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VIA E-MAIL (jackson.lisa@epa.gov) (a-and-r-docket@epa.gov)

Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Mail Code 6101A
Washington, DC 20460

Re: *Petition – Recognition of Off-site Greenhouse Gas Reductions for Netting of Stationary Source Emissions, Compliance with Emissions Limitations, and Other Purposes; and*

Public Comment Docket ID No. EPA-HQ-OAR-2010-0841, PSD and Title V Permitting Guidance for Greenhouse Gases

Dear Administrator Jackson:

Pursuant to the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 553(e), the Carbon Offset Providers Coalition (“COPC”) respectfully petitions the United States Environmental Protection Agency (“EPA”) to issue rulemaking and guidance recognizing that emissions reductions of greenhouse gases achieved outside the physical boundaries of a stationary source of greenhouse gas emissions can be credited, netted, and/or offset from on-site emissions for purposes of existing Clean Air Act programs, such as the New Source Review/Prevention of Significant Deterioration (“NSR/PSD”) pre-construction permitting program and other purposes.

This petition also serves as the COPC’s comments on the Agency’s November 2010 guidance addressing greenhouse gases under the NSR/PSD program and BACT analysis (“BACT Guidance”).¹ It is our understanding that EPA intends to revise the BACT Guidance in January 2011 to address the regulatory treatment of emissions from biomass combustion as well as indirect (Scope 2) emissions reductions through the implementation of on-site energy efficiency measures. Because the nature of outside-the-fenceline emissions reductions (*i.e.*, offsets) are similar if not identical to biomass and energy efficiency considerations in terms of the

¹ PSD and Title V Permitting Guidance for Greenhouse Gases: Notice of Availability, 75 Fed. Reg. 70254 (Nov. 17, 2010).

atmospheric science and regulatory interpretation, the Agency's consideration of offsets must be consistent with its legal conclusions and crediting of reductions associated with these other areas of analysis. The COPC also requests that offset projects and case studies be explicitly included in the RACT/BACT/LAER clearinghouse and GHG Mitigation Strategies Database.

The special nature of greenhouse gases makes the use of off-site emissions reductions (*i.e.*, reductions achieved by other facilities that voluntarily lower their emissions or sequester, avoid, or destroy greenhouse gas beyond a business-as-usual scenario) scientifically viable as a matter of both atmospheric science and sound environmental policy.² Accordingly, because the Clean Air Act does not expressly prohibit the use of off-site reductions for offsetting purposes, EPA can interpret the Act to provide broad flexibility to regulated facilities that will lower the costs of complying with restrictions on greenhouse gas emissions by allowing regulated facilities to invest in and transfer emissions reductions from other sources within the same functional airshed.

Nothing in the text or legislative history of the Clean Air Act would foreclose this approach, and therefore it becomes simply a question of agency initiative, rather than statutory constraints. Twenty five years ago, the U.S. Supreme Court in *Chevron v. NRDC* recognized EPA's ability to interpret the Clean Air Act broadly with respect to the definition of "source" and the use of offsets and bubble concepts.³ As early as 1982, EPA stated that "[i]t is the policy of EPA to encourage use of emissions trades to achieve more flexible, rapid and efficient attainment of national ambient air quality standards." Emissions Trading Policy Statement; General Principles for Creation, Banking, and Use of Emission Reduction Credits, 67 Fed. Reg. 15076 (Apr. 7, 1982).⁴ Although the focus of EPA's emissions trading policy at that time was on criteria pollutants, as discussed at greater length below, there is nothing in the Clean Air Act that would prevent EPA from authorizing greenhouse gas emissions trading under other Clean Air Act

² EPA has recognized that certain pollutants have dispersion characteristics that enable "ton for ton" trading of emissions increases and emissions decreases such that "the precise location of those increases and decreases ordinarily does not matter." Emissions Trading Policy Statement; General Principles for Creation, Banking, and Use of Emission Reduction Credits, 67 Fed. Reg. 15076, 15082:1 (Apr. 7, 1982) (Technical Information Document).

³ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although *Chevron* addressed EPA regulations under the 1977 Clean Air Act Amendments, there is nothing in subsequent legislative revisions, including the 1990 Clean Air Act Amendments, that would limit the scope of the Court's ruling, and indeed Congress appears to have implicitly ratified the flexibility endorsed in *Chevron*.

⁴ Although EPA has suggested that emissions trading cannot be used "to meet new source performance standards, best available control technology requirement in PSD areas, or lowest achievable emission rate control technology requirements in nonattainment areas," *see* Emissions Trading Policy Statement; General Principles for Creation, Banking, and Use of Emission Reduction Credits, 67 Fed. Reg. 15076, 15078 (Apr. 7, 1982), this passing statement was not supported by reasoning and does not reflect any inherent statutory restriction.

programs prior to EPA's eventual designation of greenhouse gases and establishment of national ambient air quality standards under section 110 of the Act.⁵

Congress' intent to allow flexibility and creativity, such as crediting off-site reductions where emissions trading is consistent with health and welfare objectives, is evident throughout the Act and particularly in the fact that Congress throughout the Act mandated that emissions limitations be set at levels that are achievable through application of control technology, but left room for regulated facilities to comply with such limitations through alternatives such as clean fuels, operational practices, and alternative technologies.

Accordingly, the COPC respectfully petitions EPA to adopt a regulatory policy that will allow the trading and netting of greenhouse gas reductions between regulated facilities under any applicable Clean Air Act program that establishes limits on greenhouse gas emissions, including currently the PSD stationary source pre-construction review program, the Title V facility permit program, and the light-duty motor vehicle tailpipe emissions standards.

About the Carbon Offset Providers Coalition

The COPC is an alliance of the leading companies in low-carbon and clean technology investments, representing hundreds of clean infrastructure projects, millions of tons of greenhouse gases reduced, well-paying green jobs, and millions of dollars in economic benefit to local and regional communities at project locations across the U.S., North America, and globally.⁶ COPC members finance, produce, generate, provide, aggregate, verify, and/or market greenhouse gas emission reductions for sale as offsets in existing and emerging voluntary and compliance greenhouse gas emission trading markets. Our members include the #1 and #2 project portfolios in North America, the #1 credit aggregator, as well as the largest portfolio of international Clean Development Mechanism offsets in the world.

We offer the following comments based upon our members' experience operating within these markets, including the collective experience from hundreds of low-carbon infrastructure projects in nearly all 50 states that have achieved millions of tons of greenhouse gas reduction.

About Carbon Offsets

Emissions offsets can provide real emissions reductions, whether under a new legislatively created cap-and-trade system or existing Clean Air Act authority, by providing flexibility to regulated industries to find the lowest-cost emissions reductions across a range of options not

⁵ The Center for Biological Diversity has petitioned the Agency to designate greenhouse gases as criteria pollutants on the basis that the Supreme Court has already determined that greenhouse gases are "pollutants" as defined under the Act, and that such pollutants emanate from numerous and diverse sources, and that EPA has already made an endangerment finding with respect to greenhouse gases from mobile sources, which can be readily extrapolated to stationary sources. *See* Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act, dated Dec. 2, 2009.

⁶ More information on COPC and its members is available at www.carbonoffsetproviders.org.

artificially restricted to the physical “fenceline” of an emitting facility. Greenhouse gas reduction opportunities are diverse and spread across the entire economy,⁷ and offset trading is the best means to tap these opportunities and create real change by overcoming market barriers, serving investment needs, and correcting misaligned incentives. Indeed, numerous studies have concluded that use of market-based offset approaches can reduce air pollution compliance costs in the range of 70-90 percent.⁸

Compliance with pollution reduction mandates through the use of off-site reduction projects is already recognized in the federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* For example, the Part D nonattainment program requires new or modified facilities to offset emissions increases with reductions from other sources within the same airshed through a market-based system of emissions reduction credits (“ERCs”). Clean Air Act § 173(c); 42 U.S.C. § 7503(c). Moreover, EPA has recognized that, given the global nature of greenhouse gases and global warming concerns, the use of market mechanisms such as emissions offsets is a preferable approach to mandated technological controls:

Market-oriented approaches are relatively well-suited to controlling GHG emissions. Since emissions of the major GHGs are globally well-mixed, a unit of GHG emissions generally has the same effect on global climate regardless of where it occurs. Also, while policies can control the flow of GHG emissions, what is of ultimate concern is the concentration of cumulative GHGs in the atmosphere. Providing flexibility on the method, location and precise timing of GHG reduction would not significantly affect the global climate protection benefits of a GHG control program (assuming effective enforcement mechanisms), but could substantially reduce the cost and encourage technology innovation.

⁷ See McKinsey & Company, Reducing U.S. Greenhouse Gas Emissions: How Much at What Cost, U.S. Greenhouse Gas Abatement Mapping Initiative (Dec. 2007).

⁸ Sources: U.S.EPA Analysis of the American Power Act (Kerry-Lieberman) (June 14, 2010); U.S.EPA Analysis of Economic Impacts of S. 1733: The Clean Energy Jobs and American Power Act of 2009 (Oct. 23, 2009); United States Climate Action Partnership, Economic Analysis of the USCAP Blueprint for Action (Dec. 2, 2009); U.S.EPA Analysis of the American Clean Energy and Security Act of 2009 (H.R. 2454) (June 23, 2009); Congressional Budget Office, The Use of Offsets to Reduce Greenhouse Gases (Aug. 3, 2009); Energy Information Administration, Energy Market and Economic Impacts of H.R. 2454, the American Clean Energy and Security Act of 2009 (August 4, 2009); Congressional Budget Office, Congressional Budget Office Cost Estimate: H.R. 2454, American Clean Energy and Security Act of 2009 (as Ordered Reported by the House Committee on Energy and Commerce) (June 5, 2009); CRA International, Impact on the Economy of the American Clean Energy and Security Act of 2009 (H.R. 2454) (prepared for the National Black Chamber of Commerce) (May 2009); USDA Office of the Chief Economist, Preliminary Analysis of the Effects of HR2454 on U.S. Agriculture (July 22, 2009); U.S.EPA Preliminary Analysis of the Waxman-Markey Discussion Draft, The American Clean Energy and Security Act of 2009 in the 111th Congress (Apr. 20, 2009); U.S.EPA, Analysis of the Low Carbon Economy Act of 2007 (Bingaman-Specter, S. 1766) (Jan. 15, 2008); U.S.EPA, Analysis of the Climate Stewardship and Innovation Act of 2007 (McCain-Lieberman, S. 280) (July 16, 2007).

U.S. EPA, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44409, 44410 (July 30, 2008).

In addition to providing lower cost reductions, by energizing innovation and market forces, offset projects provide an essential bridge to a transformative low-carbon economy. Offset projects are already providing green jobs and economic stimulus for the U.S. economy through a robust voluntary market and emerging market-based solutions at the state and regional level. Such projects have provided important incentives and revenue to many corners of the economy, including family farmers, municipalities, and small businesses. These projects have already demonstrated their ability to bring about real, positive behavioral changes in the way America generates electricity (for example, renewable energy from wind, biomass, landfill gas, and solar), the way America grows crops (through advanced farming practices, fertilizer management, and manure-to-energy), and the way America manufactures products (through cleaner, smarter industrial processes and innovative pollution control). In addition to reducing greenhouse gas emissions, carbon offsets have funded the development of commercially viable methods of sequestering carbon through tree planting, agricultural advances, and long-term storage of ventstack emissions in geologic formations (*i.e.*, carbon capture and sequestration).

Offsets also deliver important co-benefits (often at no additional cost) over and beyond reducing greenhouse gases and combating climate disruption, including reduction of conventional air pollutants, improved water quality, and energy security – all of which improve the lives of all Americans. Many offset projects directly benefit disadvantaged urban and rural communities, such as urban tree canopy projects that reduce “heat island effect” and beautify our inner cities, and thus have an important positive environmental justice component.⁹ In addition, offset projects can incentivize the development and adoption of new, low-carbon technology developed by American industry and research institutions, which may be exported to the rest of the world for American profit.

Not least, offsets provide critical flexibility to those heavy industry sectors covered under an emissions cap or command-and-control regulation as they transition to a new carbon-constrained economy. If properly incentivized, offset projects are available to begin achieving greenhouse gas reductions immediately – giving regulated industry time to phase in new technology and capital investment while avoiding premature retirement of assets that could result in unnecessary economic hardship and avoidable environmental life-cycle costs.¹⁰

⁹ For example, the U.S. voluntary carbon market has developed protocols for urban forest carbon reductions. See, e.g., <http://www.climateactionreserve.org/how/protocols/adopted/urban-forest/current-urban-forest-project-protocol/>.

¹⁰ For more information on greenhouse gas reduction projects and carbon offsets, please note the following resources: See, e.g., www.carbonoffsetproviders.org/; Electric Power Research Institute, Emissions Offsets: The Key Role of Greenhouse Gas Emissions Offsets, available at <http://globalclimate.epri.com/>; EPA Climate Leaders <http://www.epa.gov/climateleaders/resources/optional-module.html>.

Crediting Off-Site GHG Reductions Under Existing CAA Authorities

Greenhouse gases are a global pollutant, and their deleterious effect is a function of their global atmospheric concentrations, and not a function of local or regional airsheds. Greenhouse gases typically are well-mixed in the atmosphere and are, as a practical matter, fungible, such that an increase or decrease of greenhouse gas has the same effect anywhere on Earth.¹¹ The nature of greenhouse gases distinguishes these pollutants from conventional pollutants, such as ozone and particulate matter, which typically pose health concerns on a localized airshed basis. The special nature of greenhouse gases, as a matter of science, creates expanded opportunities for flexible regulatory mechanisms that will allow EPA to address the global warming problem more quickly and at lower cost. Several immediate opportunities to recognize offsets are inherent in existing Clean Air Act authorities.

First, under current law, the federal Clean Air Act does not prevent EPA from recognizing carbon offsets from off-site reduction, destruction, avoidance, or sequestration of greenhouse gases as a legitimate method of netting on-site greenhouse gases from regulated major emitting facilities for purposes of PSD/NSR or Title V applicability thresholds, or associated emissions analyses.

Second, the special nature of greenhouse gases, which create global warming effects while well-mixed in the atmosphere,¹² also provides opportunity for EPA to create a trading system for greenhouse gas emissions, which can be readily distinguished from the trading programs in the Clean Air Interstate Rule (“CAIR”) and NO_x SIP Call that were recently questioned by federal courts on the grounds that those programs failed to adequately account for inter-airshed transfers and resulting concentrations of pollutants in upwind airsheds, which may have posed a localized risk to health and welfare.¹³

Third, on-site or off-site carbon reduction projects legally may be considered in determining the appropriate technology standard (RACT, BACT, LAER, etc.)¹⁴ applicable to regulated stationary sources under various provisions of the Clean Air Act. Similarly, offsets should be recognized as equivalent to on-site reductions for purposes of RACT/BACT/LAER once an emissions standard is established, provided that equivalent atmospheric reductions are achieved.

¹¹ See *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44409, 44410 (July 30, 2008) (“Since emissions of the major GHGs are globally well-mixed, a unit of GHG emissions generally has the same effect on global climate regardless of where it occurs.”).

¹² See Intergovernmental Panel on Climate Change, *Climate Change 2001: The Scientific Basis*, available at <http://www.ipcc.ch/ipccreports/tar/wg1/index.php?idp=1>.

¹³ *North Carolina v. EPA*, 531 F.3d 896, 926–30 (D.C. Cir. 2008)

¹⁴ Reasonably Available Control Technology, Best Available Control Technology, Lowest Achievable Emissions Reductions.

As a threshold matter, EPA should keep in mind that it is constrained in its ability to recognize offsets, if at all, only by its mandate in the Clean Air Act and current statutory authorities. To the extent that any existing EPA regulation would thwart recognition of offsets, EPA is free to reassess and change that regulation or policy, particularly in light of the special nature of greenhouse gases, as long as the new policy is reasonably consistent with the Clean Air Act and the intent of Congress.

The fact that EPA and state permitting authorities have discretion to employ off-site reductions within the Clean Air Act permitting context to achieve reductions in addition to, or as an alternative to, technological controls has been recognized by learned and experienced experts, including EPA's own lawyers. *See, e.g.*, Gregory B. Foote, *Considering Alternatives: The Case For Limiting CO₂ Emissions From New Power Plants Through New Source Review*, 34 ELR 10642 (2004). EPA appears to have recognized in its recent Tailoring Rule that offsets and emissions trading are within its authority under the existing Clean Air Act authorizations. "The advantages to [the] sum-of-six definition include that it may: (1) allow significantly more flexibility to sources for designing and implementing control strategies that maximize reductions across multiple GHGs and would also likely align better with possible future regulations that allow for such flexibility; [and] (2) more effectively support possible future offsets or trading mechanisms that involve different source categories and different compositions of GHG emissions." *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514 (June 3, 2010).

Although the Agency's recently issued BACT Guidance states in passing that "EPA has historically interpreted the BACT requirement to be inapplicable to secondary emissions," BACT Guidance at 25, such as statement, even if accurate, would not preclude the consideration of outside-the-fenceline greenhouse gas reductions as a control option in Step 1 of the top-down BACT analysis or as part of a netting calculation. More importantly, however, the legal citation provided in the Guidance simply does not support that unexplained assertion. The Guidance cites to 40 C.F.R. 52.21(b)(18), which is merely the definition of "secondary emissions" and does not address in any way applicability of indirect emissions in the BACT analysis, nor does the definition set forth any policy with regard to the use or consideration of off-site emissions reductions. The only instances in which secondary emissions are addressed in 40 C.F.R. 52.21 is the statement in the definition of "potential to emit" at 52.21(b)(4) that "[s]econdary emissions do not count in determining the potential to emit of a stationary source," which is not dispositive of any the question regarding offsets,¹⁵ and the clarification in 52.21(k) that secondary emissions

¹⁵ Secondary emissions are defined at 40 C.F.R. 52.21(b)(18) as: "emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel."

must be considered in the source impact analysis, which suggests that off-site emissions analysis is indeed important within the PSD construct.¹⁶

Moreover, a number of court decisions have acknowledged EPA's ability to use market-based systems and offsets. For example, in *Union Oil of Cal. v. U.S. EPA*, 821 F.2d 678 (D.C. Cir. 1987), the court upheld EPA's leaded gas banking rule with respect to an additionality test and, by implication, acknowledged the legality of EPA's leaded gas offset trading under Clean Air Act § 211. As another example, in *In re Multitrade Limited P-ship*, PSD Appeal No. 91-2, 3 E.A.D. 773 (EPA 1992), then-Administrator Reilly approved use of NO_x and SO₂ offsets from boiler shutdown to mitigate impacts on Class I areas for purposes of PSD review, thus recognizing that reductions outside the regulated emissions unit can be credited.

Each of these issues is discussed at greater length below.

A. Use of Offsets for PSD/NSR Netting

As discussed above, there is nothing in the Clean Air Act that would prevent EPA and state permitting authorities from recognizing the netting of off-site emissions reductions associated with investments by a regulated major emissions source in outside-the-fenceline reductions, destruction or sequestration of greenhouse gases for purposes of applicability thresholds or significance thresholds under the existing PSD review process. Moreover, it is likely that EPA will eventually be compelled to designate greenhouse gases as criteria pollutants,¹⁷ and if national ambient air quality standards are set at a level lower than current atmospheric concentrations of greenhouse gases (approximately 390 ppm), state implementation plans will be developed for nonattainment areas.

In either scenario, netting should be allowed in recognition that investments in low-cost emissions reductions often represent the best method for reducing aggregate greenhouse gas emissions into the atmosphere from a scientific and policy standpoint. Whether the reductions associated with a particular facility occur inside or outside the physical boundaries of the facility makes no difference from a science or policy perspective when considering a global pollutant such as greenhouse gases, which have no localized effects. Thus the "fenceline" approach to PSD/NSR calculations that has underlain past EPA policy with regard to conventional pollutants (such as ozone precursors, particulate matter, air toxics, or carbon monoxide), which present health and welfare concerns based on local airshed concentrations, has no rationale application in the case of greenhouse gases.

¹⁶ See 40 C.F.R. 52.21(k): "*Source impact analysis.* The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of [any NAAQS or increment]."

¹⁷ For example, the Center for Biological Diversity and 350.org petitioned the EPA on December 2, 2009, to designate greenhouse gases as criteria pollutants, to set NAAQS at 350 ppm CO₂e, and to begin the process of establishing nonattainment areas.

In addition, EPA policy ought to encourage industrial sources to “bank” either inside-the-fenceline or outside-the-fenceline emissions reductions over time for future netting for compliance purposes, as well as trading to other facilities. Although EPA policy currently recognizes netting of contemporaneous emissions reductions, these rules are limited in flexibility and not specifically tailored to the special nature of greenhouse gases. COPC suggests that EPA re-examine its netting rules in this regard in light of the long atmospheric residence times and fungibility of greenhouse gases. In sum, the rote application of prior policies suited to conventional pollutants is not only inappropriate to greenhouse gases, but would be arbitrary and capricious, and therefore illegal.

B. Trading Program for Greenhouse Gas Emissions Using Offsets

EPA has repeatedly acknowledged that the Clean Air Act allows it to employ emissions trading between sources of air emissions and to develop market-based programs. For example, in its July 30, 2008, Advanced Notice of Proposed Rulemaking, EPA recognized that Section 110(a)(2)(A) of the Clean Air Act expressly allows for the use of “economic incentives such as fees, marketable permits, and auctioning allowances” in the context of state implementation plans. *See* CAA § 110(a)(2)(A); 42 U.S.C. § 7410(a)(2)(a); ANPR at 44411:1.¹⁸ EPA also correctly stated that “EPA has taken the position that this term [“standards for emissions of air pollutants”] authorizes a cap-and-trade program under certain circumstances,” ANPR at 44411:1, and that “the NSPS program could use emissions trading” ANPR at 44490:1. Notably, EPA has also recognized that allowing market mechanisms to be used to allocate emissions among sources that are best positioned to achieve least cost reductions could actually result in greater reductions in emissions than otherwise. *See* ANPR 44490:1 (“EPA also believes that trading among new and existing sources could be permitted”); ANPR at 44490:1 (EPA can “consider deeper reductions through a cap-and-trade program that allowed trading among sources in various sources categories”).

Although EPA’s statements were directly at programs for criteria pollutants as well as the new source performance standard program, these statements are equally applicable to the PSD program. COPC encourages EPA to give serious consideration to the development of a robust and flexible trading program under each and all of the Clean Air Act programs that would impose emissions limitations on stationary sources of greenhouse gases. Such a trading program would allow industrial sources to achieve significantly greater reductions of greenhouse gas emissions at much lower cost, and will preserve America’s ability to compete in the global economic marketplace against foreign countries and competition that have not committed to reduce their own carbon footprint.

C. Offsets as “Technology” Option

Although the Clean Air Act is often referred to as a technology-forcing statute, as discussed below, the Act actually requires regulated facilities to achieve emissions reductions at levels

¹⁸ Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule, 73 Fed. Reg. 44354 (July 30, 2008).

consistent with available emissions control technology *but without* mandating the installation of any specific technology if emissions restrictions can be met through other means. Accordingly, off-site greenhouse gas reductions should be recognized as a form of “technology” for purposes of the NSPS and NSR/PSD programs.

1. New Source Performance Standard Program

With regard to NSPS, the Act requires EPA to establish standards for new sources of air pollution, and to promulgate emissions guidelines applicable to existing sources through state implementation plans, that “reflects the degree of emission limitation achievable through the application of the best system of emissions reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1) (emphasis added). The concept of “technological system” means, within the Act, “a technological process for production or operation by any source which is inherently low-polluting or nonpolluting.” 42 U.S.C. § 7411(a)(7).¹⁹ The concept of offsets is squarely embedded in the New Source Performance Standard provisions of the Act, which authorize the Administrator to allow the substitution of alternative means of compliance if the “alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction of emissions of such air pollutant achieved under the requirements of [section 111].” Clean Air Act § 111(h)(3); 42 U.S.C. § 7411(h)(3). In short, there is nothing in the Clean Air Act that would prevent, and indeed much language that can be read to authorize, the use of a netting or bubbling mechanism using off-site reductions as a “best system” of achieving emissions standards established under Section 111.²⁰

As EPA has itself stated: “EPA has previously authorized emissions trading under section 111 [through the CAMR].” ANPR at 44515:1. EPA has also indicated that offsets from emissions averaging across multiple sources or netting of off-site indirect electricity emission reductions can be considered under the NSPS program for various sectors (*e.g.*, cement). ANPR TSD Stationary Sources Section VII (June 5, 2008), and that “a more broadly defined ‘source’ could avoid triggering a GHG NSPS by off-setting its increased GHG emissions.” *See* ANPR at 44488:1. EPA also has proposed that the “creation of such ‘super-categories’ might provide additional opportunities for the development of innovative control mechanisms such as cap-and-trade programs covering multiple industry sectors.” ANPR at 44488:2.

¹⁹ The Act also references as an alternative “a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air.”

²⁰ Although a split panel of the D.C. Circuit rejected an EPA interpretation under the NSPS program that would allow consideration of combined sources in determining applicability of the NSPS in *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), the panel decision did not address the use of off-site reductions for compliance with NSPS once applicability had been established. Moreover, the precedential viability of *ASARCO* is doubtful in light of *Chevron*, which clarified the level of deference accorded EPA interpretations and expressly noted that Congress enacted the 1977 Clean Air Act amendments prior to the circuit court’s decision and therefore with the understanding that EPA was allowing bubbling. *Chevron*, 467 U.S. at 847 n.17.

2. Prevention of Significant Deterioration Program

Similarly, the PSD program requires that sources triggering new source review be “subject to the best available control technology [BACT] for each pollutant subject to regulation.” CAA § 165(a)(4); 42 U.S.C. § 7475(a)(4). Cross-referencing to the definition of BACT, this does not mean that specific technological controls must be used, but only that the source must be subject to “an emission limitation based on the maximum degree of reduction” which the permitting authority determines “achievable” based on a cost-benefit balancing of environmental, energy, and economic considerations. Congress gave EPA, and delegated to states, broad authority to approve any “available methods, systems, and techniques” which would meet such emissions limit. There is no restriction evident in the statute that would exclude off-site reductions as an available method, system or technique for reducing greenhouse gases. Nor does the Act prevent the use of off-site reductions to satisfy BACT-related emissions limits, even if the emissions limits were based only on the availability of a physical “end of pipe” emissions control such as a scrubber. And as noted, the Supreme Court has previously determined that Congress did not intend to restrict the use of bubbling approaches, such that EPA has broad latitude to define the scope of stationary sources and associated emissions. *Chevron*, 467 U.S. at 845 (“Congress did not have a specific intention on the applicability of the bubble concept”).

Equally as important, Congress’s broad authorization arguably requires EPA to consider the purchase by regulated facilities of carbon offsets from off-site sources as one of the “available methods, systems, and techniques” for the cost-effective reduction of greenhouse gas pollution. Put simply, if a facility with significant greenhouse gas emissions seeks a PSD preconstruction permit, and if that facility can purchase off-site reductions from sources such as forest conservation programs or methane capture at livestock farms at a reasonable price, an emissions limit for the facility must be set at the level that can be achieved by netting the off-site and on-site emissions. And further, the facility must be allowed to meet its permit limits through the purchase of those off-site offsetting emissions if it so chooses.

The crediting of off-site reductions has been adequately demonstrated in the U.S. voluntary carbon market and in international settings to be a cost-effective, manageable, and robust system to credit investment in off-site reduction technologies (including anaerobic digesters, biogas collection systems, advanced farming technology, etc.) to achieve substantial and measurable reductions of greenhouse gases. Indeed, EPA’s own Climate Leaders program (before it was recently disbanded) embraced the concept of allowing industrial sources of greenhouse gas emissions the flexibility to invest in off-site reductions to reduce their greenhouse gas emissions footprint, and has demonstrated the viability of an offset trading program.

With regard to EPA’s BACT Guidance, the “top-down” BACT analysis preferred by EPA for the PSD program requires the identification of all available control technologies or techniques as Step 1 of the BACT analysis, *see* BACT Guidance at 10, which must necessarily include consideration of off-site emissions reductions achieved through investment in emissions reductions projects. Similarly, EPA has recognized that the BACT analysis must consider “clean fuels” as a potential BACT method pursuant to Clean Air Act § 169(3), 42 U.S.C. § 7479(3). As has been demonstrated in the voluntary carbon markets, offsets can be coupled with conventional fuels to lower the effective greenhouse gas content of fuel, and therefore substantially reduce net

emissions at reasonable cost. Accordingly, the Clean Air Act mandates consideration of the use of offsets in Step 1 of the BACT analysis as a “clean fuel” or “cleaner form” of fuel under the PSD program. *See* BACT Guidance at 29. And as noted, offsets should be considered as a compliance strategy to meet whatever emissions limits are ultimately embedded into a facility permit at the conclusion of the BACT selection process.

It is our understanding that EPA is considering recognizing off-site reductions in the permitting context with regard to energy efficiency or renewable energy reductions. *See, e.g.*, Clean Air Act Advisory Committee Phase II Report of the Climate Change Work Group of the Permits, New Source Review and Toxics Subcommittee at 12 (Aug. 5, 2010); BACT Guidance at 9. The suggestion is that energy efficiency gains that reduce off-site indirect emissions (*i.e.*, Scope 2 emissions) at power plants and other combustion sources should be credited to or netted in favor of facility that invests in the energy efficiency measures. A similar proposal has been raised by the biomass energy community with regard to greenhouse gas emissions savings from the off-site uptake of carbon dioxide by vegetative biomass source material on a life cycle basis. The COPC supports the reasoning behind both of these proposals and, further, if either of these approaches is adopted, the underlying logic should be extended to all off-site emissions reductions with which the regulated facility is associated either through a physical, financial, or fuel or feedstock supply relationship.

Again, because greenhouse gases are a global pollutant and do not have significant local effects, the deployment of reduction technology at a remote location from the regulated emissions source is equivalent from the standpoint of atmospheric science. Use of off-site reductions furthers the goals of Clean Air Act programs by, among other things: (1) avoiding giving a competitive advantage to one state over others in attracting industry by making low-cost reduction investments available to any industrial source, no matter where physically located; (2) maximizing the potential for economic growth in the U.S. by reducing emissions as much as possible at lowest cost, thus creating more room under any GHG limits for new industrial jobs and expansion; (3) encouraging the installation of technology at new plants by encouraging new facilities to install on-site technology where cost-effective but allowing off-site investment to the extent on-site installation is not economically or environmentally preferable; (4) maximizing the availability of fossil fuels to industrial sources that cannot practicably switch to alternative sources, which will preserve the overall U.S. energy supply while at the same time driving investment in alternative low-carbon energy; and (5) forcing the development of improved technology by directing a flow of investment capital from regulated sources to on- and off-site greenhouse gas reductions projects and technologies. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298, 325 (D.C. Cir. 1981) (upholding EPA application of variable emissions standard for power plants under NSPS program against challenge; discussing policy purposes of the NSPS program).

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In summary, the COPC requests that EPA issue regulations and guidance outlining the options available to industrial sources under the various Clean Air Act programs for using emissions reductions purchased from off-site projects that have achieved emissions reductions below a “business as usual” baseline, as such investment may well constitute the best system, method or

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process of emissions reduction in some circumstances for regulated emissions sources. As the Supreme Court noted approvingly in *Chevron*, EPA has “interpreted [the Clean Air Act] flexibly – not in a sterile vacuum, but in the context of implementing policy decisions in a technical and complex arena.” *Chevron*, 467 U.S. at 863. Both Congress and the Supreme Court have given EPA the latitude to act proactively, creatively and courageously in attaining environmental benefits through the use of cost-effective emissions reductions. The Carbon Offset Providers Coalition encourages EPA to use these powers for the common good. We would be pleased to provide further information upon request.

Sincerely,



Roger Williams, Chairman
CARBON OFFSET PROVIDERS COALITION

For inquiries, please contact our counsel at:

David M. (“Max”) Williamson
Andrews Kurth LLP
1350 I Street N.W. Suite 1100
Washington, D.C. 20005
Tel: (202) 256-6155
Email: maxwilliamson@andrewskurth.com

cc: Gina McCarthy
Assistant Administrator for Air and Radiation
attn: Robert Brenner
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Mail Code 6101A
Washington, DC 20460
Email: mccarthy.gina@epa.gov ; brenner.rob@epa.gov

Brian McLean
Director, Office of Atmospheric Programs
Office of Air and Radiation
1310 L Street NW
Washington, D.C. 20005
Email: mclean.brian@epa.gov

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Anna Marie Wood
Director, Office of Air Quality Planning and Standards
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Mail Code 6103A
Email: wood.anna@epa.gov

Office of Information and Regulatory Affairs
Office of Management and Budget (OMB)
Attn: Desk Officer for EPA
725 17th Street, NW
Washington, DC 20503