this Court must review EPA's interpretation, not just in this case, but also in cases challenging two other rulemakings where EPA both actually and constructively reopened its interpretation of the PSD permitting triggers. *See Se. Legal Found., Inc., v. EPA*, No. 10-1131 (D.C. Cir. filed June 3, 2010); *Coal. For Responsible Regulation v. EPA*, No. 10-1073 (D.C. Cir. filed Apr. 2, 2010). While Section 307(b)(1) and the actual and constructive reopener doctrines all operate differently, they serve the same essential purpose: creating access to judicial review where, as here, EPA's actions have "significantly alter[ed] the stakes of judicial review," resulting in momentous "change[s] that 'could have not been reasonably anticipated.'" *Sierra Club v. EPA*, 551 F.3d 1019, 1025 (D.C. Cir. 2008), *cert. denied*, *Am. Chemistry Council v. EPA*, 130 S.Ct. 1735 (2010) (quoting *Emtl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C. Cir. 2006)).

If EPA's new and expansive application of its old interpretation does not create the sort of new grounds that Section 307(b)(1) encompasses, nothing does. Because the Court has jurisdiction over the petitions for review, briefing on the lawfulness of EPA's interpretation must be ordered and EPA's Motion to Dismiss must be denied.

ARGUMENT

I. PETITIONERS' CHALLENGES WERE NOT RIPE UNTIL THE TAILPIPE RULE WAS FINALIZED.

By setting January 2, 2011 as the date when GHGs will be subject to regulation under the Act, the Tailpipe Rule requires many of Petitioners' members to obtain PSD permits for the first time, thereby ensuring that they will be injured by EPA's interpretation of the PSD triggers, and its overbreadth in particular, for the first time. By concretizing requirements and harms that had theretofore been only speculative (or nonexistent), the Tailpipe Rule ripened the challenges of Petitioners' members and the challenges of Petitioners as well. Because Section 307(b)(1) authorizes just-ripened challenges to long-held interpretations, Petitioners must be allowed to proceed. *See LEAN*, 87 F.3d at 1385; *see also Am. Road & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1113–14 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3745 (U.S. June 3, 2010) (No. 09-1485) (hereinafter, *ARTBA*) (discussing *LEAN*).

EPA fundamentally misunderstands ripeness, equating it with having a “sufficient incentive” to challenge agency action (MTD 16). Incentives have nothing to do with it, and EPA falsely accuses Petitioners of having simply “*chose[n]* to forego filing a petition for review ... at the time the initial regulations were promulgated” (MTD 17) (emphasis added). The mere promulgation of a regulation does not make it ripe for challenge: “a controversy concerning a regulation is not ordinarily ripe for review ... until the regulation has been applied to the claimant's situation by some

concrete action.” *Reno v. Catholic Social Servs. Inc.*, 509 U.S. 43, 57-58 (1993) (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990)); *see Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 164 (1967) (holding that a challenge to a regulation, the impact of which could not “be said to be felt immediately by those subject to it in conducting their day-to-day affairs,” would not be ripe until the regulation affected the challengers).

Challenges to a regulation are unripe when the injury parties expect arises not from the regulation by itself, but from its interaction with other, future agency action. *See LEAN*, 87 F.3d at 1385 (“CAIP’s claim itself does not demand immediate relief because the primary injury it alleges ‘is not a present hardship resulting from the regulations themselves, but rather a future injury that may result’ from programs that are approved under the regulations.”) (quoting *Cronin v. FAA*, 73 F.3d 1126, 1133 (D.C. Cir. 1996)). EPA’s interpretation that PSD permitting is required for stationary sources with major emissions of any pollutant subject to regulation under the Act is not the sort of agency action that immediately caused hardship. It turns entirely on other agency actions—those that subject pollutants to regulation under the Act.

It is, accordingly, immaterial that noncriteria pollutants in general “have been considered” by EPA to be “potential ‘triggers’ for PSD permitting for decades” (MTD 17). The judicial rule against hearing unripe challenges to agency action protects courts “from adjudicating matters that *in fact make no difference.*” *Am. Trucking Ass’ns v. ICC*, 747 F.2d 787, 789–90 (D.C. Cir. 1984) (Scalia, J.) (emphasis added); *see Nat’l Ass’n of Regulatory Utility Comm’rs v. Dep’t of Energy*, 851 F.2d 1424, 1429 (D.C. Cir.

1988) (holding a challenge unripe when it was “clear enough that some or all of the claims raised ... may well prove to be no more than theoretical when petitioners revisit them in the context of a concrete application”). Until the Tailpipe Rule added GHGs to the roster of pollutants subject to regulation, EPA’s overbroad interpretation of the PSD permitting triggers was meaningless for the vast majority of industry, including, especially, Petitioners’ members. EPA dismisses that as a “dubious proposition” (MTD 17), offering reasons why it thinks its interpretation’s overbreadth had to have mattered to industry before now (MTD 18–19).²

But even if some stationary source, sometime over the last 30 years, had to get a PSD permit because it emitted major amounts of a noncriteria pollutant, that source’s failure to challenge EPA’s interpretation (for whatever reason) would not affect the ripeness of Petitioners’ challenges. Petitioners have members who, before the Tailpipe Rule, were unaffected by EPA’s interpretation of the PSD permitting triggers, let alone its overbreadth. Now that the Tailpipe Rule subjects GHGs to regulation under the Act, those members will, for the first time, have to obtain either preconstruction or modification PSD permits *solely because of their GHG emissions*. See

² EPA’s reasons are unpersuasive because they focus on efforts to avoid adopting best available control technology (BACT) for emissions of noncriteria pollutants. BACT is a PSD obligation subsidiary to permitting and may apply to noncriteria pollutant emissions of sources with PSD permits even if those emissions do not trigger PSD permitting in the first place. In this case, Petitioners do not address whether BACT should be applied to GHGs, for that is simply a follow-on question, separate from the question of which major sources need PSD permits.

Decl. of David C. Ailor, VP, Regulatory Affairs of the Nat'l Oilseed Processors Ass'n in Supp. of Opp'n to Mot. to Dismiss (Sept. 29, 2010) (Attach. 1 hereto) (but for the Tailpipe Rule, member facilities would not trigger PSD permitting requirements, and EPA's remedial efforts will not help those facilities); Decl. of Thomas J. Ward, Nat'l Ass'n of Home Builders in Supp. of Opp'n to Mot. to Dismiss (Sept. 28, 2010) (Attach. 2 hereto) (nearly 7,000 new home construction projects will qualify as major sources because of GHG emissions, up from zero such projects before the Tailpipe Rule); *see also EPA, Regulatory Impact Analysis for the Final PSD and Title V Greenhouse Gas Tailoring Rule, Final Report*, EPA 452/R-10-003 (May 2010) at Attach. C, p. 23 (finding that, even taking EPA's remedial efforts into account, there will be 915 new industrial PSD permits annually because of the Tailpipe Rule); 75 Fed. Reg. at 31,538 (acknowledging that PSD permits for "modifications" will at least double). Because GHGs are noncriteria pollutants, those members, who are typical of Petitioners' members, are finally positioned to challenge EPA's interpretation as overbroad. *See Recreation Vehicle Indus. Ass'n v. EPA*, 653 F.2d 562, 568 (D.C. Cir. 1981) ("Before any litigant reasonably can be expected to present a petition for review of an agency rule, he first must be put on fair notice that the rule in question is applicable to him. Otherwise the agency could promulgate a confusing regulation and, after expiration of the time for any judicial contest, clarify it to the surprise and prejudice of a party whose opportunity for judicial review meanwhile has been extinguished. ... The

agency cannot now take advantage of the obscurity of intentions in order to defeat rights statutorily conferred.”).

Unable to gainsay those facts, EPA tries to avoid them, arguing (MTD 19–20) that Petitioners’ members’ claims ripened in 1998 (when, according to EPA, its “official position was that it had regulatory authority over greenhouse gases under the Clean Air Act”), in 2007 (when the Supreme Court held that GHGs were “air pollutants” that EPA could potentially regulate under the automobile provisions of the Act), or in 2008 (when EPA purportedly “addressed the question of when EPA regulations make a specific pollutant ‘subject to regulation’ for purposes of the PSD program”). In other words, EPA argues that Petitioners’ members’ claims ripened when EPA and the Supreme Court indicated that GHGs *could be* “subject to regulation under the Act” but before GHGs *were actually* “subject to regulation under the Act.” Contemplation is not action, though, and while EPA may now believe (at least for purposes of its motion to dismiss³) that regulation of GHGs was inevitable in 1998, 2007, or 2008, EPA’s hindsight is not 20/20. At several junctures between then and now, EPA could have stopped marching toward the Tailpipe Rule. It could have found that GHGs do not endanger public health and welfare (a prerequisite to

³ In contrast with EPA’s litigating position, in a recent rulemaking EPA stated that *Massachusetts v. EPA* did *not* make regulation of GHGs inevitable and that its 1998 memo made “no determination” to regulate GHGs under any part of the Act. See EPA, *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, EPA’s Response to Public Comments*, at 34, 51 (Mar. 29, 2010).

regulating emissions from cars under Section 202), or it could have declined to adopt the Tailpipe Rule (because, *inter alia*, the ends of the Tailpipe Rule are achieved by a recent NHTSA Fuel Economy Rule). That is precisely what the 1998 and 2008 memos declared—that GHGs were not then “subject to regulation” and would not be until EPA issued a standard to control GHG emissions. *See* Mem. from Jonathan Z. Cannon, General Counsel, EPA to Carol M. Browner, Administrator, EPA re: “EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation” (Apr. 10, 1998); Mem. from Stephen L. Johnson, Administrator, EPA to Regional Administrators re: “EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program” (Dec. 18, 2008).⁴

Still, foreseeability is not the essence of ripeness. *See Hinton v. Udall*, 364 F.2d 676, 680 (D.C. Cir. 1966) (“The doctrine of ripeness often precludes immediate judicial consideration even in cases when judicial consideration seems well nigh inevitable.”). Injury is. And Petitioners’ members’ injury comes not from the mere prospect of regulating GHGs under the Act, but from the actual regulation itself,

⁴ EPA also argues that its 2002 NSR Reform revisions to the PSD rules ripened Petitioners’ claims. That argument has at least two flaws. *First*, the revisions did not address or change the original interpretation and thus injured Petitioners’ members no more than the original. They were injured only after the Tailpipe Rule. *Second*, the 2002 action did not make EPA’s regulation of GHGs more likely, let alone make it certain or inevitable. In fact, a few months later, EPA determined that it *could not* regulate GHGs, a determination the Supreme Court reversed less than five years later.

because only actual regulation requires Petitioners' members to change how they conduct their "day-to-day affairs." *Toilet Goods*, 387 U.S. at 164. Petitioners have no doubt that if they had brought challenges in 2008, 2007, or 1998 (or 1980, for that matter), claiming that their members would be harmed by EPA's overbroad interpretation of the PSD permitting triggers whenever EPA got around to regulating GHGs, their challenges would have been summarily dismissed. EPA's off-handed suggestion that Petitioners should have filed a protective petition for review before now (MTD 17) misreads *Eagle-Picher* and ignores Section 307(b)(1), which together confirm that a protective petition hypothesizing future harms is unnecessary where, as here, the ripening of a challenger's claim (like a newly arisen substantive challenge) opens a new filing window under the statute. *See Eagle-Picher*, 759 F.2d at 913–14.

Petitioners' members' injuries went from "speculative" to "concrete" *only after* EPA finalized the Tailpipe Rule on May 7, 2010, 60 days before Petitioners filed their challenges. Their challenges, therefore, are timely.

II. THE TAILPIPE RULE CREATED NEW SUBSTANTIVE CHALLENGES TO EPA'S INTERPRETATION OF THE PSD PERMITTING TRIGGERS.

In allowing challenges to a long-held EPA interpretation when a new ground arises for challenging it, Section 307(b)(1) strikes "a careful balance between the need for administrative finality and the need to provide for subsequent review in the event of *unexpected difficulties*." *NMA*, 70 F.3d at 1350 & n.2 (emphasis added). New facts, laws, and regulations can "essentially create a challenge that did not previously exist."

Eagle-Picher, 759 F.2d at 913. A grounds-arising-after challenge thus is timely when it “raises points,” like unexpected difficulties or other consequences of recent events, that could not have been raised immediately after an agency adopted an interpretation. *ARTBA*, 588 F.3d at 1113; *see NMA*, 70 F.3d at 1352 (considering a grounds-arising-after challenge to an agency rule regarding allocation of authority between state and federal regulators because the petitioners relied on recent “conflict between state regulatory authorities and the Department” of the Interior).

Petitioners bring just such a case. Notwithstanding EPA’s assertion to the contrary (MTD 13–14), the arguments Petitioners intend to raise against EPA’s overbroad interpretation of the PSD permitting triggers are not just arguments that “were available to them at the time [the interpretation] was adopted.” *NMA*, 70 F.3d at 1350. Specifically, Petitioners will argue that the Tailpipe Rule has made EPA’s interpretation absurd and, thus, unreasonable. *See Int’l Alliance of Theatrical & Stage Employees v. N.L.R.B.*, 334 F.3d 27, 35 (D.C. Cir. 2003) (when an agency’s “reading upsets the statutory balance struck by Congress and leads to irrational results in practice, ... its interpretation is unreasonable under *Chevron* step two”). While it has always been unlawful for EPA to require a stationary source to obtain a PSD permit solely because of emissions of noncriteria pollutants, before the Tailpipe Rule added GHGs to the list of noncriteria pollutants subject to regulation under the Act, the requirement and its consequences were never absurd. Now they are. EPA estimates that, because of the Tailpipe Rule, 82,000 construction projects will require permits

each year (up from 280), 75 Fed. Reg. at 31,556, and that each permit could take “a decade or longer” to obtain (up from 1 year), *id.* at 31,535, 31,557. Congress did not “intend[] to define such obviously minor sources as ‘major’ for the purposes of the PSD provision” but rather intended to burden only sources “financially able to bear the substantial regulatory costs imposed by the PSD provisions,” the number of which was “reasonably in line with EPA’s administrative capability.” *Alabama Power*, 636 F.2d at 353, 354. Even EPA admits its interpretation of the PSD permitting triggers imposes “costs to sources and administrative burdens to permitting authorities” that “are so severe” as to “be considered ‘absurd results,’” 75 Fed. Reg. at 31,517, which is why EPA has invoked little-used doctrines (absurd results, administrative necessity, and one-step-at-a-time) to justify raising the unambiguous statutory major-source emissions thresholds one-thousand-fold, *see id.* at 31,516.

Those absurdities did not exist in 1980 or any time before the Tailpipe Rule actually opened the PSD permitting floodgates. Petitioners’ challenges satisfy Section 307(b)(1) because they are based on those newly arisen absurdities. EPA cannot escape that fact by arguing, as it might, that its effort to reduce the absurd consequences of the Tailpipe Rule somehow means that the Tailpipe Rule never generated absurdities to begin with. Besides being illogical, the point is irrelevant. The Tailpipe Rule requires thousands of sources to obtain PSD permits because of their GHG emissions. The scope of that requirement is absurd *today*, even if it “will be phased in over time” (MTD 11). There is, moreover, no guarantee that EPA’s

remedial effort, which it undertook separately and finalized *after* the Tailpipe Rule, will survive judicial review (it is currently being challenged).

III. **UNION ELECTRIC AND ALABAMA POWER DO NOT BAR PETITIONERS' CHALLENGE.**

Believing that “the statute and this Court’s precedent [*i.e.*, *Alabama Power*] would clearly bar Petitioners’ approach to pollutants subject to PSD,” EPA contends that “Petitioners’ arguments on that score do not constitute new grounds to review EPA’s long-standing rules” (MTD 15). In essence, EPA contends that this Court has no jurisdiction over a grounds-arising-after challenge that (allegedly) will be unsuccessful. Every part of EPA’s convoluted effort to make *jurisdictional* questions out of *merits* questions is wrong.

As an initial matter, “[i]t is firmly established ... that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts’ statutory or constitutional power to adjudicate the case.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998). Apparently unaware of that principle, EPA purports to identify a contrary rule in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), yet misreads that case. In *Union Electric*, a party brought a grounds-arising-after challenge to a state implementation plan under the Clean Air Act, claiming that the plan had become economically and technologically infeasible. Because the Court had not yet decided whether EPA could consider feasibility when approving a plan, the party argued that Section 307 authorizes courts to consider *any* ground arising after agency

action, even a ground the agency is forbidden to consider. The Supreme Court found no merit in that position, as it would “transfer a substantial responsibility in administering the Clean Air Act from the Administrator and the state agencies to the federal courts.” Rather, the Court held that “a reviewing court—regardless of when the petition for review is filed—may consider claims ... only if the Administrator may consider such claims” in the first instance. 427 U.S. at 255–56.

From that portion of the *Union Electric* opinion, EPA extracts a single sentence and, quoting it out of context, argues that the timeliness of Petitioners’ challenge is tied to its merit (MTD 14–15 & n.14). But when the Supreme Court wrote that “new ‘grounds’ ... must be such that, had they been known at the time the plan was presented to the Administrator for approval, it would have been an abuse of discretion for the Administrator to approve the plan,” 427 U.S. at 256, the Court was simply explaining that a proper grounds-arising-after challenge is one that raises new issues that are *among the class of issues* the agency could have considered when it took action originally. Unlike EPA, the Court was not conflating jurisdiction with the merits. The wrongness of EPA’s reading is confirmed by the fact that, in the 34 years since the Supreme Court decided *Union Electric*, this Court has never cited it for EPA’s counterintuitive position. Indeed, EPA’s reading is entirely self-defeating: if it were right, a court would have to defer resolving the timeliness of a petition for review until after the parties had fully briefed the merits, which is what a jurisdictional motion to dismiss is meant to obviate.

This case proves the point. EPA asserts that *Alabama Power* and “the unambiguous terms of the statute” drove its determination of which pollutants trigger PSD permitting (MTD 14–15). Petitioners believe that the text of the Clean Air Act and the holdings of *Alabama Power* (and some of its dicta, too) clearly support their interpretation. A fight over the significance *vel non* of *Alabama Power*, like a fight over the meaning of the Clean Air Act, is quintessentially a subject for full briefing on the merits, not for cursory treatment on a motion to dismiss for want of jurisdiction.⁵

⁵ A brief explication of EPA’s and Petitioners’ views of *Alabama Power* helps to show why Petitioners’ position is not unfounded, like EPA suggests.

EPA reads *Alabama Power* as endorsing a “relatively broad reading” of the Clean Air Act (MTD 15). Citing three portions of the opinion, EPA contends that “this Court clearly embraced a much broader notion of the range of pollutants that could trigger PSD than simply NAAQS pollutants” (MTD 14); later, EPA cites the same three portions as tying “PSD applicability to emissions of *any* pollutant subject to regulation under the Act” (MTD 17). But the cited portions of *Alabama Power* are not focused on triggering PSD permitting or on the vague concept of “PSD applicability.” They are focused on BACT, a subsidiary obligation for PSD permit-holders. *See* 636 F.2d at 353–54 n.60 (observing that BACT is required for a narrower set of pollutants than the set of pollutants identified in the definition of “major” sources); *id.* at 361 n.90 (rejecting an argument that BACT was required only for hazardous air pollutants); *id.* at 405–07 (rejecting a regulation limiting BACT to only the pollutants a source emits in major amounts, and also rejecting an argument that BACT should apply only to two pollutants until EPA conducted studies of other pollutants).

Besides demonstrating that EPA’s position is absurd and incompatible with Congress’s vision for the PSD program, *see, e.g.*, 636 F.2d at 353, 354, *Alabama Power* also validates Petitioners’ interpretation of the PSD permitting triggers because it *held* that a source’s location in an area in attainment with a NAAQS must be the basis for triggering PSD permitting. *See id.* at 364–68; *see also id.* at 365 (“The plain meaning of the inclusion in [Section 165, 42 U.S.C. § 7475] of the words ‘any area to which this part applies’ is that Congress intended location to be the key determinant of the applicability of the PSD review requirements.”).

Even if EPA were correct (and it is not) that it had the better of the debate 30 years ago (MTD 14–15), Petitioners must be allowed to proceed now. Congress opened new filing windows under Section 307(b)(1) precisely so that the agency and courts can examine longstanding EPA positions, even positions originally well-founded, in light of new absurdities and other “unexpected difficulties.” *NMA*, 70 F.3d at 1350. Furthermore, nothing in *Union Electric* or Section 307(b)(1) bars this Court from reconsidering its own decisions, assuming any arguably supported the agency’s longstanding-but-now-absurd position. *Cf. In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (courts “interpreting the words of a statute” have “some ‘scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results ... or would thwart the obvious purpose of the statute’”) (quoting *Comm’r of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965)) (omission in original). Petitioners allege that events unforeseeable thirty years ago—the regulation of GHGs and the concomitant explosion of PSD permits such regulation requires—have rendered EPA’s interpretation of the PSD permitting triggers so absurd that it must be considered anew. That is enough for Petitioners to get through the courthouse door. Whether the Court agrees with Petitioners or EPA about the merits, and whether it would overrule earlier decisions that favor EPA (assuming there even are any), are questions to resolve *after* EPA’s Motion to Dismiss is denied.

IV. PETITIONERS PROPERLY FILED IN THIS COURT.

In a concluding footnote, EPA argues that Petitioners erred in filing their petitions for review in this Court instead of with the agency (MTD 20 n.18). That objection is quickly dispatched. On July 6, 2010, the same day Petitioners filed their petitions for review, they sent EPA petitions to reconsider its interpretation of the PSD permitting triggers. *See* Nat'l Ass'n of Manufacturers *et al.*, Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulation (July 6, 2010) (Attach. 3 hereto); Am. Chemistry Council, Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulations: 40 C.F.R. Sections 51.166 and 52.21 (July 6, 2010) (Attach. 4 hereto). Moreover, this Court recently indicated that the prudential concerns that favor giving an agency the first crack at a grounds-arising-after challenge are not implicated when the new ground underlying the petition is the ripening of the petitioner's claim. *See ARTBA*, 588 F.3d at 1114.

CONCLUSION

EPA cannot escape the consequences of the Tailpipe Rule. It both ripened the claims of stationary sources (including Petitioners' members) whose emissions of noncriteria pollutants never before triggered PSD permitting, and it created a new challenge to the old interpretation. Because Section 307(b)(1) authorizes petitions for review based on such new grounds, EPA's motion to dismiss must be denied.

September 30, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2010, I caused to be electronically filed the foregoing Opposition to Respondents' Motion to Dismiss with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

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