ORAL ARGUMENT NOT YET SCHEDULED

Nos. 11–1101 et al.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Center for Biological Diversity, *et al.*,
Petitioners,

v.

Environmental Protection Agency, *et al.*,
Respondents.

On Petitions for Review of a
Rule of the Environmental Protection Agency

BRIEF OF INTERVENORS IN SUPPORT OF RESPONDENTS

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Date: June 21, 2012

INTERVENORS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) counsel for Intervenors submit this certificate as to parties, rulings, and related cases:

(A) Parties and *Amici*

Except for the National Association of Clean Water Agencies, who was granted leave to participate as *amicus curiae* on June 5, 2012, all parties, intervenors, and *amici* appearing in this court are listed in the Brief for Petitioners.

(B) Rulings Under Review

The rulings at issue appear in the Brief for Petitioners.

(C) Related Cases

The cases related to the EPA rule challenged here are listed in the Brief for Petitioners.

INTERVENORS' RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Intervenors make the following disclosures.

American Forest & Paper Association. AF&PA is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. The forest products industry is the leading producer and user of renewable biomass energy. AF&PA has no parent companies, and no publicly-held company has a 10% or greater ownership interest in AF&PA.

American Wood Council. AWC is the voice of North American traditional and engineered wood products, representing over 60% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs over one-third of a million men and women in well-paying jobs. AWC's engineers, technologists, scientists, and building code experts develop state-of-the-art engineering data, technology, and standards on structural wood products for use by design professionals, building officials, and wood products manufacturers to assure the safe and efficient design and use of wood structural components. AWC also provides technical, legal, and economic information on wood design, green building, and manufacturing environmental regulations advocating for balanced

government policies that sustain the wood products industry. AWC has no parent corporation, and no publicly held company has a ten percent (10%) or greater ownership interest in AWC.

Biomass Power Association. BPA is a non-profit, national trade association headquartered in Portland, Maine and organized under the laws of the State of Maine. BPA serves as the voice of the U.S. biomass industry in the federal public policy arena. BPA is comprised of 23 member companies who either own or operate biomass power plants, and 16 associate and affiliate members who are suppliers to or customers of the industry. BPA's member companies represent approximately 80 percent of the U.S. biomass to electricity sector. BPA has no parent corporation, and no publicly held company has a ten percent (10%) or greater ownership interest in BPA.

Corn Refiners Association. CRA is the national trade association representing the corn refining (wet milling) industry of the United States. CRA members are engaged in manufacturing and other operations which generate or have the potential to generate biogenic CO_2 emissions. CRA has no parent companies, and no publicly-held company has a 10% or greater ownership interest in CRA.

Florida Sugar Industry. FSI is comprised of the Sugar Cane Growers Cooperative of Florida, the Osceola Farms Company, and U.S. Sugar Company.

The FSI is joined in this proceeding by the Rio Grande Valley Sugar Growers, Inc., of Texas and the Hawaiian Commercial & Sugar Company of Hawaii. For the purposes of this proceeding, FSI includes all five of these entities. FSI is an informal coalition of these five business entities that share common interests in EPA's Deferral Rule, the regulation of GHG emissions from biomass combustion under the CAA, and other environmental regulations. FSI is not a corporation or other formal business entity. Accordingly, FSI has not issued any shares or debt securities to the public. No parent corporation or publicly held company has a ten percent (10%) or greater ownership interest in FSI. None of the members of FSI have issued shares or debt securities to the public; however, the Hawaiian Commercial & Sugar Company is a division of Alexander & Baldwin, Inc., which is a publicly traded company.

National Alliance of Forest Owners. NAFO is a national trade association representing private forest owners who manage more than 80 million acres of private forests in 47 states. NAFO's mission is to protect and enhance the economic and environmental values of private forests through targeted policy advocacy at the national level. NAFO has no parent companies, and no publicly-held company has a 10% or greater ownership interest in NAFO.

National Oilseed Processors Association. NOPA represents 12 companies engaged in the production of food, feed, and renewable fuels from oilseeds,

including soybeans. NOPA members are engaged in manufacturing and other operations which generate or have the potential to generate biogenic CO_2 emissions. NOPA has no parent companies, and no publicly-held company has a 10% or greater ownership interest in NOPA.

Renewable Fuels Association. RFA is a non-profit trade association representing companies that produce fuel ethanol for purposes of marketing that product to blenders and marketers of gasoline. It is a trade association as defined in D.C. Circuit Rule 26.1(b). RFA has no parent companies, and no publicly-held company has a 10% or greater ownership interest. It has not issued shares or debt securities to the public.

Rubber Manufacturers Association. RMA is the national trade association representing every major domestic tire manufacturer. RMA has no parent companies, and no publicly-held company has a 10% or greater ownership interest in RMA.

Treated Wood Council. TWC is the international trade association of the wood treating industry, serving more than 460 companies and associations related to the production of treated wood. TWC's members both produce and use biomass-based renewable energy sources. TWC has no parent companies, and no publicly-held company has a 10% or greater ownership interest in TWC.

Utility Air Regulatory Group. UARG is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

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* Authorities upon which we chiefly rely are marked with asteriks.

STATUTES

OTHER AUTHORITIES

GLOSSARY

TERMS

AF&PA	American Forest & Paper Association
CAA	Clean Air Act, 42 U.S.C. §§ 7401-7671q
CFI	Call for Information
CO_2	Carbon dioxide
CO_2e	Carbon dioxide equivalent
EPA	Environmental Protection Agency
GHG	Greenhouse gas
JA	Joint Appendix
LULUCF	Land Use, Land Use Change, and Forestry
NAFO	National Alliance of Forest Owners
PANEL	Biogenic Carbon Emissions Panel
PSD	Prevention of Significant Deterioration, 42 U.S.C. §§ 7470-7492
RFA	Renewable Fuels Association
SAB	Science Advisory Board
TITLE V	42 U.S.C. §§ 7661-7661f

GLOSSARY contd.

OTHER RELEVANT REFERENCES

THE CHALLENGED RULE

Deferral Rule: "Deferral for CO2 Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs," 76 Fed. Reg. 43, 490 (July 20, 2011)

RELATED RULES AND ACTIONS

Endangerment Determination: "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule," 74 Fed. Reg. 66,496 (December 15, 2009)

Call for Information: "Call for Information: Information on Greenhouse Gas Emissions Associated With Bioenergy and Other Biogenic Sources," 75 Fed. Reg. 41,173 (July 15, 2010)

Tailoring Rule: "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 75 Fed. Reg. 31, 514 (June 3, 2010)

Timing Decision: "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004 (April 2, 2010)

Vehicle Rule: "Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule," 75 Fed. Reg. 25,324 (May 7, 2010)

RELATED CASES

AF&PA Endangerment Determination Challenge: D.C. Circuit Case No. 10-1172, challenging the Endangerment Finding (severed from consolidated cases and held in abeyance).

AF&PA and NAFO Tailoring Rule Challenge: D.C. Circuit Case No. 10-1209, challenging Tailoring Rule (severed from consolidated cases and held in abeyance).

Endangerment Case: D.C. Circuit Case No. 09-1132 and consolidated cases, challenging the Endangerment Finding.

Grounds Arising After Challenge: D.C. Circuit Case No. 10-1167 and consolidated cases, challenging EPA's interpretation of the Clean Air Act's Prevention of Significant Deterioration provisions.

Tailoring Rule Challenge: D.C. Circuit Case No. 10-1073 and consolidated cases, challenging the Tailoring Rule and Timing Decision.

Vehicle Case: D.C. Circuit Case No. 10-1092 and consolidated cases, challenging Vehicle Rule.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review rules issued by the Environmental Protection Agency ("EPA") under the Clean Air Act ("CAA") pursuant to 42 U.S.C. § 7607(b). However, the Court lacks jurisdiction to review Petitioners' claims to the extent they challenge EPA's authority to provide a permanent exclusion of biomass emissions under certain CAA provisions because EPA has not taken final action, and Petitioners' claims are unripe.

ISSUES PRESENTED

1. Whether Petitioners' claims that EPA cannot provide a permanent exclusion from CAA permitting programs for carbon dioxide ("CO_2") emissions resulting from biomass combustion[1] are justiciable when EPA made no final decision whether to provide such an exclusion and has instead deferred regulation for a limited, fixed period in order to study the issue?

2. Whether, after granting administrative reconsideration of a rule regulating biomass emissions, EPA lawfully and reasonably issued an interim rule that temporarily deferred regulation of biomass emissions for a limited period so that the Agency could conduct legally required scientific studies before issuing

[1] Intervenors refer herein to these emissions as "biomass emissions" or "carbon emissions."

proposed and final rules regarding whether those emissions should be regulated under the CAA?

STATUTES AND REGULATIONS

Except for excerpts from 42 U.S.C. § 7607, which are reproduced in an Addendum to this Brief, all applicable statutes, etc., are contained in the Briefs and Addenda for Petitioners and Respondents.

STATEMENT OF FACTS

I. Biomass and Carbon Emissions.

As EPA has correctly concluded, carbon emissions associated with fossil fuels, on the one hand, and biomass, on the other, warrant fundamentally distinct analyses and treatment due to key differences in their carbon cycles. In particular, biomass combusted for energy is part of a natural and renewable carbon cycle.

This scientific principle is well-understood and uncontroversial. CO_2 is sequestered in plants through photosynthesis and emitted through decay and combustion. National Alliance of Forest Owners ("NAFO") Comments (EPA-HQ-OAR-2011-0083-0074) ("NAFO Deferral Comments") at 20 (JA:___). These dynamic processes occur simultaneously across the landscape and form an ongoing cycle by which emitted carbon is sequestered and vice versa. *Id.* at 21-22 (JA:___-___). Thus, CO_2 released through the combustion of biomass for energy was only recently sequestered from the atmosphere and is replaced by an equivalent amount

of CO_2 through ongoing plant growth and regeneration as part of the natural carbon cycle. Provided the amount of carbon stored in plants remains stable, no net increase occurs in atmospheric CO_2 concentrations due to biomass emissions. *Id.* at 3 (JA:____). In contrast, fossil fuels are formed over millennia and combustion of those fuels increases atmospheric CO_2 concentrations with no corresponding reductions in CO_2 through sequestration. Renewable Fuels Association ("RFA") Comments (EPA-HQ-OAR-2011-0083-0086) ("RFA Deferral Comments") at 5 (JA:___).

As EPA and other agencies have recognized, this difference is important because biomass emissions "result from natural biological processes," whereas anthropogenic fossil fuel emissions "unnaturally release[] CO_2 emissions into the atmosphere." RFA Comments (EPA-HQ-OAR-2010-0560-0194) ("RFA CFI Comments") at 2 n.3 (JA:___) (quoting EPA definitions of anthropogenic and biogenic emissions). Recognizing these differences, numerous government agencies have uniformly provided for distinct treatment of biomass emissions, excluding them from regulation. EPA, for example, has consistently excluded biomass emissions from the energy sector in its annual Greenhouse Gas ("GHG") Inventory[2] based on the conclusion that there is "[s]cientific consensus . . . that the

[2] EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008* at 3-10 (Apr. 15, 2010), *available at* http://www.epa.gov/climatechange/Downloads/ghgemissions/508_Complete_GHG

CO_2 emitted from burning biomass will not increase total atmospheric CO_2 concentration if this consumption is done on a sustainable basis." NAFO Comments (EPA-HQ-OAR-2010-0560-0261) ("NAFO CFI Comments") at 3 (JA:___) (quoting 2008 GHG Inventory). Likewise, biomass emissions are excluded from EPA's Mandatory GHG Reporting Rule and the Department of Energy's Voluntary Reporting of Greenhouse Gases Program. NAFO Deferral Comments at 5-6 (JA:___-___). EPA also excluded biomass emissions when assessing impacts of GHG emissions as part of its endangerment determination for motor vehicle emissions—the foundation for its regulation of GHGs under the CAA. 74 Fed. Reg. 66,496, 66,537-45 (Dec. 15, 2009) (JA:___-___).

Similar practices are observed internationally. The Intergovernmental Panel on Climate Change, the United Nations Framework Convention on Climate Change, and the European Union all exclude biomass emissions from stationary source GHG accounting programs. NAFO Deferral Comments at 5 (JA:___). In fact, Intervenors are not aware of any GHG regulations anywhere in the world that treat biomass emissions in the same manner as fossil fuel emissions.

_1990_2008.pdf. Pursuant to international agreements, EPA compiles an annual inventory of all domestic sinks and sources for CO_2 emissions. The GHG Inventory accounts for all biomass emissions in the land use sector at the time of harvest, not when they are combusted for energy.

II. EPA's Treatment of Biomass Emissions from Stationary Sources.

A. The Tailoring Rule and Biomass Emissions.

On October 27, 2009, EPA published the proposed Tailoring Rule, which proposed how GHGs, including CO_2, would be treated under the CAA's Prevention of Significant Deterioration ("PSD") and Title V programs. 74 Fed. Reg. 55,292 (Oct. 27, 2009) (JA:___). Under that proposal, a source's GHG emissions would be measured in "carbon dioxide equivalent" ("CO_2e") units. *Id.* at 55,351 (JA:___). In turn, the definition of CO_2e required the use of the GHG Inventory as "guidance on how to calculate a source's GHG emissions." *Id.* at 55,351, 55,352, 55,361, 55,365 (JA:___, ___, ___, ___). As explained above, the GHG Inventory excludes biomass emissions when accounting for emissions from sources in the energy sector. *See* NAFO CFI Comments at 3 (JA:___). EPA cross-referenced the GHG Inventory in this manner, in order to demonstrate its intent to (1) incorporate the well-established GHG accounting principles embodied in the GHG Inventory; and (2) exclude biomass emissions from regulation. In response, several Intervenors filed comments supporting EPA's reliance on the GHG Inventory and urging the Agency to state more explicitly that it was excluding biomass emissions from regulation. NAFO Comments (EPA-HQ-OAR-2009-0517-5070) at 5-7 (JA:___-___); American Forest & Paper Association ("AF&PA") Comments (EPA-HQ-OAR-2009-0517-4903) at 22-27 (JA:___-___);

Utility Air Regulatory Group Comments (EPA-HQ-OAR-2009-0517-5317) at 60-61 (JA:___-___).

In the final Tailoring Rule, however, EPA unexpectedly reversed course, removed all reference to the GHG Inventory in the final regulations, and announced for the first time that biomass emissions would "count" toward PSD and Title V emissions thresholds in the same manner as emissions from fossil fuels. 75 Fed. Reg. 31,514, 31,527-29, 31,590-91 (June 3, 2010) (JA:___-___, ___-____). EPA offered no explanation for this sudden reversal. Instead, when responding to Intervenors' comments, EPA merely acknowledged that "many state, federal, and international rules and policies" exclude biomass emissions and recognized that biomass energy could play a role in "reducing anthropogenic GHG emissions." 75 Fed. Reg. at 31,590-91 (JA:___-___). EPA also acknowledged that, in its haste to promulgate the final rule, it did not specifically examine the effects of biomass emissions and instead announced that it would "seek further comment on how [EPA] might address emissions of biogenic carbon dioxide under the PSD and title V programs." *Id.* at 31,591 (JA:___).

Subsequently, many parties, including several of the Intervenors here, petitioned for review of the Tailoring Rule (and other related rules).[3] Intervenors

[3] *See* Nos. 09-1322 and consolidated cases; 10-1073 and consolidated cases; 10-1092 and consolidated cases; and 10-1167 and consolidated cases. Intervenors do not concede EPA's position that GHG emissions can trigger PSD permitting

AF&PA and NAFO specifically challenged EPA's regulation of biogenic GHG emissions in the Tailoring Rule, on the grounds, *inter alia*, that it was arbitrary for EPA to regulate biomass emissions that were not considered in EPA's endangerment determination. See Nos. 10-1172 and 10-1209. These two petitions were severed from the other Tailoring Rule litigation and held in abeyance during the reconsideration process discussed below.

A month after publishing the Tailoring Rule, EPA issued a Call for Information ("CFI") and solicited "information and viewpoints … on approaches to accounting for [GHG] emissions from bioenergy and other biogenic sources." 75 Fed. Reg. 41,173, 41,173 (July 15, 2010) (JA:___). Recognizing "the broad and complex nature of this issue," EPA candidly explained that "the Agency did not have sufficient information to address the issue of carbon neutrality of biogenic energy." *Id.* at 41,174 (JA:___).

B. EPA Reconsiders and Defers Regulation of Biomass Emissions.

On August 3, 2010, NAFO filed an administrative petition for reconsideration, urging EPA to reconsider its decision to regulate biomass emissions, particularly because the proposed Tailoring Rule had provided no notice

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requirements or EPA's position that GHG emissions can otherwise be subject to PSD requirements and do not waive any of the arguments they have made or may make in those or any other proceedings. Furthermore, Intervenors *do not* endorse all portions of EPA's brief or regulatory bases for its rulemaking here.

that biomass emissions would be regulated. NAFO Petition for Reconsideration (EPA-HQ-OAR-2011-0083-0361) ("NAFO Petition") at 2 (JA:___). First, NAFO argued that EPA failed to provide a reasoned explanation for reversing its long-standing policy of accounting for biomass emissions in the land use sector. *Id.* at 7-11 (JA:___-___). Second, NAFO argued that, because EPA reversed course without prior notice and comment opportunity, the final rule was not a logical outgrowth of the proposed rule and was arbitrary and capricious. *Id.* at 11-13 (JA:___-___). NAFO also requested a stay pending reconsideration. *Id.* at 13-16 (JA:___-___).

On January 12, 2011, EPA granted reconsideration and announced plans to complete "a detailed examination of the science associated with [biomass] emissions" along with an independent peer review. *See* EPA-HQ-OAR-2011-0083-0008 ("Reconsideration Letter") at 1 (JA:___). EPA also announced plans to issue a new rule addressing the applicability of PSD and Title V to biomass emissions once the scientific review was complete. *Id.* Rather than grant NAFO's stay request, however, EPA announced it would propose to "defer" regulation of biomass emissions under PSD and Title V for three years, *id.*, allowing it to complete its scientific review and rulemaking.

On July 20, 2011, after notice and opportunity for comment, EPA issued the Deferral Rule that is the subject of this Petition. This "interim deferral," 76 Fed.

Reg. 43,490, 43,502 (July 20, 2011) (JA:___), effectuates in part the grant of reconsideration by temporarily deferring regulation of biomass emissions under the PSD and Title V permitting programs while EPA studies the science surrounding biomass emissions and develops a permanent policy to account for their emissions from stationary sources. *Id.* at 43,490 (JA:___). EPA's Deferral Rule does not mandate that all states adopt it. Rather, states with approved CAA programs may decide whether to adopt the Deferral Rule or to implement their own requirements for biomass emissions. *Id.* at 43,500-01 (JA:___-___). EPA determined that the study and rulemaking could be completed within three years. Thus, the Deferral Rule includes a sunset provision that automatically brings biomass emissions within the Tailoring Rule if EPA fails to issue a new rule within three years. *Id.* at 43,501 (JA:___).

In justifying the Deferral Rule, EPA explained it had a duty to ensure that biomass feedstocks "with negligible net atmospheric CO_2 emissions" were not subject to unnecessary and wasteful regulation. *Id.* at 43,492, 43,504 (JA:___, ___). EPA also stated that biomass energy offers "a way to address climate change." *Id.* at 43,492 (JA:___). EPA's greatest obstacle, however, is that "accounting for net atmospheric impacts of biomass emissions is complex," and EPA said it needed to conduct further study of the issue. *Id.* at 43,492 (JA:___). EPA stressed that, pending completion of its scientific review, the results of its

analysis were "prospective and unknown," *id.* at 43,499 (JA:___), and EPA could not project with certainty whether specific biomass feedstocks had "negligible (or *de minimis*), negative, or positive" impacts on atmospheric CO_2 concentrations. *Id.* at 43,496 (JA:___). But even after a limited scientific review, EPA noted "the unique role and impact that biogenic sources have on the carbon cycle," *id.* at 43,496 (JA:___), and confirmed that "at least some biomass feedstocks … have a negligible impact on the net carbon cycle, or even a net positive impact," *id.* at 43,499 (JA:___).

Since issuing the Deferral Rule, EPA has acted quickly to advance its scientific review and, in turn, a permanent policy for biomass emissions. In September 2011, EPA released a draft *Accounting Framework for Biogenic CO_2 Emissions from Stationary Sources* ("draft *Framework*"),[4] which included a proposed methodology that could be applied in the PSD and Title V programs. In October 2011, EPA convened a Biogenic Carbon Emissions Panel ("Panel") under the auspices of the Science Advisory Board ("SAB") and charged it with peer-reviewing the draft *Framework*. 76 Fed. Reg. 61,100 (Oct. 3, 2011) (JA:___). The Panel has met several times and, on May 29, 2012, concluded deliberation on its report and recommendations. SAB Panel May 29, 2012 Meeting Minutes

[4] *Available at* http://www.epa.gov/climatechange/Downloads/ghgemissions/Biogenic-CO2-Accounting-Framework-Report-Sept-2011.pdf.

(Addendum:___).[5] The Panel is expected to submit the report to the full SAB for approval in 2012. SAB approval is the final step in the review process and, thereafter, EPA can begin the rulemaking process to address any permanent treatment of biomass emissions. Unlike EPA's sudden decision to regulate biomass in the final Tailoring Rule, the issues have now been publicly discussed so that interested stakeholders can provide meaningful input.

III. Impacts of Bioenergy on Atmospheric Carbon.

A. Biomass Emissions and Atmospheric CO_2 Concentrations.

To properly evaluate the impacts of biomass emissions on atmospheric CO_2 concentrations, temporal and spatial scales must accurately reflect domestic forestry and agricultural practices. To achieve a continuously productive land base and meet consumer demands over time, forests are managed at a landscape level and, in any given year, harvest occurs on a few stands, while the majority continue to grow and sequester carbon. NAFO Deferral Comments at 21 (JA:___). Thus, when properly managed, the total amount of carbon on the landscape remains stable and emissions are offset by sequestration. NAFO Petition at 4 (JA:___). NAFO explained that a landscape-based spatial scale can be coupled with a short-

[5] *Available at* http://yosemite.epa.gov/sab/SABPRODUCT.NSF/MeetingCal/E1F653DD05807E94852579CA00551AAF?OpenDocument.

term comparison of forest and agricultural carbon stocks to ensure that carbon stocks remain stable. NAFO Deferral Comments at 22 (JA:___).

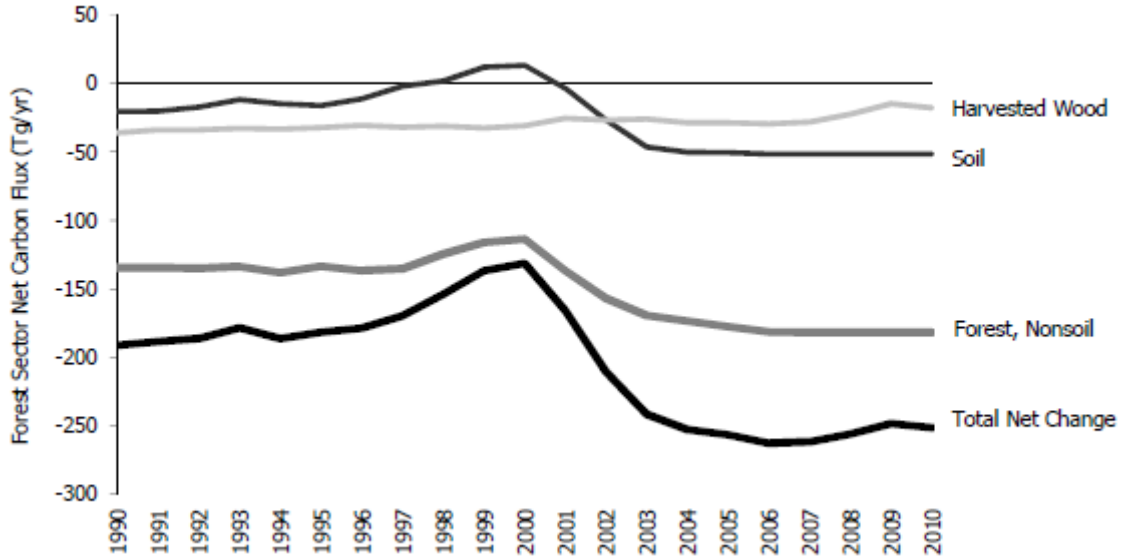
Studies based on actual forestry practices (as opposed to hypothetical scenarios) demonstrate that biomass is a carbon neutral feedstock that does not increase atmospheric CO_2 concentrations. These studies, which apply the carbon cycle on a broad, landscape level, consistently find that bioenergy is carbon neutral when utilized as part of a long-term forest management strategy. NAFO CFI Comments at 9-10 (JA:___-___). Even though demand for forest products—including energy feedstocks—has increased, the total amount of carbon stored in forests has been increasing for the past 50 years, and is expected to do so long into the future. *Id.* at 6-8 (JA:___-___). The figures below, from EPA's most recent GHG Inventory, confirm that forests and agricultural land, which are part of the Land Use, Land Use Change, and Forestry ("LULUCF") sector, are a carbon sink, annually removing more carbon from the atmosphere than they emit. Figure 1[6] below shows the net emissions from each sector included in the GHG Inventory and notes that the LULUCF sector is a net sink.

[6] Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2010 at 2-7 (Apr. 15, 2012), *available at* http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html.

Chapter/IPCC Sector	1990	2005	2006	2007	2008	2009	2010
Energy	5,287.7	6,282.4	6,214.4	6,294.3	6,125.4	5,752.7	5,933.5
Industrial Processes	313.9	330.1	335.5	347.3	319.1	268.2	303.4
Solvent and Other Product Use	4.4	4.4	4.4	4.4	4.4	4.4	4.4
Agriculture	387.8	424.6	425.4	432.6	433.8	426.4	428.4
Land Use, Land-Use Change, and Forestry (Emissions)	13.8	25.6	43.2	37.6	27.4	20.6	19.6
Waste	167.7	137.2	136.5	136.7	138.2	136.0	132.5
Total Emissions	**6,175.2**	**7,204.2**	**7,159.3**	**7,252.8**	**7,048.3**	**6,608.3**	**6,821.8**
Net CO_2 Flux from Land Use, Land-Use Change, and Forestry (Sinks)*	(881.8)	(1085.9)	(1110.4)	(1108.2)	(1087.5)	(1062.6)	(1074.7)
Net Emissions (Sources and Sinks)	**5,293.4**	**6,118.3**	**6,048.9**	**6,144.5**	**5,960.9**	**5,545.7**	**5,747.1**

* The net CO_2 flux total includes both emissions and sequestration, and constitutes a sink in the United States. Sinks are only included in net emissions total. Please refer to Table 2-9 for a breakout by source.
Note: Totals may not sum due to independent rounding.
Note: Parentheses indicate negative values or sequestration.

Figure 2[7] below shows that forests have sequestered more carbon than they have emitted each year since the inventory began.



[7] *Id.* at 7-15.

Thus, the forestry industry—and its products—reduce rather than increase atmospheric CO_2 concentrations.

B. Projections for Bioenergy Production.

In January 2012, the President announced an "all-of-the-above" energy strategy focused on homegrown, renewable energy sources. President Obama, *Remarks by the President in State of the Union Address*, January 24, 2012 (JA:___). For such a strategy to succeed, bioenergy must play a critical role. The Energy Information Administration projects substantial bioenergy growth over the next 20 years, with increases in both volume and market share. NAFO CFI Comments at 27, 70 (JA:___, ___). However, commenters argued, Petitioners' "regulate first, study second" approach would deter development of biomass facilities—and lose associated benefits of such facilities in reducing GHG emissions. NAFO Comments (EPA-HQ-OAR-2010-0560-0651.3) ("Forisk Study") at 9 (JA:___).

SUMMARY OF ARGUMENT

After having failed to express a rational basis (or, for that matter, any basis) for regulating biomass emissions under the PSD and Title V permitting programs, EPA properly granted NAFO's petition for reconsideration, restored the pre-Tailoring Rule status quo, and commenced a three-year scientific study and public process to determine what (if any) regulations would be appropriate to address

biomass emissions. EPA determined that such a study was required due to unresolved scientific complexity and uncertainty surrounding the impacts of biomass emissions and EPA's failure to analyze the science surrounding biomass before regulating these emissions for the first time in the final Tailoring Rule.

The Deferral Rule was the appropriate and necessary outgrowth of EPA's prudent decision to grant reconsideration and study the complex science during a limited three-year window, before making any decision regarding a permanent policy governing regulation of biomass emissions. However, rather than waiting for EPA to complete the ongoing review process, and make a final decision regarding possible future regulation of biomass emissions, Petitioners petitioned for review of EPA's interim deferral, essentially arguing that, even when faced with scientific uncertainty and complexity, the Agency is required by law to regulate first and study later.

Petitioners' claims fail. First, to the extent Petitioners challenge EPA's legal authority and factual basis for permanently excluding biomass emissions from PSD and Title V, that challenge is premature because EPA has made no final determination. EPA is undertaking a scientific study and only after it is finished can it *then* promulgate a final rule that determines what (if any) regulations are appropriate for biomass emissions.

Second, having granted reconsideration, EPA appropriately deferred regulation of biomass emissions until it could complete its study and issue a final rule. The Deferral Rule is reasonable because (1) subjecting biomass-fueled facilities to unlawful permitting requirements during the reconsideration process would irreparably harm the regulated community and the public interest, (2) general principles of administrative law dictate that EPA should defer regulation until after it has studied and resolved scientific complexity and uncertainty, and (3) EPA determined that biomass emissions have distinguishing characteristics that support a conclusion that they should not be regulated.

ARGUMENT

I. STANDARD OF REVIEW

Intervenors adopt Respondents' Standard of Review. Resp. Br. at 26.

II. EPA HAS NOT TAKEN FINAL ACTION REGARDING A PERMANENT EXCLUSION OF BIOMASS EMISSIONS FROM PSD AND TITLE V.

Despite the Deferral Rule's limited scope, Petitioners invite the Court to make expansive findings as if Petitioners were challenging EPA's legal authority and factual basis for *permanently* excluding biomass emissions from PSD and Title V. *See* Pet. Br. at 37-54[8] But the issue here is fundamentally and significantly

[8] Likewise, Petitioners' characterization of the Deferral Rule as based on "off-site factors" and "off-site CO2 absorption," Pet. Br. at 40-46, is inaccurate, as the

narrower: Did EPA, having granted administrative reconsideration (an action Petitioners do *not* contest), properly defer inclusion of biomass emissions in PSD and Title V for up to three years in order to study the issue? It would be wholly inappropriate for the Court to consider expansive arguments as to the propriety of a general exclusion on an undeveloped record. The entire point of the Deferral Rule was to provide EPA time to study *whether* to regulate biomass emissions. Once EPA makes that decision, whatever the result, it will be subject to judicial review on a complete record.

Thus, to the extent Petitioners challenge EPA's authority to issue a permanent exclusion rather than a temporary deferral to study the issue, this Court lacks jurisdiction under section 307(b) of the CAA, 42 U.S.C. § 7607(b), because EPA has not yet taken the former action. *See Portland Cement Ass'n v. EPA*, 665 F.3d 177, 193 (D.C. Cir. 2011).[9] The only arguably final action EPA has taken is its interim decision to defer regulation of biomass emissions for three years while it studies the science and develops a record to support a future, permanent rule.

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deferral is based on the effect of burning one type of fuel—biomass—at a stationary source.

[9] While this Court does not consider finality to be a jurisdictional issue under the APA, *see e.g.*, *Sierra Club v. Jackson*, 648 F.3d 848, 853-54 (D.C. Cir. 2011), it has considered finality to be jurisdictional under the CAA, *Portland Cement*, 665 F.3d at 193.

The Supreme Court's two-prong test for finality is well settled: "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one from which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The principal purposes of the finality requirement are "to protect agencies from undue judicial interference" and "to avoid judicial entanglement in abstract policy disagreements." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). Thus, under the CAA, courts must withhold judgment until EPA has first reached a final decision whether, and if so how, it will regulate. *Am. Elec. Power Co. v. Conn.*, 131 S. Ct. 2527, 2539 (2011). It is common sense that

> [j]udges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input of any interested person. … Rather, judges are confined by a record comprising the evidence the parties present.

Id. at 2540. Thus, courts routinely dismiss cases for lack of finality in challenges to an agency's threshold determination that further study or investigation is needed to develop the factual record necessary to support its actions. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 241 (1980) (no final action when agency makes "threshold determination that further inquiry is warranted").

In *Portland Cement*, EPA issued a final rule revising new source performance standards for Portland cement facilities under CAA § 111, 42 U.S.C. § 7411, but, despite petitioners' request, did not adopt standards for GHG emissions. 665 F.3d at 193. The final rule stated that "EPA 'did not yet have adequate information about [greenhouse gas] emissions sufficient to set a standard'" and "'[was] working towards a proposal for [greenhouse gas] standards from Portland cement facilities'—a proposal it [would] promulgate after it receive[d] the data necessary 'to develop proposed standards.'" *Id.* (quoting 75 Fed. Reg. 54,970, 54,996-97 (Sept. 9, 2010). EPA further noted that "'[t]his [rule] is not the end of the matter.'" *Id.* (quoting 75 Fed. Reg. at 54,996). This Court dismissed the claim for lack of jurisdiction, finding that "there was nothing 'final' in EPA's decision to collect further information before proposing greenhouse gas emissions standards." *Id.* The Court likewise rejected the petitioners' assertion of jurisdiction based on 42 U.S.C. § 7607(b)(2), finding that "EPA began the process of reviewing its NSPS standards for greenhouse gases, decided it needed further information, and is now continuing that process of review." *Id.*

Here, EPA deferred final action regarding any permanent treatment of biomass emissions under PSD and Title V to further study the science in order to support a final decision on that issue. First, the Deferral Rule states that "the results of EPA's review of the science related to net atmospheric impacts of

biomass and the framework to properly account for such emissions in Title V and PSD permitting programs based on the study are *prospective and unknown*." 76 Fed. Reg. at 43,499 (JA:___) (emphasis added). Second, EPA confirmed its intention, after completing the scientific review, "to undertake a notice-and-comment rulemaking to establish the treatment of [biomass] emissions in the PSD and Title V programs." *Id.* at 43501 (JA:___). Third, EPA characterizes the rule as an "interim deferral," *id.* at 43,503 (JA:___), and states "[t]his is not EPA's final determination on the treatment of biogenic CO_2 emissions in [the PSD and Title V] programs," *id.* at 43,493 (JA:___). Indeed, even if EPA fails to act within three years, the sunset provision will be triggered and the deferral period will end. *Id.* at 43,507 (JA:___). Accordingly, the Deferral Rule does not mark the consummation of EPA's decision-making process regarding biomass emissions under PSD and Title V and, therefore, the Court lacks jurisdiction to determine whether or not a permanent exclusion for biomass emissions is legally or factually warranted.[10] The Court should ignore Petitioners' arguments to the contrary. *See* Pet. Br. at 37-54.

Alternatively, the Court should disregard Petitioners' arguments about the legality of a permanent biomass exclusion for lack of prudential ripeness. *See, e.g.*, *Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 812 (2003).

[10] Because the Deferral Rule is not the consummation of EPA's decision-making process, the Court need not address the second prong of the *Bennett* test. *Bennett*, 520 U.S. at 177.

> [D]eclining jurisdiction over a dispute while there is still time for the challenging party to "convince the agency to alter a tentative position" provides the agency "an opportunity to correct its own mistakes and to apply its expertise," potentially eliminating the need for (and costs of) judicial review.

Am. Petroleum Inst. v. EPA, ___ F.3d ___, No. 09-1038, 2012 WL 2053572, slip op. at 7 (D.C. Cir. June 8, 2012) (citation omitted); *see also Texas Independent Producers and Royalty Owners Ass'n v. EPA*, 413 F.3d 479 (5th Cir. 2005) (EPA deferral of rule already in effect not ripe for judicial review). Here, EPA's ongoing study of biomass emissions and its administrative reconsideration of the Tailoring Rule render Petitioners' arguments unfit for review now. It would be incongruous (and unfair) to find arguments regarding the legality of a permanent exemption ripe for review while at the same time holding NAFO's and AF&PA's petitions for review of the Tailoring Rule in abeyance pending the outcome of reconsideration of that very issue. Additionally, Petitioners will not suffer any hardship from delaying review, as EPA's final decision whether to regulate biomass emissions will effectively terminate the Deferral Rule, if the rule has not already expired by its own terms. *See Pub. Citizen Health Research v. FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984).

III. EPA Properly Deferred Regulation of Biomass Emissions While Completing the Reconsideration Process and Scientific Review.

The Deferral Rule must be upheld for three reasons. First, deferral was necessary to avoid irreparable harm to the regulated community. Second, basic principles of administrative law and good government dictate that an agency should not impose new requirements where it has not even studied issues that are complex and uncertain, but instead should study first before deciding whether to impose new requirements. Third, the fundamental characteristics of biomass support the conclusion that a distinct regulatory approach is needed. For each of these reasons, EPA's temporary deferral of biomass emission regulation is reasonable.

A. The Deferral Rule Was Necessary in Light of EPA's Grant of Reconsideration of the Final Tailoring Rule.

At the outset, there is no valid regulatory footing today for doing what Petitioners seek: regulating biogenic carbon emissions now under the PSD and Title V programs. EPA is not in a position to address biogenic emissions at this time because it ignored proper rulemaking procedures, did not provide adequate public participation and process, and did not sufficiently study biomass emissions.

1. EPA Erred by Including Biomass Emissions in the PSD and Title V Thresholds Because Such Inclusion Was Not a Logical Outgrowth of the Proposed Rule.

As discussed *supra*, in the proposed Tailoring Rule, EPA did not include CO_2 emissions from bioenergy facilities under the PSD and Title V programs.

Thus, EPA's first-time inclusion of biomass emissions in PSD and Title V thresholds in the final Tailoring Rule violated the CAA and APA rulemaking requirements because inclusion of biomass did not appear in and was not a logical outgrowth of the proposed rule.

It is well-settled that "an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005); *see also Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1275 (D.C. Cir. 1994) (requiring that interested parties be able to "anticipate[] the final rulemaking from the draft [rule]" (quoting *Anne Arundel Cnty. v. EPA*, 963 F.2d 412, 418 (D.C. Cir. 1992))). The logical outgrowth rule exists because the public "must be able to trust an agency's representations about which particular aspects of its proposal are up for consideration." *Envtl. Integrity Project*, 425 F.3d at 998. Thus, when an agency fails to inform the public that an existing policy is up for debate, interested parties who support or oppose that policy will lose the opportunity to provide valuable input to the agency. *See Nat'l Mining Ass'n v. Mine Safety and Health Admin.*, 116 F.3d 520, 530-31 (D.C. Cir. 1997).

Intervenors could not have anticipated from the proposed Tailoring Rule that EPA intended to regulate biomass emissions in the same manner as fossil fuel emissions. Indeed, when EPA published the proposed Tailoring Rule, all federal

programs addressing GHG emissions—including the GHG Inventory that EPA proposed to adopt in the Tailoring Rule as the methodology for calculating emissions—*excluded* biomass emissions from the energy sector. *See supra* p. 3-4. The only logical conclusion to be drawn from the proposal was that biomass emissions would be excluded from PSD and Title V thresholds.[11] Thus, EPA's final action, which unexpectedly reversed course and regulated biomass emissions was not a logical outgrowth of the proposed rule. *See Envtl. Integrity Project*, 425 F.3d at 998 ("Whatever a 'logical outgrowth' of [EPA's] proposal may include, it certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse."). EPA, therefore, had to rectify its error by granting reconsideration and deferring regulation of biomass emissions.

2. EPA Failed to Provide a Reasoned Basis for Reversing Its Long-Standing Policy of Excluding Biomass Emissions from Stationary Source Inventories.

In the final Tailoring Rule, EPA included biomass emissions despite never having justified its decision to regulate them for the first time. An agency is required to "examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choices

[11] EPA's assertion that it never intended to exclude biomass emissions from stationary sources, 76 Fed. Reg. at 43,495-96 (JA:___-___) is simply irrelevant. Whatever its unexpressed intent may have been, EPA was required but failed to provide any notice that it might regulate biomass emissions under PSD and Title V.

made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). The CAA requires "an explanation of the reasons for any major changes in the promulgated rule from the proposed rule." 42 § U.S.C. 7607(d)(6)(A). Likewise, an agency "is obligated to supply a reasoned analysis" when it changes course and departs from existing policy. *Motor Vehicle Mfrs.*, 463 U.S. at 42; *see also Jicarilla Apache Nation v. Dep't. of Interior*, 613 F.3d 1112, 11120 (D.C. Cir. 2010); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). It is arbitrary and capricious when an agency "entirely fail[s] to consider an important aspect of the problem" it is trying to address. *Motor Vehicle Mfrs.*, 463 U.S. at 46; *see also* 42 U.S.C. § 7607(d)(3), (6) (requiring statement of basis and purpose that includes "the factual data on which the [] rule is based" and the methodology used to obtain and analyze that data).

Consistent with its long-standing policy of excluding biomass emissions from stationary sources, *see supra* p. 3-4, EPA proposed to use the GHG Inventory "for guidance on how to calculate a source's GHG emissions" in the definition of CO_2e. 74 Fed. Reg. at 55,351, 55,352, 55,361 (JA:___, ___, ___). The GHG Inventory excludes biomass emissions from the energy sector. With no explanation, and no opportunity for comment, the final rule reversed course and included biomass emissions in PSD and Title V thresholds. EPA nowhere explained or even acknowledged its departure from its proposal to rely on the GHG

Inventory when calculating GHG emissions. Instead, EPA ignored entirely its long-standing policies regarding biomass emissions, which are based on the role the carbon cycle plays in sequestering emitted carbon, and mischaracterized Intervenors' support for this long-standing policy as a request for a new exemption. 75 Fed. Reg. at 31,590-91 (JA:___-___). Obviously, no "new" exemption was needed because biomass emissions had previously been excluded, by definition. Further, EPA stated in the final Tailoring Rule that it had never considered the unique nature of the impacts of biomass emissions on atmospheric CO_2 concentrations, *id.* at 31,591 (JA:___), and, only a month later, EPA stated in the CFI that "the Agency did not have sufficient information to address the issue of carbon neutrality of biogenic energy," *id.* at 41,174 (JA:___). Thus, EPA essentially acknowledged that it "entirely failed to consider an important aspect of the problem" of how to account for biomass emissions. *See Motor Vehicle Mfrs.*, 463 U.S. at 46. Since EPA failed to provide any reasoned basis or explanation for its decision to regulate biomass emissions from stationary sources, deferral was justified.

B. Having Failed to Propose Regulating Biomass Emissions and Having Granted Reconsideration, EPA's Deferral of Biomass Emissions Was Reasonable and Required.

For the reasons discussed in section III.A, *supra*, section 307(d)(7)(B) compelled EPA to grant NAFO's petition for reconsideration. 42 U.S.C. §

7607(d)(7)(B) (when an objection could not be raised within the comment period and "is of central relevance to the outcome of the rule, the Administrator *shall* convene a proceeding for reconsideration of the rule … ." (emphasis added)). After granting reconsideration, EPA determined that the complexity and uncertainty surrounding biomass emissions required further study. Thus, as EPA's brief notes, "conventional notions of sound administrative law" dictated that EPA restore the pre-Tailoring Rule status quo and complete the necessary scientific review before reaching a final decision on the proper treatment of biomass emissions. Resp. Br. at 25.

1. EPA Has Broad Discretion Regarding the Timing of GHG Regulations.

Agencies are frequently called upon to regulate complex, technical subjects and, as a result, courts consistently recognize agencies' inherent discretion to set priorities regarding the timing and content of regulations. *See, e.g.*, *Ass'n of Bus. Advoc. Tariff Eq. v. Hanzlik*, 779 F.2d 697, 701 (D.C. Cir. 1985) ("It is too well-established to be seriously questioned that agencies are empowered to order their own proceedings and control their own dockets."); *Nat'l Cong. of Hispanic Am. Citizens v. Usery*, 554 F.2d 1196, 1200 (D.C. Cir. 1977) (recognizing "traditional agency discretion to alter priorities and defer action"). This is especially true when "further factual development [is] needed." *Cent. Texas Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 215 (D.C. Cir. 2005).

Likewise, courts have consistently recognized that EPA's decisions regarding the timing of its actions are subject to deference, particularly when those decisions are based on complex scientific assessments. *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 941 (D.C. Cir 2006) (courts must defer to agencies on "matters of scientific and statistical judgment within the agency's sphere of special competence and statutory jurisdiction"). This Court has acknowledged EPA's authority to defer regulation until it can provide a reasoned basis for an action that is grounded in sound science:

> A simple reading of the Clean Air Act reveals that whether to impose a certain type of regulation often involves complex scientific, technological, and policy questions. EPA must be afforded the amount of time necessary to analyze such questions so that it can reach considered results in a final rulemaking that will not be arbitrary and capricious or an abuse of discretion.

Sierra Club v. Thomas, 828 F.2d 783, 798 (D.C. Cir. 1987). In *Sierra Club*, petitioners challenged EPA's ongoing rulemaking process to determine whether fugitive emissions from strip mines should be subject to PSD, alleging that EPA had unreasonably delayed in promulgating regulations. *Id.* at 786-87. The Court disagreed, finding that "the complexity of the issues facing EPA and the highly controversial nature of the proposal" justified a three-year delay while EPA continued to study the issue. *Id.* at 799. In fact, the Court noted that such a

deferral could produce more timely results, because a well-reasoned and scientifically supported rule would be more likely to withstand judicial review. *Id.*

This inherent discretion to defer regulation pending scientific review is particularly relevant to EPA's regulation of GHG emissions. Without question, concerns regarding atmospheric concentrations of GHGs and possible climate change effects present issues that are among the most complex and controversial EPA has faced.[12] Consequently, it is not surprising that the Supreme Court found that EPA has "significant latitude as to the manner, timing, content, and coordination of its [GHG] regulations." *Massachusetts*, 549 U.S. at 533. Courts have referred to that latitude in dismissing suits seeking to compel EPA to regulate GHG emissions. *See, e.g.*, *SF Chapter of A. Philip Randolph Inst. v. EPA*, No. C 07-04936, 2008 U.S. Dist. LEXIS 27794 (N.D. Cal. Mar. 28, 2008). More recently, this Court affirmed EPA's deferral of GHG regulations under the NSPS program while it was in the process of studying GHG emissions from Portland cement facilities. *Portland Cement*, 665 F.3d at 193. As such cases illustrate, EPA can defer regulation where, as here, scientific uncertainty and complexity preclude it from developing a scientifically sound, rational basis for regulating particular GHG emissions from particular sources.

[12] Indeed, EPA asserts that "about the only consensus in the scientific community is that [the impact of biomass emissions] is complex and requires further technical analysis." Resp. Br. at 5.

2. EPA's Temporary Deferral of Regulation of Biomass Emissions Is Reasonable Given the Irreparable Harm That Would Be Caused by Regulating Biomass Emissions Under the Tailoring Rule.

When considering whether to defer implementation of a rule pending review, EPA considers the same four factors courts apply under the preliminary injunction standard: (1) likelihood of success on the merits; (2) a showing of irreparable harm; (3) the balance of the harms to the parties if a stay is granted; and (4) the public interest. *See, e.g.*, 76 Fed. Reg. 4780, 4800 (Jan. 26, 2011) (JA:___).[13] Based on these factors, EPA reasonably issued the Deferral Rule to avoid irreparable harm.[14]

First, the very nature of regulation of biomass emissions under the PSD and Title V programs would irreparably harm NAFO, other Intervenors, and their members. Barring the Deferral Rule, permitting agencies would be required to apply PSD to biomass emissions from new and modified facilities, requiring "best available control technology for each pollutant subject to regulation under [the CAA]," 42 U.S.C. § 7475(a)(4), even though the agency is concurrently studying the issue to determine if such emissions should be regulated at all. As EPA recognized in the Deferral Rule, once the costs of permitting and installing control

[13] This test is also applied by this Court when considering administrative stays. *See Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

[14] Likelihood of success is addressed by section III.A, *supra*.

technology are incurred, it is practically impossible to reverse those burdens if EPA later determines that biomass emissions should be excluded or that some biomass emissions are *de minimis* and unregulable. 76 Fed. Reg. at 43,500 (JA:___) (once permitting is compete, the burden "has already been experienced"). Thus, applying PSD and Title V to biomass emissions pending reconsideration would require bioenergy facilities to incur significant, irreversible, and potentially unnecessary costs that at most would yield only "trivial" benefits. *Id.* at 43,496 (JA:___). This risk of irreparable harm is substantially greater than the potential risks identified by Petitioners, which are contingent upon a new bioenergy facility obtaining a minor source permit, surviving other administrative and judicial challenges, and commencing construction before the Deferral Rule expires or is replaced (or before Petitioners could seek appropriate relief).

Second, the Deferral Rule is undoubtedly in the public interest. As EPA explained, regulating biomass emissions without first understanding the consequences for atmospheric GHG concentrations could undermine the purpose of the PSD and Title V programs by discouraging construction of bioenergy facilities that reduce those concentrations. *Id.* In fact, because combustion of biomass can generate more CO_2 than fossil fuel at the time of combustion to

produce the same amount of thermal energy,[15] regulation of biomass under the PSD program in the same manner as fossil fuels makes little sense and could create incentives for proposed biomass-fueled projects with projected CO_2 emissions that would be slightly over the Tailoring Rule's PSD threshold to opt to use fossil fuels instead to avoid PSD review altogether, despite the lower carbon cycle CO_2 emissions associated with biomass.

Furthermore, EPA's entire reconsideration process is designed to allow, and even encourage, public participation. In addition to its own internal review, EPA has assembled an expert Panel to conduct a peer review of EPA's findings. That process is open to the public, and both Intervenors and Petitioners have been active participants in the Panel's review. By committing to complete a rulemaking with notice and opportunity for comment at the conclusion of its scientific review, EPA has further ensured that all interested stakeholders can be fully involved in the reconsideration process. Thus, it is in the public interest for EPA to restore the status quo until it completes its study and determines whether regulation of biomass emissions is warranted.

[15] Biomass has higher moisture content than fossil fuel and is thus less thermally efficient. *See* AF&PA Comments at 8 (JA:___) (wood-fired boiler generates almost twice as much CO_2 per million BTUs at the point of combustion as gas-fired boiler).

3. EPA Reasonably Issued a Temporary Deferral of Any Regulation of Biomass Emissions Because EPA Must Study Any Effects on Atmospheric CO_2 Concentrations and Engage in Public Participation Before Issuing Regulations.

EPA's restoration of the pre-Tailoring Rule status quo and temporary deferral of any regulation of biomass emissions was a reasonable response to the unresolved scientific complexity and uncertainty surrounding biomass emissions. It is a bedrock principle of agency decisionmaking that agencies should conduct the studies necessary to resolve complexity and uncertainty before deciding whether regulation is appropriate. Likewise, the CAA and APA require that EPA provide for public participation in the process.

Despite scientific complexity surrounding biomass emissions, EPA, in the Tailoring Rule, opted to regulate first and study later. EPA has now properly corrected this error and made the study of biomass emissions and potential regulatory options a priority. Thus, the Deferral Rule is a reasonable application of the "conventional notions of sound administrative law" that EPA identified in its brief. Resp. Br. at 25.

As EPA has realized, biomass emissions raise complex questions regarding atmospheric CO_2 impacts that require thoughtful analysis. Beginning with the final Tailoring Rule, EPA has recognized that the unique attributes of biomass "warrant[ed] further exploration" and committed to study them in the future. 75 Fed. Reg. at 31,591 (JA:___). Likewise, in the CFI, EPA recognized "the broad

and complex nature of this issue" and acknowledged that it "did not have sufficient information to address the issue of carbon neutrality of biogenic energy." 75 Fed. Reg. at 41,174 (JA:___). Given the nearly 900 responses to the CFI, EPA found that further study was needed to resolve this alleged complexity and develop a permanent policy for biomass emissions. Accordingly, after granting NAFO's petition for reconsideration, EPA announced a three-year review period to "seek independent scientific analysis of the complex issues pertinent to the climate impacts of [biomass] emissions and to develop a rulemaking on how these emissions should be treated." Reconsideration Letter at 1 (JA:___).

Recognizing that it lacked a scientific basis for regulating biomass emissions, EPA reasonably restored the pre-Tailoring Rule status quo to avoid costly regulation of biomass emissions while it continued its study. In the Deferral Rule, EPA acknowledged that the CFI "underscore[d] the complexity and uncertainty associated with accounting for biogenic emissions of CO_2" and that the Agency could not state with certainty whether specific biomass feedstocks had "negligible (or *de minimis*), negative, or positive net impact on the carbon cycle." 76 Fed. Reg. at 43,496 (JA:___). Nevertheless, EPA did state an interim conclusion that biogenic emissions differ from fossil fuel emissions and, in some cases, may be carbon neutral. *Id.* at 43,499 (JA:___). EPA also recognized it had a duty "to ensure that those feedstocks with negligible net atmospheric CO_2

emissions not be subject to unnecessary regulation." *Id.* at 43,492 (JA:___). In light of the substantial likelihood that scientific review will compel EPA to adopt a different regulatory approach than in the Tailoring Rule, the "study first" principles of administrative law dictated that EPA return to the pre-Tailoring Rule status quo under which regulation of biomass emissions would not occur before its study was complete.

4. In Light of the Distinct Benefits of Biomass, EPA Reasonably Decided to Defer Temporarily Regulation of Biomass Emissions.

EPA's decision to defer regulation of biomass emissions is reasonable in light of its conclusions that distinguish biomass as having important benefits in terms of mitigating GHG emissions. Although EPA's scientific analysis is ongoing, there is consensus that, when considered on appropriate temporal and spatial scales, biomass produces few, if any, net GHG emissions. Thus, regardless of EPA's final scientific conclusions, it was reasonable for EPA to defer any regulation of biomass emissions.

In the Deferral Rule, EPA made a finding that distinguishes between biogenic and fossil fuel emissions.[16] 76 Fed. Reg. at 43,496 (JA:___) (recognizing

[16] Contrary to Petitioners' assertions, advantages of biomass are significant and could provide a justification for excluding biomass emissions from future regulation. However, because EPA has made no final decision on the issue, it is neither ripe for review nor properly before the Court at this time.

"the unique role and impact biogenic sources have on the carbon cycle"). More important, EPA found that biomass energy produces important GHG-limiting benefits. For example, EPA stated that biomass energy provides "a way to address climate change," *id.* at 43,492 (JA:___), and that "EPA believes based on information currently before the Agency that at least some biomass feedstocks that may be utilized to produce energy or other products have a negligible impact on the net carbon cycle, or possibly even a positive net effect." *Id.* at 43,499 (JA:___). Thus, while EPA continues to study the potential GHG-limiting benefits offered by biomass, it has stated that it believes biomass is qualitatively distinguishable from fossil fuel from a climate perspective.

The conclusion that biomass has distinct benefits is well-supported by the scientific literature. As Intervenors have explained, forests are managed to meet an ongoing demand for goods, services, and uses, which requires a predictable continuation of a productive, stable forest land base. *See supra* p. 11. When biomass emissions are evaluated at proper spatial and temporal scales that reflect domestic forestry and agricultural management practices, it is clear that biomass emissions are balanced by the carbon sequestered in growing forests. These emissions therefore have no net impact on atmospheric CO_2 concentrations. For this reason, biomass emissions should be excluded from regulation under PSD and Title V.

However, even the flawed studies upon which Petitioners rely acknowledge that biomass energy provides distinct benefits in limiting GHG emissions over appropriate time scales. *See* Booth Decl. ¶ 20.A (stating that the alleged "carbon debt" period typically lasts for "a few years to several decades"). Thus, despite uncertainty and complexity stemming from these flawed studies, there is at least scientific consensus that, at a minimum, biomass energy has significant benefits from the standpoint of limiting GHG emissions.

Further, given the states' inability to develop additional permitting capacity since the Tailoring Rule was issued, *see* 77 Fed. Reg. 14,226, 14,234-37 (Mar. 8, 2012) (JA:___, ___-___), it was certainly reasonable for EPA to distinguish biomass emissions by temporarily delaying the Tailoring Rule provisions affecting biomass emissions until the Agency could quantify and, if necessary, properly rank biomass emissions within its phase-in approach to implementing PSD and Title V.

After explaining the complicated nature of the PSD "best available control technology" analysis for biomass emissions and the general lack of resources and regulatory capacity among state permitting agencies, 76 Fed. Reg. at 43,497 (JA:___), EPA ultimately provided discretion to states with respect to regulation of biomass emissions, *id.* at 43,500 (JA:___). To the extent a state agency faces overwhelming permitting burdens as a result of the Tailoring Rule and other recent

EPA regulations, it has authority to defer regulation of biomass emissions. *Id.* at 43,500 (JA:___).

EPA's commitment to address expeditiously the uncertainty surrounding the science of biomass emissions and to develop a permanent policy for such emissions underscores the reasonableness of the Deferral Rule. EPA published the CFI one month after the Tailoring Rule and granted NAFO's petition for reconsideration six months later. EPA completed the draft *Framework* three months after the Deferral Rule became final, and the SAB Panel's peer review process is nearly complete. EPA has made clear that developing a policy for biomass emissions is a priority; it appears the Agency is moving expeditiously toward a final determination. *See* 76 Fed. Reg. at 43,498 (JA:___).

Finally, if EPA fails to complete a new rulemaking within three years, the Deferral Rule contains a sunset provision that will be triggered, subjecting biomass emissions to regulation under the Tailoring Rule. In light of these assurances that the deferral is temporary (and states can opt out of the deferral), EPA's deferral of regulation of biomass emissions is a reasonable exercise of EPA's CAA and APA rulemaking authority. *See Sierra Club*, 828 F.2d at 799 (three-year delay not unreasonable).

CONCLUSION

Given the lack of any reasonable basis to justify the Tailoring Rule's treatment of biomass emissions and the substantial likelihood of irreparable harm should that approach be implemented, EPA's decision to defer regulation of biomass emissions while the Agency conducts further study of the science is reasonable. The Deferral Rule marks the beginning, not the end, of an open and transparent reconsideration process that could take up to three years. EPA has, however, defined an endpoint in the form of a sunset provision to ensure the reconsideration will not last indefinitely. 76 Fed. Reg. at 43,507 (JA:___). Given the scientific complexity and regulatory uncertainty that EPA claims it must address, EPA was compelled to restore the status quo by deferring regulation of biomass emissions until it develops a reasoned and scientifically supported approach for biomass emissions. For the foregoing reasons, the petitions for review should be denied.

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedures, the undersigned certifies that the accompanying brief has been prepared using 14-point Times New Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 8,583 words exclusive of the certificate required by Circuit Rule 28(a)(1), table of contents, table of authority, glossary, signature lines, and certificates of service and compliance. The undersigned used Microsoft Word 2007 to compute the word count, as supplemented by a manual count of the words in Figures 1 and 2.

Dated: June 21, 2012

/s/ Roger R. Martella
Roger R. Martella, Jr.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF INTERVENORS IN SUPPORT OF RESPONDENTS was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners, Respondents, and all other parties who have registered with the Court's CM/ECF system.

Dated: June 21, 2012

/s/ Lisa E. Jones
Lisa E. Jones
Counsel for Intervenors

Statutory Addendum

Statutory Addendum – Table of Contents

Statutory Addendum

Clean Air Act Sec. 307, 42 U.S.C. § 7607

§ 7607 Administrative proceedings and judicial review

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(d) Rulemaking

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(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

***

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a

proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.