ORAL ARGUMENT NOT SET

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE REGULATION, INC. et al., Petitioners, **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** Respondent.	No. 09-1322 (and consolidated cases)
COALITION FOR RESPONSIBLE REGULATION, INC. et al., Petitioners, **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** Respondent.	No. 10-1092 (and consolidated cases)
OHIO COAL ASSOCIATION, Petitioner, **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** Respondent.	No. 10-1145 (consolidated with No. 10-1131 and other cases)

Petitions for Review of Decisions
of the U.S. Environmental Protection Agency

RESPONSE TO PETITIONERS' MOTION TO COORDINATE CASES BY INTERVENOR STATES OF CALIFORNIA, MASSACHUSETTS, NEW YORK, ARIZONA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MINNESOTA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE CITY OF NEW YORK

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State Intervenors[1] file this response to the motion to coordinate filed on August 26, 2010, by several petitioners ("Movants"). Although State Intervenors have no objection to designating these cases as complex, the wholesale coordination Movants seek is without justification and in fact would be counterproductive. To do as Movants suggest – effectively creating a single, over-sized, and unwieldy proceeding before one panel of this Court – would not advance judicial efficiency, but would have the opposite effect, by conflating and confusing discrete issues and by overly burdening one panel of this Court.

State Intervenors agree with the alternative approach that we understand will be advanced by Respondents:

1. Designate the cases as complex.
2. Consolidate the cases challenging the endangerment findings (No. 09-1322 and consolidated cases) with the cases challenging EPA's denial of administrative reconsideration (No. 10-1234 and consolidated cases).
3. Leave the cases challenging the vehicle rule (No. 10-1092 and consolidated cases) separate from the other cases.

[1] Arizona, Connecticut, and Minnesota have intervened in the endangerment cases. Delaware, Vermont, and Washington and the City of New York have intervened in the endangerment and vehicle rule cases. New Hampshire has intervened in the endangerment cases and is a proposed intervenor in the tailoring rule cases. North Carolina is a proposed intervenor in the tailoring rule cases. The other States listed in the signature blocks have intervened in the endangerment and vehicle rule cases, and are proposed intervenors in the tailoring rule cases.

4. Consolidate the cases challenging the so-called "triggering" rule (Nos. 10-1073, 10-1083, and 10-1109 and consolidated cases) with the cases challenging the tailoring rule (Nos. 10-1131 and consolidated cases).

Each of these cases is already complex, involving dozens of parties, dozens of issues, and very voluminous records (with thousands of documents). The alternative proposal outlined above would offer the benefits of judicial economy and conserving the parties' resources, which Movants purportedly seek, while at the same time keeping the cases to a manageable size. As explained below, this alternative approach also honors the statutory structure of the Clean Air Act (Act), which Movants completely overlook in their rush to lump the cases together.

In enacting and amending the Act, Congress included separate provisions for stationary sources (subchapter I) and for mobile sources (subchapter II). These provisions work in very different ways, and often are administered by different agencies. *Compare, e.g.,* 42 U.S.C. §§ 7470-79 (permitting of major stationary sources in attainment areas) *with id.* §§ 7521-54 (establishing structure for regulation of air pollution from motor vehicles). In issuing the various regulations at issue here, EPA adhered to this statutory structure in taking its incremental, step-by-step approach: adopting a vehicle rule under section 202(a) of the Act, and separately addressing stationary source triggering and phase-in issues under a different part of the Act. Movants' proposed approach to coordination would run

afoul of this statutory structure by lumping all these cases together under the guise that they have something to do with global warming.

Movants' request further ignores the distinct nature of the endangerment findings, vehicle rule, triggering rule, and tailoring rule.

In response to *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA was under an obligation to address whether greenhouse gases from motor vehicles "contribute to climate change" under section 202(a) of the Act. 549 U.S. at 533. This was a scientific inquiry. *Id.* at 533-34. EPA's decision on this question is found in its endangerment findings, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

Once EPA made these findings, it had an obligation under section 202(a) to develop regulations addressing these emissions from motor vehicles. *Massachusetts*, 549 U.S. at 533. As the Supreme Court noted, EPA had "significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." *Id.* EPA's regulations are found in its greenhouse gas emissions vehicle rule, 75 Fed. Reg. 25,324 (May 7, 2010).

Under a different subchapter of the Act, and long before EPA had responded to the *Massachusetts* remand, EPA began looking at the question of when greenhouse gases would become "subject to regulation" under sections 165 and 169, concerning Prevention of Significant Deterioration (PSD) permitting of new and modified major stationary sources. The answer would determine when these

sources, under subchapter I of the Act, would have to apply "best available control technology" to their emissions. EPA made the understandable decision that it should formally lay out its interpretation of this "subject to regulation" language in the Federal Register, rather addressing the issue piecemeal in individual permitting decisions (and waiting for any challenges to work their way through the courts). EPA's final interpretation is found in its decision on reconsideration of the "Johnson memorandum," 75 Fed. Reg. 17,004 (Apr. 2, 2010).

The Act's PSD and Title V permitting programs apply to stationary sources that emit as little as 100 tons per year. Without any further action by EPA, applying these programs to greenhouse gas emissions could potentially include millions of sources, and thus would impose tremendous burdens on permittees and the state and local agencies that administer these provisions. EPA therefore decided to phase in permitting requirements so that the initial focus would be on the largest sources of greenhouse gas emissions and so that air permitting programs would not become unmanageable for EPA or state permitting agencies. EPA estimates that, under this phased-in approach, until 2013 fewer than 2,000 sources will be subject to these requirements. This decision, along with EPA's formal adoption in the Code of Federal Regulations of the "subject to regulation" interpretation, is found in EPA's tailoring rule, 75 Fed. Reg. 31,514 (June 3, 2010).

Each of these actions should be evaluated in the context of the specific legal

provisions applicable, the scientific and other evidence contained in that particular administrative record, and the process EPA followed for establishing that rule. Movants' approach – seeking to make broad-brushed policy arguments – risks injecting irrelevant issues and evidence into each case, conflating and confusing the separate issues, and requiring some of the parties to these cases to participate in cases they did not seek to bring or join.

Importantly, although each of these challenges concern federal greenhouse gas emissions regulations, the procedural and substantive issues are largely distinct. As Movants themselves seem to acknowledge, there will be separate jurisdictional issues in each case. And Movants have raised a number of procedural objections in each case, which will depend on each rulemaking's process and EPA's explanations in its separate decisions. On the substance, with the exception of the triggering rule and the tailoring rules, the issues are significantly different. On the endangerment findings, the case will largely turn on whether evidence in the record supports EPA's science-based decision. On the vehicle rule, the principal issue will be whether EPA and NHTSA made reasoned judgment in addressing the technological issues concerning motor vehicle emissions. On the triggering rule, the case will primarily concern issues of statutory interpretation. On the tailoring rule, there is the same issue of statutory interpretation, and the question of whether the record supports EPA's phase-in of

permitting for stationary sources under the PSD and Title V programs. Other than the overlap between the triggering rule and the tailoring rule, the cases involve different issues of law and fact.

Movants wish to lump all of these issues together, arguing at length about the relationships between the rules. But, under their proposed approach, the cases will remain separate, and thus Movants' proposal would bring little efficiency to these proceedings – and in fact may produce more voluminous briefing. The parties will have to address the issues relevant to each particular agency action separately. Each agency action can only be set aside if the Court finds errors with that particular agency action.

The alternative approach advocated by Respondents would both promote judicial economy and conserve the resources of the parties by keeping the proceedings to a manageable size, while remaining faithful to the Act's structure regulating mobile and stationary sources. The alternative approach would keep these cases separate except where the same issues are at play: with the endangerment findings and the denial of reconsideration of those findings; and with the triggering rule and tailoring rule, which include the same statutory interpretation issue of the meaning of the phrase "subject to regulation." This utilizes the Court's resources in a reasonable way. For these reasons, these State Intervenors respectfully request that the Court deny the motion to coordinate (other

than as laid out above).

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Respectfully Submitted,

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