Exhibit 10

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 Respondents.	No. 09-1322 and consolidated cases
COALITION FOR RESPONSIBLE REGULATION, INC., ET AL. Petitioners, **v.** UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Respondent.	No. 10-1073 and consolidated cases

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

No. 10-1092 and consolidated cases

SOUTHEASTERN LEGAL FOUNDATION, ET AL.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

No. 10-1131 and consolidated cases

DECLARATION OF MICHAEL R. PEELISH, EXECUTIVE VICE PRESIDENT AND CHIEF SUSTAINABILITY OFFICER, ALPHA NATURAL RESOURCES, INC.

I, Michael R. Peelish, swear or affirm under penalty of perjury the following:

1. I am Executive Vice President and Chief Sustainability Officer at Alpha Natural Resources, Inc. ("Alpha Natural Resources"), Petitioner in the above-captioned case, and I have firsthand knowledge of the facts set forth herein.

2. I am more than twenty-one (21) years of age and I am competent to make this declaration.

3. Alpha Natural Resources is a major supplier of thermal coal to electric utilities and manufacturing industries across the country, and a leading producer and exporter of metallurgical coal used in the steelmaking process. Alpha Natural Resources operates 60 mines and 14 coal preparation plants in Virginia, West Virginia, Kentucky, Pennsylvania, and Wyoming, and employs 6,200 individuals throughout the United States.

4. Alpha Natural Resources is a member of the Coalition for Responsible Regulation, Inc.

5. Alpha Natural Resources controls approximately 1.6 billion tons of coal reserves in the eastern United States, and approximately 700 million tons of coal reserves, through either fee title or federal lease, in Wyoming's Powder River Basin. In 2009, Alpha Natural Resources sold 47.2 million tons of coal. Of this total, approximately 39 million tons was steam coal, including approximately 38 million tons used for electricity generation and approximately 900,000 tons sold for industrial boilers. Alpha Natural Resources sold 8.13 million tons of eastern metallurgic coal in 2009 for use in steelmaking.

6. EPA's issuance of the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg.

66,496 (Dec. 15, 2009) ("Endangerment Finding"), and the regulations that EPA has promulgated as a result of the Endangerment Finding, are threatening substantial and irreparable economic harm to coal producers like Alpha Natural Resources, which produce primarily steam coal for use in the generation of electricity.

7. Upon issuance of the Endangerment Finding, EPA moved forward with regulating emissions of greenhouse gases from motor vehicles. On May 7, 2010, EPA and the National Highway Traffic Safety Administration ("NHTSA") issued vehicle greenhouse gas emission standards and average fuel economy standards for light-duty vehicles. 75 Fed. Reg. 25,324 (May 7, 2010). EPA maintains that this action triggered regulation of GHG under other provisions of the Clean Air Act, specifically stationary source permitting under the Prevention of Significant Deterioration ("PSD") and Title V programs. When the stationary source provisions are triggered, the statutory text would require all sources that emit more than 100 tons per year of carbon dioxide equivalent to apply for a Title V operating permit. New sources that emit more than 100 tons per year or 250 tons per year of carbon dioxide equivalent (depending on the source category), and sources that undertake major modifications at existing sources that are projected to increase emissions of greenhouse gases by any amount, would be required by statute to go through the PSD permitting process. *Id.*

8. EPA proposes in its Tailoring Rule to phase-in the statutory thresholds for triggering stationary source permitting for GHG. Pursuant to the Tailoring Rule, beginning in January 2011, new or modified sources that must undergo PSD permitting for pollutants other than greenhouse gases, but will also increase emissions of greenhouse gases by 75,000 tons per year of carbon dioxide equivalent, will trigger PSD permitting for greenhouse gases. As of July 1, 2011, sources with the potential to emit 100,000 tons per year of carbon dioxide equivalent will be considered major sources subject to PSD review, and major modifications resulting in net greenhouse gas emissions increases of 75,000 tons per year of carbon dioxide equivalent will be subject to PSD review. Title V permitting for greenhouse gases also will be phased in as follows: between January and July 2011, only those sources that must apply for, renew, or revise their permits for pollutants other than greenhouse gases must incorporate greenhouse gas applicable requirements into their permits, and after July 2011, sources that emit more than 100,000 tons per year of carbon dioxide equivalent will be required to obtain a Title V permit. EPA states in the Tailoring Rule that it will undertake another rulemaking that will take effect by July 1, 2013, that may lower these thresholds for PSD and Title V applicability. I am aware that the Tailoring Rule and the increased thresholds are being challenged.

9. The thermal coal dryers located at two of Alpha Natural Resources' facilities will emit more than 25,000 tons per year of carbon dioxide equivalent in 2011 and therefore would be subject to the statutory thresholds for Title V and PSD permitting. Neither of these facilities is currently subject to Title V or PSD requirements.

10. Even though 25,000 tons per year is less than the initial thresholds found in the Tailoring Rule, the suite of GHG regulations issued by the EPA creates substantial uncertainty for companies such as Alpha Natural Resources that emit 25,000 tons per year or even 100 tons per year of carbon dioxide equivalent. Alpha Natural Resources faces the prospect of potentially inconsistent regulation by the states, the prospect of lower emissions thresholds under the upcoming July 1, 2013 modifications to the Tailoring Rule, and the prospect that the Tailoring Rule will not withstand judicial review. This uncertainty irreparably harms Alpha Natural Resources' ability to plan for physical or operational changes at its coal preparation plants.

11. The Endangerment Finding and the associated regulation also is substantially affecting Alpha Natural Resource's profitability outlook for domestic steam coal production. The combustion of coal, by its very nature, results in the emission of substantial amounts of carbon dioxide. EPA's conclusions that greenhouse gases "may reasonably be anticipated both to endanger public health

and to endanger public welfare," 74 Fed. Reg. at 66,497, affects the perception of coal as a viable long-term source of electricity and makes coal a less desirable commodity. Moreover, the uncertainty surrounding the regulation of stationary sources of greenhouse gases is having a substantial impact on demand for coal, particularly steam coal for electricity generation.

12. I am aware that a number of our utility customers are switching units to natural gas, dropping planned expansions, or shutting down coal-fired facilities altogether as a result of, in large part, costs associated with the pending regulation of greenhouse gases. Electric utilities and independent power producers that are adding capacity are being pressured by EPA's regulations, and by the uncertainty arising from those regulations, to design and construct electric generating units that do not use coal. New electric generating units will remain in service for decades, effectively locking in the lower demand for coal. Our coal stockpiles are as high as they've ever been, and I expect this trend to continue. Indeed, our 2010 production forecast for utility customers is down. A further reduction in the demand of coal from utility customers reasonably can be expected to result in decreased revenues that cannot be remedied in future years, thereby causing irreparable harm to Alpha Natural Resources.

13. Alpha Natural Resources' mining operations also use substantial amounts of electricity, which Alpha Natural Resources purchases from local power

producers. Alpha Natural Resources purchases on average a total of 860,707,186 kilowatt hours of electricity annually, which comprises approximately seven percent of its operating costs.

14. In light of the substantial amount of electricity that Alpha Natural Resources uses in its operations, any increase in the costs of electricity resulting from the regulation of greenhouse gases emitted from coal-fired electric generation units will increase Alpha Natural Resources' operating costs, thereby inflicting harm on Alpha Natural Resources.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2010.

Michael R. Peelish

Exhibit 11

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. 10-1073 (consolidated with Nos. 10-1083, 10-1099, 10-1109, 10-1110, 10-1114, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123, 10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129, 10-1131, 10-1032, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1205, 10-1206, 10-1207, 10-1208, 10-1209, 10-1210, 10-1211, 10-1212, 10-1213, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221, and 10-1222)

DECLARATION OF DUNCAN KINCHELOE

I, Duncan Kincheloe, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge and beliefs:

1. I have been with Missouri Joint Municipal Electric Utility Commission ("MJMEUC") for 12 years and currently hold the position of General Manager and CEO of MJMEUC. MJMEUC is a state-wide Joint Action Agency specifically authorized by state law to operate as an electric utility for the benefit of the combined requirements of its members. MJMEUC is a public utility that was created to help serve municipals (primarily small, rural municipals) in Missouri and receives power through power plants in Missouri, Nebraska,

Arkansas, and Illinois. MJMEUC also serves municipal loads in Arkansas. MJMEUC members include 60 municipalities providing electric service to their customers. MJMEUC may, and does, construct, operate, and maintain jointly owned generation and transmission facilities for the benefit of its members. I make this declaration in support of the petitioners' brief.

2. The United States Environmental Protection Agency ("EPA") has interpreted the Clean Air Act to mean that emissions of greenhouse gases ("GHGs") alone can trigger the Prevention of Significant Deterioration ("PSD") permitting program for the construction of new stationary sources or major modifications to existing stationary sources. (*See Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (April 2, 2010) ("Timing Rule")). As a result of the Timing Rule and EPA's *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,154 (June 3, 2010) ("Tailoring Rule"), together with EPA's promulgation of the Tailpipe Rule, MJMEUC is now subject to and harmed by EPA's regulations. (*See* MJMEUC's Comment Letters to Timing and Tailoring Rules, Ex. A).

3. For example, MJMEUC owns a coal-fired generating facility south of Osceola, Arkansas. The air permit obtained from the Arkansas Department of Environmental Quality does not require that best available control technology ("BACT") be utilized to keep emissions of GHGs within limits defined by the

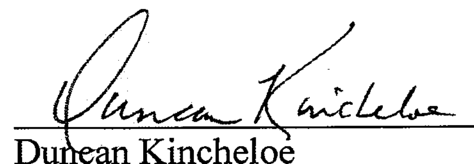
permit. However, under EPA's Timing Rule, MJMEUC would be required to obtain a PSD permit for GHG emissions if any "major modifications" were made and be required to utilize BACT to keep emissions of GHGs within limits defined by the new PSD permit. Further, MJMEUC would incur costs associated with the PSD permitting process and there will be significant delays associated with obtaining a PSD permit that could impact the planned operations of this power plant as well as other power plants and future projects.

4. MJMEUC is also harmed by EPA's promulgation of the Tailoring Rule, because the Tailoring Rule discriminates against the largest emitters by changing the definition of major source to the largest sources as the term applies to GHG emitters – and only to GHG emitters. Congress clearly set the standard for the universe of sources intended for the Clean Air Act regulation to apply and EPA cannot arbitrarily choose "winners and losers" as a matter of convenience to the agency.

5. The Timing and Tailoring Rules also work an environmental injustice against MJMEUC's customers who are mainly located in rural or small town services with a disproportionate number of low income, minorities, and elderly. Specifically, Missouri has one of the largest numbers of small towns with populations under 1,000 people. Further, a disproportionate number of sources in the Midwest and South, including many of MJMEUC's power plants, are coal-burning facilities that would be disproportionally affected by the Timing and

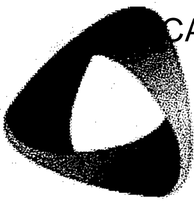
Tailoring Rules. The rising energy costs that would result from the Timing and Tailoring Rules would serve a great environmental injustice to MJMEUC's customers, because they already have lower incomes to begin with and spend a higher percentage of their incomes on energy. (*See generally* Declaration of Dr. Roger Bezdek, Ex. B). These customers rely on public utilities like MJMEUC to provide them affordable electricity in order to maintain basic hygiene and health standards. The significant increase in energy costs will force many of these customers to choose between heat and other necessities such as clothing, medical necessities, and food. It is clear that EPA did not consider any of these impacts on low-income, elderly, or minority ratepayers, who will ultimately shoulder the burden of the increased costs of the Timing and Tailoring Rules. Thus, EPA's Timing and Tailoring Rules impose a greater economic hardship against low-income, minority, and elderly populations and raises serious issues of environmental justice.

Executed this 16th day of June, 2011.



Duncan Kincheloe

EXHIBIT A



MPUA
Missouri Public Utility Alliance

December 4, 2009

United States Environmental Protection Agency
EPA Docket Center (EPA/DC),
Mailcode 6102T
Attention Docket ID No. EPA–HQ–OAR–2009–0171
1200 Pennsylvania Avenue, NW.
Washington, DC 20460.

Dear Sir or Madam:

Subject: Reconsideration of Johnson memo regarding PSD applicability
Docket Number: EPA-HQ-OAR-2009-0597
Federal Register cite: 74 Fed. Reg. 51535 (Oct. 7, 2009)

The Missouri Joint Municipal Electric Utility Commission (MJMEUC) would like to submit comments on the referenced agency action (the proposal). MJMEUC is a joint action agency of municipally owned public utilities providing electric, natural gas, water, transportation, and broadband services within the state of Missouri, and represents over 100 Missouri cities.

Generally, MJMEUC adopts and incorporates by reference the Comments of the American Public Power Association (APPA) to the proposal, with the following clarifications and all comments should be construed accordingly:

1. The entire action, taken together with the mobile source greenhouse gas rule upon which it is predicated, is untimely because EPA has yet to finalize an endangerment finding regarding greenhouse gases;
2. Prevention of Significant Deterioration rules apply only to pollutants for which a NAAQS exist and certainly not to a Title II motor vehicle standard for which there is no NAAQS ;
3. We respectfully disincorporate the concluding paragraph of Subpoint B.1 (concerning the threshold quantity for permit applicability under PSD and/or Title V regulations) of the APPA comments from our own. However, we do agree with APPA's logic that application of PSD requirements retroactively would be unreasonable and unsupported by the Clean Air Act; and,

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Missouri Association of Municipal Utilities
Missouri Joint Municipal Electric Utility Commission
Municipal Gas Commission of Missouri

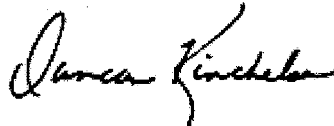
4. Nothing in the comments should be construed as admitting that GHGs are, individually or in combination, a "pollutant" subject to regulation under the Clean Air Act.

MJMEUC appreciates the opportunity to participate in this administrative matter. If additional information or clarification is required, please do not hesitate to contact us by telephone or electronic mail.

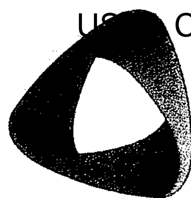
Contact information:

Duncan Kincheloe
General Manager & CEO
MJMEUC
Columbia, Missouri
Phone: 573.445.3279
e-mail: dkincheloe@mpua.org

Sincerely,



Duncan Kincheloe
General Manager & CEO
MJMEUC



MPUA
Missouri Public Utility Alliance

December 28, 2009

For Electronic Delivery

EPA Docket Center, EPA West (Air Docket)
United States Environmental Protection Agency
Mail code 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Subject: **Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule**

Docket Number: **EPA-HQ-OAR-2009-0517**

Federal Register citation: Volume 74, page55291, October 27, 2009

The Missouri Joint Municipal Electric Utility Commission (MJMEUC) is pleased to submit comments on the referenced agency action ("the proposal"). MJMEUC is a state-wide Joint Action Agency specifically authorized by state law to operate as an electric utility for the benefit of the combined requirements of the members. Established by six charter members, the Commission has grown to a membership of 58 consumer-owned systems ranging in size from 700 to 87,000 meters. These municipal and cooperative electric systems serve 347,000 retail customers, and have a combined peak load of over 2100 MW. MJMEUC may construct, operate and maintain jointly owned generation and transmission facilities for the benefit of members. The Commission has the authority to enter into contracts for power supply, transmission service, and other services necessary for the operation of an electric utility. Full membership in the Missouri Joint Municipal Electric Utility Commission by Missouri municipal utilities requires approval of a Joint Contract and acceptance by the Board of Directors. A current list of MJMEUC members is attached.

I. Overview of Comments

MJMEUC submits at the outset that the only fair and legally appropriate way to regulate greenhouse gas (GHG) emissions effectively is through specifically targeted legislation. However, in the absence of specific legislation, EPA has unilaterally decided to apply the Clean Air Act ("CAA" or "Act") to regulate GHG emissions, through a series of rulemakings, findings, and interpretations. These actions will redirect the capital investments of a significant part of the nation's economy for decades to come, to the detriment of other beneficial uses.

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Having crossed that Rubicon, EPA now has no legal choice but to implement the Act exactly *as written by Congress* and to regulate *all* GHG sources in a fair and equitable manner as contemplated by the Act. To do otherwise would create additional opportunities for future judicial action against the agency, and perpetuate the fallacy that climate change is primarily an issue specific to automobiles and power plants. As the agency acknowledges in this proposal, GHGs arise from a wide range of industrial, commercial, and even residential sources. By attempting to bypass the plain language of the Act, EPA is attempting to pin sole responsibility for future emission reductions on a few select sources, a subset which happens to make a very convenient and consistent target of their actions. It is hoped that the agency will remember that Congress enacted the CAA for the purpose of controlling air emissions. If EPA deems that carbon dioxide (CO_2) and other GHGs are regulable air pollutants, then their emissions should be and must be controlled in accordance with the specific provisions of the Act, and not merely in a manner most convenient for EPA and those numerous state agencies which administer the federal laws.

EPA's proposed regulation of GHG under the auspices of the Clean Air Act (CAA or the Act) as envisioned in this Tailoring Rule is unlawful in that it exceeds the legal authority of the agency, unwarranted because EPA is not legally required to implement these new requirements at this time, and imprudent because the proposed rule ignores significant sources GHG emissions in the aggregate in the country. Accordingly, MJMEUC opposes the proposed amendments to the Prevention of Significant Deterioration (PSD) and Title V applicability thresholds. Specifically, MJMEUC opposes both the proposed definitions for "major source" and "major modification" under the PSD and Title V programs to the extent they vary from the emission levels set by Congress in the Clean Air Act. MJMEUC also specifically opposes the proposed to amendments to 40 C.F.R. 52.1323 that would effectively require Missouri to adopt these new thresholds in its State Implementation Plan.

II. Specific Issues

A. The Proposed Tailoring Rule is unnecessary on its face

1. The Agency's assertion on PSD/Title V applicability is flawed. EPA asserts that the Tailoring Rule is necessary because EPA will soon regulate GHG for light duty vehicles, thereby causing GHG to become a "regulated pollutant" under the Act, triggering perhaps unintentionally PSD and Title V permitting requirements for all other GHG sources throughout the economy. However, this supposed nexus was the subject of an ancillary agency action under Docket EPA-HQ-OAR-2009-0171 (the Johnson Memo reconsideration). In our comments on that action we observed both the inadvisability of regulating GHGs under the CAA and the disconnection between stationary source permitting programs and the pending mobile source tailpipe regulations, especially given the lack of ambient standards and a comprehensive stationary source endangerment finding. We reiterate those comments in today's action and incorporate them by reference herein.

EPA need not and should not regulate GHGs under the Clean Air Act. Further, EPA's issuance of a mobile source tailpipe standard does not automatically then require EPA to impose permitting requirements on stationary sources not subject to that standard.

2. Absent PSD/Title V applicability, there is no reason to limit scope by redefining Major Sources. The Tailoring Rule is proposed as a limiting regulation. That is, it purports to limit the reach of GHG regulation under the PSD and Title V permit programs to fewer than 14,000 of the largest GHG emitters. However, we are of the opinion that the Johnson Memo determination should not apply to any stationary sources[1].

Accordingly, there is no reason for EPA to limit the applicability of an action that has no applicability in the first place.

B. The Proposed Rule is not supported by law

1. PSD/Title V applicability – if EPA chooses to invoke – is clearly defined by the Clean Air Act. If EPA elects to continue down the path of regulating stationary source GHGs under the unlikely vehicle that is the CAA, then the plain language of the Act is clear. Major sources are defined as those having the potential to emit 100 or 250 tons of regulated pollutant per year under the PSD program and over 100 tons per year under Title V. There is no room for EPA to impose a different interpretation under a "*Chevron*"-type analysis or otherwise exercise discretion to deviate from the CAA's clearly articulated requirements.

If a substance is deemed to be an air pollutant, then the respective CAA numerical limits must apply. This point is embarrassingly obvious and should go without having to be restated.

2. The Clean Air Act does not grant EPA the authority to alter applicability thresholds for the PSD or Title V permitting programs. The Act grants the EPA Administrator discretion in a wide range of implementation issues. However, it is silent on the specific matter of granting authority to unilaterally change applicability threshold quantities. The agency may claim that Congress could not have foreseen the consequences of regulating a ubiquitous substance like CO_2. However, that is tantamount to saying that Congress did not intend to regulate CO_2 emissions under the Act at all[2]. This is not consistent with the

[1] This view has been expressed by multiple commenters, and we expect this issue ultimately will be decided in a court of law.

[2] The Clean Air Act is replete with very technical chemical, physical, and mathematical terminology. It would be insulting and condescending to assume that Congress did not understand the language of the statute which it enacted. Further, EPA played a major role in drafting, amending, and negotiating the language of the PSD and Title V programs. If EPA understood the consequences of including CO_2 emissions in these programs, as it belatedly purports to do today, there was a*mple* opportunity to convey this consideration to the Legislative branch.

agency's decision to regulate CO_2 as an air pollutant and EPA can not hold both of these opinions simultaneously.

If, as EPA claims, Congress intended to regulate GHGs as air pollutants, they could have – but chose not to – provide latitude to EPA to account for their relatively high emission rates. Further, no other administrative statute provides EPA this latitude.

C. The Proposed Rule is not supported by Agency claims of administrative burden.

1. The doctrine of "absurd results" is inapplicable and does not allow EPA to alter the CAA's applicability thresholds. EPA invokes the doctrine of "absurd results" to claim that Congress could not have intended for GHG sources to be defined identically to other air contaminant sources. MJMEUC disagrees that existing case law allows EPA to unilaterally change the Congressionally-mandated applicability thresholds simply to avoid an "absurd result" in this instance. Notwithstanding the inappropriate adoption of this judicial standard in this regulatory action , this argument falls for several reasons:

a) As explained in the preamble to the proposed rule, an "Absurd Result" is one that is narrowly construed by the courts to contravene or subvert Congressional intent. That is to say, the outcome of the action must preclude the original intended outcome of the Act. It is not enough to point to the tremendous volume of new permit applicants as a risible consequence of literal implementation. Even if EPA could legally invoke the doctrine here, it must show that the expansion of permit applicants that will from broader rule applicability would prevent the agency and the states from achieving CAA goals of reduced emissions and improved air quality. EPA has not made this showing.

Furthermore, EPA admits that there are other options for streamlining the permitting requirements that would lessen the burden on the agency and the regulated community, but that these options could not possibly be implemented by the time EPA promulgates the light duty motor vehicle standards. (*See* 74 Fed. Reg. at 5536 col.2.) Thus, any "absurd results" are a direct function of EPA's *choice* of when to promulgate the light duty motor vehicle standards. The absurd results doctrine does not allow an agency to avoid its statutory duties simply to accommodate inconveniences of its own making.

*It is difficult to imagine how applying CAA requirements to a broader universe of sources would contravene clean air goals. Further, to the extent that EPA argues that their inclusion would subvert Congressional intent, it again appears to hold that Congress did not **intend** to regulate these sources under the CAA, an argument EPA has already rejected (see Paragraph B.2., supra).*

b) If Congress did intend to regulate GHGs – but to somehow regulate them differently than other air contaminants – then Congress could have, but did not, set different thresholds.

> *Congress could have provided administrative latitude to EPA to adjust applicability thresholds, or Congress could itself have provided for alternate applicability threshold quantities for GHGs. Importantly, it chose to do neither.*

c) EPA's argument that broad regulatory application would somehow lead to the inability for EPA and the states to issue timely permits is not cogent. EPA and the states routinely ignore statutory requirements and fail to issue permits in a timely manner. The record shows that they persistently face massive backlogs in all permit programs (air, water, and waste) under the *status quo.* Yet EPA has never cited this backlog as a reason to restrict applicability for any other statutory program. On the contrary, permitting agencies actually invite additional backlog by *extending* permit applicability requirements to marginal projects in order to collect additional permit fees.

> *EPA's concern over the ability to issue timely permits and the concomitant claim that this somehow deters clean air goals are disingenuous in the face of longstanding backlogs in the PSD and Title V programs.*

d) Broader application of the PSD and Title V programs would not subvert the Congressional intent of continued economic development. MJMEUC agrees with EPA that Congress intended to permit economic development, consonant with environmental protection. However, we have noted very little compunction in the past on the part of the agency in restricting economic development by applying expensive controls to so-called "large sources" in the name of environmental protection.

> *EPA's professed sympathy for "small sources", who would actually **save** money over time by implementing energy efficient BACT measures, is curiously misplaced.*

e) EPA's persistent reference to "small" sources in the preamble, as in the claim that Congress did not intend for "small" sources to be affected, is unfounded and self-serving. The CAA clearly defines the difference between large and small

("major" and "minor") in terms of potential emissions of air contaminants, not on the basis of the dollar cost of a project[3]. This is precisely the issue here.

> *EPA's continued differentiation between "large" and "small" projects is inconsistent with the language of the Act. The agency should not be allowed to invent definitions at its convenience in order to support its arguments.*

f) If there is an Absurd Result, it stems from EPA's decision to regulate GHGs under the CAA. EPA could not elect to embark on such a program unless it believed it was expressly authorized by Congress.

> *Since the Supreme Court has stated that EPA has that authority and since EPA has now chosen how and when to exercise it, EPA cannot now argue that the application of the PSD and Title V permit programs to GHG sources under the Act is an unintended consequence.*

2. The claim of "Administrative Necessity" is unfounded. The agency posits that it would be an administrative burden to apply CAA permit regulations to the entire universe of affected sources and therefore finds it an absolute necessity to restrict applicability requirements. This calls to mind the complaint heard by the parents of many a child that the mess in their bedroom – which was created by themselves – is just too large for them to clean up. The argument falls on several grounds:

a) The judicial doctrine of administrative necessity is narrowly construed to apply when literal interpretation of a statute renders its administration *impossible*. It does not apply when the task is merely difficult, daunting, or inconvenient. The agency admits that the challenge is not totally insurmountable by explaining how a broad program might be rolled out in phases over a period of time. Therefore, it is not a question of "whether," but "when."

> *The arguments posed by EPA do not support a finding that the administration of a broad nationwide permit program is impossible, merely tricky.*

b) EPA has shown a propensity for regulating incredibly large numbers of smaller emission sources under other air programs. For example, the number of small "area" sources[4] regulated under Title III MACT rules may reach into the hundreds of thousands or perhaps millions. EPA did not flinch at the prospect of regulating

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[3] In fact, EPA and the states have discretion to use cost factors to establish BACT limits. This discretion can be and should be exercised during the permitting process, not as a basis for exempting a large segment of the affected sources.

[4] E.g., gas stations, dry cleaners, and small auto body shops

auto body shops that paint as few as two vehicles per year[5] nor consider it "impossible" to administer and enforce such a broad-based requirement.

Previous EPA actions demonstrate EPA's willingness and ability to impose massive air regulatory programs on incredibly large numbers of affected sources, without regard to economic size of the source. .

c) The administrative burden of regulating all affected sources under the PSD program would not be unmanageable. EPA is of the opinion that it can not possibly perform engineering reviews for new and modified GHG sources in anything approaching a timely manner. However municipal and county building, planning, and zoning departments perform engineering reviews and issue permits to virtually every single construction project in the nation. These agencies have found a way to perform this duty without crashing the U.S. economy – an outcome direly predicted by EPA.

Rather than deeming such a program "impossible", EPA and the states could and should look to local agencies as a model for issuing timely permits. There is no reason that it should require a week and a half of engineering review to calculate the CO_2 emissions from a fast food restaurant[6].

d) The administrative costs of regulating all affected sources under the PSD program are not unbearable. Based in part on the 60-hour-per-burger-joint estimate, EPA states that PSD administration *sans* the Tailoring Rule would require 3.3 million staff hours per year at an annual cost of $257 million. This is stated as if it would add significantly to the $1.4 trillion deficit and therefore render such a program unworkable. However, the agency fails to note that EPA and the states are *paid* for PSD permit reviews, by the permittee, on an hourly basis. In Missouri, which arguably has one of the lowest fee rates in the nation, this rate is statutorily established at $50 per hour, with current discussions aimed at raising the fee to $100 per hour. At $50 per hour, the 3.3 million hour review effort would result in permit fees paid to the agency in the amount of $165 million, thereby offsetting a major portion (64%) of the incremental program cost. At the $100 rate, agency revenues would total $333 million and the program would serve as a profit center to subsidize other clean air programs.

The permit fees generated by PSD review would largely offset or even exceed stated program incremental costs. Any remaining shortfall would be

[5] National Emission Standard for Hazardous Air Pollutants: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources, Final Rule, 73 Fed. Reg. page 1737, January 9, 2008

[6] Proposed rule at page 55301, column 2, second paragraph: "This 20-percent estimate amounts to 60 hours of permitting authority time per residential or commercial permit."

insignificant in relation to total program expenditures and would certainly not render implementation impossible.

e) The administrative burden of regulating all affected sources under the Title V program would not be unmanageable. EPA estimates that each permitting authority in the nation (presumably 50 or more) would have to add 57 full time equivalent employees to administer a thorough Title V permitting authority as (arguably) prescribed under the CAA. This would accommodate the six million new permittees that would enter the system under a literal interpretation of the 100 ton per year threshold. The implication here is that such an expansion in environmental regulatory staffing would be unconscionable and unaffordable, thereby rendering it impossible. MJMEUC doubts that this would be the case. In fact, EPA and the agencies routinely outsource their permit overload to environmental engineering consultants. This is especially true of routine, *pro forma* permits of the type envisioned by EPA throughout this proposal. Accordingly, the overwhelming majority of FTEs added would be in the private sector rather than an expanded government bureaucracy[7]. From this vantage point alone, the proposed Tailoring Rule should be seen as contrary to the goal of economic stimulus in general and the creation of new green jobs – an expressed goal of the current Administration - in particular.

EPA also details the frustration of being unable to issue Title V permits within statutorily prescribed time frames, again pointing to such delays as a root cause of administrative impossibility. However, the agency fails to outline any serious repercussions stemming from this inability. *Many* sources have experienced delays – significant delays – in obtaining Title V permits with no observable consequences. In the twenty year history of the Title V program, EPA has never pointed to these delays as a reason to curtail applicability requirements. On the contrary, facility owners are advised to abide by the terms of their permit application (the permit shield referenced in the proposal) and to resubmit applications every five years, even if the original permit has yet to be issued.

Extending the ranks of permit-eligible sources will not cause an administrative catastrophe. If anything, a great number of sources will be subject to the same conditions experienced under the status quo. Further, the environmental consulting industry will receive significant positive benefits and contribute to the nascent green jobs movement in the United States.

[7] Actually, this outsourcing is routine in writing of the PSD permits as well, so these observations apply equally to that program.

f) The administrative costs of regulating all affected sources under the PSD program are not unbearable. EPA estimates that administration of the Title V program under a literal interpretation of the Act would result in new program costs of $15 billion per year[8]. At the same time, however, EPA is reported to be advising state regulatory agencies to look at new Title V permit fees and specifically at per-ton fees on CO_2 as a means to replenish state air program coffers. We respectfully disagree that existing sources are or should be automatically subject to CO_2 emission fees. However, if EPA carries their argument to conclusion, they would see that the addition of new Title V permit fees would more than offset the stated incremental program costs. Specifically, if each of the six million new permittees were to emit only the *minimum* 100 tons per year annually, they would generate nearly $26 billion in new program revenues per year[9] – nearly double the stated incremental cost of administering the permit program.

> *Far from rendering the program "impossible," this would appear to fully enable the Title V program, provide funds to clear up existing permit backlogs, and help EPA and the states work toward Congressionally mandated clean air goals. It also goes without saying that such a program, implemented under (arguably) existing authority, would bear a striking resemblance to an economy-wide carbon tax – the mechanism generally recognized as the most economically efficient means to bring about GHG emission reductions.*

g) Expanded Title V permitting would produce environmental and administrative benefits. The preamble asserts that bringing smaller sources would be a futile paper exercise, inasmuch as the overwhelming majority of commercial and residential sources are not subject to any air restrictions that would form the basis for a permit. This is a gross misstatement that demands retraction. If nothing else, EPA's recent extension of CAA Title III hazardous air pollutant "MACT" requirements to smaller "area" sources has created a class of newly-regulated facilities that are beyond the reach of the current Title V program. By not being subject to Title V permit requirements, these sources have no current effective method to monitor, record keeping, or enforcement for these sources. In the event of a complaint, these sources frequently plead ignorance and avoid enforcement action. A viable Title V permit – or even a signed application form for that matter – provides at least some measure of assurance that these sources are aware of their regulatory responsibilities and the consequences for noncompliance. Even in the absence of any unit-specific or facility-wide emission standards, EPA is forgetting that these sources would be subject to general and core permit requirements based

[8] Proposed rule at page 55302, column 3, end of second paragraph

[9] Based on a per-ton fee of $43; a value approximating EPA's current suggested guideline

on miscellaneous clean air standards. Importantly, violations of these standards represent a substantial majority of current agency enforcement efforts. For example, in the months of September and October 2009, the Missouri Department of Natural Resources Air Pollution Control Program reported 125 new complaints and 107 actions that were in some stage of enforcement[10]. Of these 232 incidents, no less than 162 entailed asbestos abatement, fugitive emissions, open burning, odor control, or fuel vapor recovery. These statistics are dominated by small firms or individuals lacking formal environmental compliance personnel. Less than a half-dozen of the 232 involved sources currently subject to Title V permitting.

> *Extending Title V program requirements to this class of sources would improve outreach, education, and compliance with existing laws and regulations. Rather than creating a fruitless administrative morass, this actually would provide substantial air quality benefits and allow EPA and the states to redirect enforcement efforts to more productive pursuits.*

D. The Proposed Rule is based on a threshold level established in an arbitrary and capricious manner.

1. Under the authority of the CAA the Administrator found that GHG as a group endangers the health and welfare of US residents as well as the residents based in other countries. That determination while at the discretion of the EPA Administrator is required to be based on science.

2. When the same administrator announced a proposed 25,000 ton limit, no scientific studies were cited as to why this limit was appropriate in order to achieve specific benefits to the individuals who are to be protected under the endangerment finding. It is entirely possible that this level will not achieve the level the Administrator claims is necessary to achieve the protection the agency claims is necessary.

3. The justification is based on the administrative implications of attempting to regulate CO_2e emissions at the 250 ton level. Nowhere in the CAA is the agency specifically authorized to consider such implications.

4. The proposed rule itself acknowledges that the 25,000 ton CO2 level may not be adequate to achieve the necessary reduction goals and sunsets the current rule after six years of study to determine what the appropriate level should be. This approach to regulating a substance that has been deemed by an agency to endanger public health and welfare is unique in the realm of public health and environment. It is akin to the Food and Drug Administration authorizing a drug with a five year sunset,

[10] Missouri Air Conservation Commission Briefing Document, December 3, 2009, incorporated by reference

saying that they will evaluate the treatment outcomes of treated patients after 5 years at authorized dosing levels to determine whether the drug was effective.

E. The Proposed Rule is discriminatory

1. Tailoring would unlawfully discriminate against largest sources.

Congress clearly set the standard for the universe of sources intended for Clean Air Act regulation to apply. By changing the definition of major source as the term applies to GHG emitters- and only to GHG emitters, EPA is arbitrarily choosing "winners and losers" in the permitting and enforcement sweepstakes. Importantly, this distinction is to be made solely as a matter of convenience to the agency, not as a matter of conformance to established public law or on any identifiable technical basis. Thus, EPA's arbitrary establishment of the new applicability thresholds potentially violates the equal protection rights of regulated entities guaranteed by the United States Constitution.

2. Tailoring would discriminate against Midwest sources. In addition to discrimination based on size, the rule also creates winners and losers based on geography. Since a disproportionate number of sources in the Midwest are coal-burning facilities, they would be affected disproportionately by the proposed rule. A regulatory threshold based on the statutory quantities would encompass a more representative population of GHG emitting sources across the Nation. Again, this potentially violates the equal protection rights of those who would be subject to the proposal.

3. Tailoring would work an environmental injustice against rural populations of Middle America. The existing mix of fuel use in the United States is based primarily on economic considerations. To the extent that the proposed rule works a discriminatory hardship against Midwestern coal-burning sources, it also imposes an economic hardship against the lower income populations indigenous to the region. By using an environmental regulation to selectively create an economic harm, EPA is raising serious issues of environmental justice.

F. The Proposed Rule could create an unfunded mandate for the state environmental agencies of one or more states.

If EPA rejects the economic arguments in Paragraphs II.C.2.d and II.C.2.f above, then the agency is essentially imposing an unfunded mandate on the various state air agencies. Despite EPA's assurances within the proposed rule, States will not be able to attract, hire, train, and utilize the additional staff necessary to carry out this rule. The fact that EPA has chosen to ignore emissions below 25,000 tons CO_2e for the first five years of the rule, effectively walls off new sources of revenue from smaller emitters.

G. The Acknowledged Purpose of the Proposed Rule is Not To Regulate GHG

It has been widely reported that the tailoring rule was part of an administrative strategy along with the Endangerment Finding to pressure the Senate into passing Climate Change Legislation . A Voice of America news article citing an interview with EPA Administrator Lisa Jackson (Dec 9, 2009) illustrates this point as follows:

She (Lisa Jackson) described her agency's decision this week to regulate carbon gas emissions in the United States as an attempt to boost ongoing U.S. congressional efforts dealing with global warming.

III. Further Contacts

The Missouri Joint Municipal Energy Commission appreciates the opportunity to participate in this rule making. If additional information or clarification is required, please do not hesitate to contact us by telephone or electronic mail at the address shown below.

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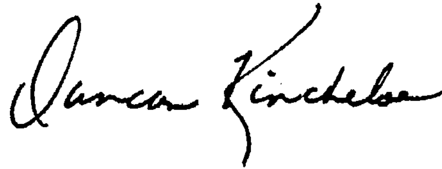
Respectfully,



Duncan Kincheloe
General Manager & CEO
MJMEUC

EXHIBIT B

DECLARATION

1. I am Dr. Roger H. Bezdek, president of Management Information Services, Inc., (MISI), an economic research firm specializing in energy and environmental issues.

2. I have 40 years experience in consulting and management in the energy, utility, environmental, and regulatory areas, and have served in private industry, academia, and the U.S. Federal government. My experience includes Corporate Director, Corporate President and CEO, University Professor, Research Director in the Bureau of Economic Analysis of the U.S. Department of Commerce, Research and Program Director at the Energy Research and Development Administration and the U.S. Department of Energy, Special Advisor on Energy in the Office of the Secretary of the Treasury, and U.S. energy delegate to the European Community and to the North Atlantic Treaty Organization. I have served as a consultant to the White House, the Office of Vice President Al Gore, Federal and state government agencies, and various corporations and research organizations, including the National Science Foundation, NASA, DOE, DOD, EPA, IBM, Goldman Sachs, Raytheon, Lockheed Martin, J. P. Morgan Chase, BAE Systems, Ontario Power Generation, Eastman Kodak, American Solar Energy Society, Greenpeace, the Rockefeller Foundations, UN Environmental Program, Pew Charitable Trusts, the Blue Green Coalition, Japan Atomic Energy Research Institute, National Energy Technology Laboratory, Electric Power Research Institute, Edison Electric Institute, National Coal Council, and Nuclear Energy Institute. During 2003/04, I served on the Federal Task Force charged with rebuilding the economy of Iraq and in 2008 I presented energy briefings to the staffs of Senators Barack Obama, John McCain, and Hillary Clinton. I am active with the National Research Council of the U.S. National Academies of Science (NAS), and have served on various NAS committees, including, most recently, the joint NAS/Chinese Academy of Sciences Committee on U.S.-Chinese Energy Cooperation and on the NAS Committee on Fuel Economy of Medium and Heavy Duty Vehicles. I have testified before the Federal, state, and city governments. I am the author of six books (including a book on energy policy published in September 2010) and over 300 articles in scientific and technical journals, I serve as an editorial board member and peer-reviewer for various professional publications, and am the Washington editor of *World Oil* magazine. I received a Ph.D. in Economics from the University of Illinois (Urbana)

3. I prepared this Declaration and the attached study.

4. As demonstrated in the attached study, in recent months, EPA has taken four related actions that, taken together, trigger PSD applicability for GHG sources on and after January 2, 2011. These actions, the Endangerment Finding, the Johnson Memo Reconsideration, the Tailpipe Rule, and the Tailoring Rule, will affect numerous entities and lead to the most comprehensive, restrictive, and intrusive environmental regulations in U.S. history. A major impact of such regulations would be restrictions on the availability and increases in the prices of fossil fuels. The economic impacts would be serious, and this report analyzes the likely economic, employment, and energy market

impacts of EPA GHG control regulations on low-income groups, the elderly, and minorities.

5. The study's major finding is that the CO_2 restrictions implied in the EPA regulations would have serious economic, employment, and energy market impacts at the national level and that the impacts on low-income groups, the elderly, Blacks, and Hispanics would be especially severe. The EPA regulations will impact low income groups, the elderly, and minorities disproportionately, both because they have lower incomes to begin with, but also because they have to spend proportionately more of their incomes on energy, and rising energy costs inflict great harm on these groups.

6. Senior citizens are particularly vulnerable to energy price increases due to their relatively low incomes, and older consumers with the lowest incomes will experience the greatest cost burdens from the EPA regulations. Large percentages of the elderly have high energy burdens, and low income senior citizens dependent primarily on retirement income have especially high energy burdens. Thus, the greatest burdens of the increased energy costs resulting from EPA GHG regulations will fall on households of elderly Social Security recipients – more than 20 percent of all households -- who depend mainly on fixed incomes, with limited opportunity to increase earnings from employment.

7. The low-income elderly are particularly susceptible to weather-related illness such as potentially-fatal hypothermia, and a high energy burden can represent a life-threatening challenge. Given their susceptibility to temperature-related illnesses, elderly households require more energy to keep their homes at a reasonable comfort level. Implementation of the EPA GHG regulations would place many elderly households at serious risk by forcing them to heat and cool their homes at levels that are inadequate for maintenance of health.

8. Over the past decade, home heating costs have been increasing as a result of an overall rise in energy costs, and energy costs have increased more rapidly than the purchasing power of low-income consumers. As a result, winter heating costs present a special burden for seniors – especially low income seniors, and this burden will be exacerbated by the impending EPA GHG regulations.

9. Black and Hispanics will be adversely affected threefold by the EPA GHG regulations: Their incomes will be less than they would without the regulation, their rates of unemployment will increase substantially, and it will take those who are out of work longer to find another job. These impacts on earnings and employment will increase the rates of poverty among Blacks and Hispanics, and one of the impacts of implementing the EPA regulations will be to, by 2025:

- Increase the poverty rate for Hispanics from 23 percent to about 28 percent. This represents an increase in Hispanic poverty of nearly 22 percent.

- Increase the poverty rate for Blacks from 24 percent to about 30 percent. This represents an increase in Black poverty of 20 percent.

10. The added costs that will result from the EPA regulations will reduce Black and Hispanic household incomes by increasing amounts each year:

- In 2015, Black median household income will decrease about $550 compared to the reference case (which assumes that the EPA regulations are not implemented), and Hispanic median household income will decrease $630 compared to the reference case.
- In 2025, Black median household income will be nearly $600 less than under the reference case, and Hispanic median household income will be about $660 less than under the reference case.
- In 2035, Black median household income will be $700 less than under the reference case, and Hispanic median household income will be $820 less.
- The cumulative loss in Black median household income over the period 2012 – 2035 will exceed $13,000.
- The cumulative loss in Hispanic median household income over the period 2012 – 2035 will exceed $15,000.

11. Implementation of the EPA regulations would result in the loss of an increasingly large number of Black and Hispanic jobs:

- In 2015, 180,000 Black jobs would be lost and nearly 250,000 Hispanic jobs would be lost.
- In 2025, more than 300,000 Black jobs would be lost and nearly 400,000 Hispanic jobs would be lost.
- In 2030, nearly 390,000 Black jobs would be lost and nearly 500,000 Hispanic jobs would be lost.

12. The EPA regulation will likely have a doubly negative impact on the living standards of Blacks and Hispanics:

- First, the regulations will decrease Black and Hispanic incomes.
- Second, they will increase the costs of the basic goods upon which Blacks and Hispanics must spend their reduced incomes.

13. In the face of reduced incomes and rising prices, the trade-offs that Blacks and Hispanics will face involve reallocating spending between food, clothing, housing, and heat. Implementing the EPA regulations will force Blacks and Hispanics to spend an even more disproportionate share of their incomes -- which will have been reduced due to the effects of the CO_2 restrictions -- on basic necessities. Finally, the cumulative impact of increased unemployment, reduced incomes, and increased prices for housing,

basic necessities, energy, and utilities resulting from the EPA regulations will be to further reduce Black and Hispanic discretionary incomes.

14. The EPA regulations would significantly increase the energy burdens for Blacks and Hispanics and to force large numbers of both groups into energy poverty. Implementing the EPA GHG regulations would:

- In 2020, increase the energy burden of Blacks by 14 percent and Hispanics by 16 percent
- In 2030, increase the energy burden of Blacks by nearly one-third and Hispanics by more than 35 percent

5. I, Roger Bezdek, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge. Executed this 9th of September, 2010.

Roger H. Bezdek