NATIONAL ASSOCIATION OF Manufacturers

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Vice President
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December 1, 2010

Air Docket,
Attention Docket ID No. **EPA–HQ–OAR–2010–0841**
Environmental Protection Agency
Mail Code: 6102T
1200 Pennsylvania Ave., NW.
Washington, D.C. 20460

Re: Comments of the National Association of Manufacturers Regarding ‘‘PSD and Title V Permitting Guidance for Greenhouse Gases,’’ Docket: EPA–HQ–OAR–2010–0841

Sir/Madam:

The National Association of Manufacturers (Manufacturers) respectfully submits these comments on the PSD and Title V Permitting Guidance for Greenhouse Gases (Guidance), issued by the Environmental Protection Agency (EPA) and noticed in the Federal Register on November 17, 2010. Notice, 75 Fed. Reg. 70,254 (Nov. 17, 2010). The Manufacturers appreciate the opportunity to provide comments on this Guidance. The Manufacturers are the largest trade association in the United States, representing over 11,000 small, medium and large manufacturers in all 50 states. We are the leading voice in Washington, D.C. for the manufacturing economy, which provides millions of high-wage jobs in the U.S. and generates more than $1.6 trillion in GDP. In addition, two-thirds of our members are small businesses, which serve as the engine for job growth.

Our mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. While the Manufacturers support environmental regulations designed to provide real net benefits to the environment and public health, we oppose regulations that create adverse economic impacts without corresponding benefit to human health and the environment.

Manufacturers are attempting to fully recover from the steepest economic downturn since the 1930s and bring back the 2.2 million high-wage jobs lost during the previous recession. At the same time, our member companies are confronting an avalanche of additional rules and regulations from the EPA including new SO_2 and NO_X National Ambient Air Quality Standards (NAAQS), the reconsideration of the 2008 "Ozone NAAQS," the reconsideration of the 2007 "PM NAAQS," Boiler MACT regulations, and new coal ash disposal regulations.

The Manufacturers strongly urge federal policymakers to create conditions that will lead to economic expansion and not stifle the industrial and manufacturing vitality necessary to create jobs and spur innovation. Imposing unduly strict mandates on the manufacturing sector will not accomplish any of these objectives.

It is unfortunate that the EPA has decided to delay offering any meaningful guidance to stakeholders regarding greenhouse gas (GHG) permitting requirements until this late date. As many states have confirmed, the EPA's rushed approach and delays in providing useful guidance has placed them in a difficult situation, requiring them to deal with GHG permitting before they are ready to do so. *See* State and Local Permitting Authority Responses to Tailoring Rule Request (60-day Letters), http://www.epa.gov/NSR/2010letters.html. The EPA's delay has also hampered facilities subject to GHG permitting requirements, which will have little time to prepare for novel permitting requirements based on a Guidance that raises more questions than provides answers.

While the EPA has stated that the Guidance is intended to partially alleviate the harms created by the EPA's actions, the Manufacturers are concerned that it will not do so. We believe that it will exacerbate the problems created by the EPA's new program for at least two reasons: 1) in summarizing past guidance, the Guidance document actually misstates and ends up modifying the EPA's established approach to the New Source Review (NSR) permitting process in a way that will make it more onerous for existing pollutants, all without the required notice and comment rulemaking; and 2) the Guidance prescribes an impermissibly broad GHG-permitting process without appropriately narrowing the issues for local permitting authorities.

I. THE GUIDANCE SHOULD NOT BE ISSUED WITHOUT A LONGER AND MORE COMPLETE COMMENT PERIOD

As the EPA has acknowledged, regulating GHG emissions under the Clean Air Act (CAA) is fraught with controversy, as well as significant economic consequences. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (Tailoring Rule), 75 Fed. Reg. 31,514, 31,557 (June 3, 2010) (absent the Tailoring Rule construction at

new facilities would be delayed "at least a decade or longer . . . with all of the adverse effects that this would have on economic development."). As a result, it is obvious that this Guidance is very important. Despite this, the EPA has provided only 14 days to comment and has stated that it "does not intend to respond to comments." Notice, 75 Fed. Reg. at 70,256. This is improper—the EPA must comply with the rulemaking requirements of CAA § 307(d) and provide a comment period of at least 30 days and respond to the comments it receives. The EPA's chosen path is contrary to the CAA and will lead to permitting gridlock. The Guidance adds another reason to the many for why the EPA should delay the GHG permitting requirements.

More than one year ago, the EPA established a Climate Change Working Group as part of the Clean Air Act Advisory Committee (CAAAC). The Working Group issued several reports, including two in February and October 2010. The Working Group, comprising representatives from industry, environmental groups and permitting authorities, was intended to achieve consensus on implementation of Prevention of Significant Deterioration (PSD) permitting for GHGs, particularly Best Available Control Technology (BACT), and "identify and discuss approaches to enable state and local permitting authorities to apply the BACT criteria in a consistent, practical and efficient manner." Charge, Climate Change Working Group, http://www.epa.gov/oar/caaac/climate/charge.pdf. The Working Group, however, was not able to reach consensus, instead disagreeing on a number of important issues, including the proper scope of review and the feasibility and appropriateness of different technologies. *See* Interim Phase I Report, Climate Change Working Group (Feb. 3, 2010), http://www.epa.gov/oar/caaac/climate/2010_02_InterimPhaseIReport.pdf.

In light of the inability of the Working Group to agree on these important issues despite trying to do so for 11 months, the EPA must offer a reasonable period for comment by all interested stakeholders, consider these comments and issue a response to those comments. The EPA's assertion that this first draft of the Guidance is immediately effective and that it might not even be revised in response to comments is unreasonable, arbitrary, and capricious. Notice, 75 Fed. Reg. at 70,256. By limiting the comment period and not ensuring that the comments it does receive will be responded to, the EPA has failed to adequately involve all interested stakeholders in the development of this important Guidance, all the while providing the appearance of a notice and comment process that the Agency has announced it intends to ignore.

The EPA claims that it can issue this Guidance without first considering public comment because "it is not a regulation and does not establish binding requirements." *Id.* at 70,255. This

assertion is misguided, both factually and legally. As a factual matter, both the EPA and state and local permitting authorities routinely rely on and apply the EPA's existing NSR guidance materials as if they were rules. From a legal perspective, a guidance document is final agency action when it states the agency's authoritative interpretation, which will be enforced through the state and local permitting authorities. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021–23 (D.C. Cir. 2000). Because of this, in issuing this Guidance, the EPA is required to comply with the rulemaking procedures in CAA § 307(d), providing a reasonable period to submit comments and respond to these comments. *Id.* at 1028; 42 U.S.C. § 7607(d)(5),(6). Furthermore, the EPA must satisfy the requirements of several other statutes that require agency consideration of the consequences of its actions. *See* Regulatory Flexibility Act, 5 U.S.C. §§ 603(a) & 605(b); Unfunded Mandates Reform Act, 42 U.S.C. § 1535; The Paperwork Reduction Act; 44 U.S.C. §§ 3501-3521; 42 U.S.C. § 7617; Executive Order 13211.

As explained in these comments, it is particularly important that the EPA comply with these rulemaking procedures because, as in *Appalachian Power*, the EPA is prescribing permitting requirements for GHGs that go beyond what would be required by current regulations and practice. *See infra* Section III. Just as important, the Guidance announces new agency views on PSD and Title V permitting in general, in ways not limited to GHGs. The Guidance establishes new and potentially binding permitting requirements without following the requirements mandated by the CAA.

II. THE EPA'S GUIDANCE WILL NOT ALLEVIATE SERIOUS PERMITTING GRIDLOCK

A. The States Are Not Prepared To Address GHG Permitting Starting January 2, 2011.

The EPA states that it is "working closely with permitting authorities to assure that on January 2, 2011, sources needing a permit for GHG emissions will be able to get one." Questions and Answers on Guidance (Nov. 10, 2011) at 3, http://www.epa.gov/nsr/ghgdocs/externalqas.pdf. The information the EPA has released to date, however, shows that 21 of the 99 permitting jurisdictions will likely face some form of permitting gridlock, which will prevent construction projects from receiving the PSD permits they need to commence. Higgins Dec. Tbl. I . The GHG permitting requirements thus will lead to a construction ban or *de facto* freeze on January 2 in more than 20 percent of the country.

Each permitting authority is different, but most jurisdictions fall into two categories: (1) 36 jurisdictions have a State Implementation Plan (SIP) that includes GHGs; and (2)16 have a SIP

that does not include GHGs. The first category of jurisdictions—those whose SIPs provide for GHG permitting—will face a widespread construction freeze, because on January 2 they will be obligated to enforce PSD for GHGs at the *statutory* levels of 100 or 250 tons per year and would sweep in millions of existing sources and tens of thousands of construction projects each year. The EPA has acknowledged that this will create a *de facto* construction freeze because local permitting authorities will be unable to issue permits as they become overwhelmed with permit applications. Tailoring Rule, 75 Fed. Reg. at 31,557. This freeze will affect not just industrial facilities but also entities that have not traditionally been subject to PSD permitting, such as apartment buildings and large single-family homes. The only way to prevent this would be for each of the 36 separate jurisdictions to revise the thresholds contained in their SIPs and submit revisions to the EPA, which must then be reviewed and approved before they can be effective. It is inconceivable that the EPA and these jurisdictions could do all of this before January 2, 2011. Indeed, many jurisdictions have already indicated they *will not* meet the deadline. Tailoring Rule, 75 Fed. Reg. at 31,580. Another 13 jurisdictions will not likely have new state regulations in place by January 2. Higgins Dec. ¶ 47 (Att. 4). Furthermore, even if states change their laws and SIPs before January, the EPA *will not be able to approve* those revisions by January 2 in accordance with CAA § 110(k)(5), *id.* 7410(k)(5). It is well settled that SIP revisions are not effective until the EPA approves them as required by the CAA. *General Motors v. U.S.*, 496 U.S. 530 (1990).

In the second category of jurisdictions – those with SIPs that do not cover GHGs – there will be a ban on new construction. *Action to Ensure Auth. to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 53,892 (Sept. 2, 2010). This is because the EPA has interpreted the CAA to preclude any construction in a state, like these, that is unable to issue GHG permits. The EPA has proposed two solutions to this problem: 1) states can attempt to revise their SIPs on an impossible timeframe (30 days in advance of January 2, 2011); or 2) states can ask the EPA to take over their permitting process by accepting a Federal Implementation Plan (FIP), which the EPA *hopes* to have in place by December 1. This latter option – requiring states to accept a FIP – is directly contrary to the fundamental cooperative federalism principles underlying the CAA.[1] Although the EPA says "most of the States and other

[1] For example, the EPA told an Arizona county it would face a "construction ban" if it did not ask for its own "PSD program to be FIP'ed." E-mail (Oct. 4, 2010)(Att. 5). The County replied "To the extent a prompt FIP will enable the avoidance of a construction ban, Pinal County Air Quality sees no choice but to ask for such a FIP." *Id*. Similarly, Arizona said the EPA's "threat of a

jurisdictions have adopted this FIP approach," Texas has refused to do so, and seven other jurisdictions will not meet the demands for months. Higgins Dec. ¶ 27.

B. The EPA Should Delay Imposing Permitting Requirements GHGs

To avoid these problems, the EPA should delay the GHG permitting program it has designed. The Guidance is of no help here. The EPA has provided only 14 days for comment, and no time for the Agency to consider and respond to those comments before January 2. This is inadequate as a matter of law, *see supra* Section I, and unjustifiable on policy grounds. The EPA must provide enough time for comments and reasoned consideration of those comments, as well as fair notice and lead time to stakeholders. The EPA's rush to issue this important Guidance and the lack of sufficient time for a full comment period demonstrates the need to delay the January 2, 2011 compliance date.

The EPA's decision to rush implementation of the GHG permitting process has also apparently left it unable to complete the Guidance. For example, the EPA has left open the important issue of how permitting authorities should treat biomass until January, at the earliest. Guidance at 8. The Guidance also provides only "some preliminary EPA views on some key issues that may arise in a BACT analysis for GHGs" without any explanation of when the EPA intends to provide more thorough and considered views on these issues. *Id.* at 21. The inability to provide the guidance that permitting authorities and applicants need is further proof that a delay in implementation of the GHG permitting is a necessity.

Moreover, the current iteration of the Guidance will not help avoid the impending permitting gridlock because it potentially expands to the BACT process for GHGs *and* criteria pollutants. The EPA must revise the Guidance and stay its GHG permitting program.

III. THE GUIDANCE IMPROPERLY MODIFIES THE BACT PROCESS

The EPA devotes significant portions of the Guidance to "summarizing" previous BACT principles and practices rather than providing much-needed specific and tailored guidance on PSD permitting or BACT for GHG emissions. Summarizing existing practice is both unnecessary and confusing and, in so doing, the Guidance appears to modify or expand the existing BACT and PSD permitting practices. In the absence of complying with the notice and comment rulemaking procedures in CAA § 307(d), the EPA should retract these modifications. *See*, *e.g.*, *Appalachian Power Co. v. EPA*, 108 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-

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construction ban" and the "practical impossibility" of revising a SIP in the brief time frame meant it had "no choice but to accept the imposition of a FIP." Letter, Arizona (Oct. 4, 2010) (Att. 5).

established that an agency may not escape the notice and comment requirements (here, of 42 U.S.C. § 7607(d)) by labeling a major substantive legal addition to a rule a mere interpretation"); *American Mining Cong. v. Mine, Safety & Health Admin.*, 995 F.2d 1106, 1109-1110 (D.C. Cir. 1993) (modification to prior definitive statement of the law cannot be made without notice and comment rulemaking).

The Guidance's misstatement of existing BACT principles is evident in a variety of ways. First, the Guidance inaccurately describes how a permitting authority determines whether a control technology is "available." The EPA applies this error by mistakenly—and without any record-based justification—claiming that carbon capture and storage (CCS) is an "available" technology under Step 1 of the top-down process. Existing guidance makes clear that a technology is considered "available" when it has been applied to or permitted for full-scale operations and when the technology may be purchased or constructed or has been demonstrated in practice (i.e., when it is commercially available). *See* NSR Workshop Manual at B.11, B.17-B.18. In the Guidance, however, the EPA states that technologies are available where they "have the potential for practical application to the emissions unit and the regulated pollutant under evaluation." *See* Guidance at 25. This statement ignores the critical elements for identifying "available" technologies specified in the NSR Workshop Manual. Moreover, applying this loose definition of "availability," the EPA asserts without any analysis that CCS is "available" under Step 1. The EPA's assertion that CCS is "available" is based solely on speculation. As noted elsewhere in these comments, *see infra* Section IV.D., the EPA should modify the Guidance to remove its conclusion that CCS is an "available" technology.

Second, the EPA's description of how a permitting authority should evaluate the transferability of technology is inaccurate. In the Guidance, the EPA states without citation that:

> if a control option has been demonstrated in practice on a range of exhaust gases with similar physical and chemical characteristics and does not have a significant negative impact on process operations, product quality, or the control of other emissions, it may be considered as potentially feasible for application to another process.

Guidance at 26. No similar test is set forth in the NSR Workshop Manual. *See*, *e.g.*, NSR Workshop Manual at B.11 ("Opportunities for technology transfer lie where a control technology has been applied at source categories other than the source under consideration"). Furthermore, the NSR Workshop Manual calls for the evaluation of technology transfer options in Step 2 of the top-down process, not Step 1, as suggested by the GHG Guidance document. *Compare* NSR Works Shop Manual at B.18-19 *to* Guidance at 26. The Guidance also fails

entirely to caution permitting authorities that their discretion to consider the possible transfer of technology is constrained by their inability to redefine the applicant's source. The EPA should not take this opportunity to revise the process and factors to be used when assessing the transferability of technology to a different source type.

Third, the Guidance asserts that, at new, Greenfield sources, permitting authorities may evaluate BACT "on a facility-wide basis by taking into account operations and equipment which affect the environmental performance of the overall facility." Guidance at 24 (citing regulatory definitions of "stationary source" and "major stationary source"). Applying this to GHGs, the Guidance urges permitting authorities to evaluate all processes (not just emission units) that "impact the facility's energy utilization." *Id*. at 31. This suggestion for an intrusive examination of all possible uses of energy at a facility stretches prior practice beyond recognition. For non-conventional pollutants, the rule at new facilities has always been that permitting authorities may apply BACT to all *emitting units* that emit a pollutant for which the source has significant emissions. To suggest that a permitting authority now has broader authority to examine non-emitting operations is not consistent with existing practice, a fact that the Guidance itself acknowledges. *See id*. at 32 (describing how examining energy efficiency in Greenfield facility practices involves a far broader evaluation than previously conducted for criteria pollutants). The EPA should revise these sections of the Guidance to limit the scope of BACT analyses at Greenfield facilities to emitting units.

In short, the EPA's attempt to restate BACT practice with new and broad approaches is both unnecessary and contrary to law. This discussion will confuse permitting authorities and the regulated community by offering new interpretations of established principles. Rather than dwell on existing principles, the Guidance should limit itself to providing useful and direct guidance on BACT for GHG emissions. Everything else in the document should be removed.

IV. THE EPA MUST MODIFY THE GUIDANCE TO CORRECT SEVERAL FLAWS

GHG permitting begins on January 2 with potentially significant consequences. As noted, it is likely to lead to permitting gridlock, and even by the EPA's account, permitting GHG emissions will strain existing resources and the existing permitting system: "EPA seeks to include as many GHG sources in the permitting programs at as close to the statutory thresholds as possible, and as quickly as possible." Tailoring Rule, 75 Fed. Reg. at 55,295. The EPA should exercise caution to prevent overstraining of the permitting system through new and expansive requirements.

The Guidance does not show such caution. It identifies broad and expansive requirements for BACT review of GHG emissions and appears to expand *existing* requirements for conventional pollutants. *See supra* Section III. The EPA should quickly revise the Guidance and allow sufficient time for the permitting authorities to digest the Guidance prior to the date when GHG emissions will be subject to CAA permitting requirements. If that means delaying the date on which GHGs are included in the permitting programs, then the EPA should delay that date. *See supra* Section II.B.

The Manufacturers object to the EPA's providing an unreasonably brief period of time for comment on this important Guidance and reserve the right to offer further comments. But even in the inadequate time that the EPA has granted for comment, we note significant flaws in the Guidance.

A. The Guidance Should Provide Clearer Guidelines on GHG BACT

The Guidance fails to provide truly useful instructions to permitting authorities and applicants that could ameliorate the confusion surrounding the GHG permitting program. The EPA should take this opportunity to ease the pressure on permitting authorities and the uncertainty affecting industry by establishing an option for use of a "presumptive" or "model" BACT. Rather than summarizing (and misstating) already-available guidance and then giving broad and vague instructions that do nothing to minimize the confusion surrounding the GHG permitting program, the EPA should offer clear guidelines on how permitting authorities and applicants should focus their GHG BACT evaluations.

For example, the EPA has correctly identified the benefits of limiting BACT to energy efficiency:

- Energy efficiency "is a key GHG-reducing opportunity," Guidance at 30;
- Energy efficiency lowers not only greenhouse gas emissions, but also emissions of all other pollutants, *id*.;
- Some energy-efficiency measures "generally cost less than add on emission controls and can result in cost savings." Questions and Answers on Guidance, http://www.epa.gov/nsr/ghgdocs/externalqas.pdf.

For these reasons, the Guidance should identify feasible energy-efficiency measures *focused on emitting units* as a "presumptive" or "model" BACT permitting authorities should consider. This would provide a focused and easily-implemented blueprint for permitting authorities to limit

their BACT evaluations for GHGs to a reasonable suite of identifiable and available measures. It would have the added benefit of providing greater certainty for applicants and other stakeholders on what will be required to meet BACT in order to expedite the permitting process.

The Guidance, unfortunately, does not do this. First, the EPA suggests that energy efficiency would not necessarily be a substitute for, and might be employed *in tandem* with, other controls. *Id*. at 30. Then, the EPA states that numerous sources' BACT determinations will have to include "comprehensive" analysis of CCS. *Id*. at 37. This is not guidance at all, but rather an approach that leaves permitting authorities adrift to consider a limitless grab bag of options. Given the administrative and logistical challenges the EPA is creating for permitting authorities and applicants, the EPA must use the Guidance to provide bounds on the scope of considerations for GHG BACT, rather than an instruction to waste time conducting comprehensive, but rhetorical, analyses of options that will not be implemented. *See infra* Section IV.D. This kind of instruction from the EPA will simply fill paper with no environmental benefit and will likely result in lawsuits challenging permitting authorities' BACT determinations. Rather than enabling such pointless obstruction, the EPA should provide a clear and decisive blueprint for energy efficiency BACT options that will allow permitting authorities to streamline GHG permits.

While the Manufacturers agree that "energy efficiency" should form the core of any GHG BACT, the Guidance is far too vague on this point to be of any use for permitting authorities and sources undergoing BACT review. For example, the Guidance suggests that permitting authorities may consider not only technologies or processes to improve efficiencies of emitting units, but also an entire facility's energy utilization. *See* Guidance at 31. Not only does this suggestion go far beyond the bounds of what is appropriate in a BACT review, it is so vague as to provide permitting authorities no instruction on where their evaluations should be focused. The EPA should be providing more specific guidelines on the scope and type of energy efficiency options a permitting authority should consider in its BACT analysis.

The EPA also should provide greater clarity on other issues. For example, the EPA properly allows a full 10-year look-back to establish baseline emissions (*see* Guidance at 6), but it should also give sources flexibility to calculate past emissions, which typically occurred before there were even reporting requirements for GHGs. The EPA should allow applicants and authorities to make reasonable approximations involving fuel usage, heat output and hours of use, to ensure that all sources can make full use of the appropriate look-back period. The Guidance should also make clearer that, in Step 1 of the top-down process, BACT must be

determined based on "available" technologies at the time of permitting and may not be based on the promise of future technology availability.

B. The EPA Must Rule Out Consideration of Options that Would Redefine the Source

Under the CAA, BACT analyses must be made with reference to the project the applicant proposes; permitting authorities may not "redefine the source." To allow them to do so would lead to a usurpation of the freedom of businesses to define their plans and operations, rather than how a given facility should control pollutant emissions. Permitting authorities lack the expertise and experience to analyze business decisions about what kind of source is appropriate. Furthermore, they would be overwhelmed if they were saddled with this task.

The EPA's Guidance on this issue is either too tentative or counter-productive. The EPA first suggests that a permitting agency's authority to redefine a source is essentially unlimited. Guidance at 28, ("The 'redefining the source' issue is ultimately a question of degree that is within the discretion of the permitting authority."). The EPA then proceeds to describe options that any reasonable person would clearly understand to involve inappropriate regulation of an applicant's purpose or objective. For example, the EPA states that "combined cycle combustion turbines, which have higher efficiencies than simple cycle turbines, should be listed as options when an applicant proposes to construct a natural gas-fired facility." *Id*. at 31. But simple cycle turbines are often used for entirely different purposes than combined cycle turbines (*e.g.*, back-up generation for intermittent power sources), and, in such circumstances, requiring a combined cycle turbine would be an inappropriate redefinition of the purpose and objective of the facility.

The Guidance also does not make it sufficiently clear that requiring "fuel switching" would lead to an improper redefinition of the source. The Guidance is too confusing and vague on this important point. On the one hand, the EPA correctly states that it would be improper to require consideration of "options . . . that would require a permit applicant to switch to a primary fuel type (*i.e.*, coal, natural gas, or biomass) other than the type of fuel that an applicant proposes to use for its primary combustion process." Guidance at 29.

However, the Guidance then contradicts this clear statement by adding that "a permitting authority retains the discretion to conduct a broader BACT analysis and to consider changes in the primary fuel in Step 1 of the analysis." *Id*. This "clarification" is both improper and unhelpful, effectively authorizing a permitting authority to regulate an applicant's purpose and objective. It is exacerbated by the Guidance's assertion that "when a permit applicant has incorporated a

particular fuel into one aspect of the project design (such as startup or auxiliary applications), this suggests that a fuel is 'available' to a permit applicant." *Id*. This is an unreasonable leap of logic. Simply because a fuel might be used in one unit does not *per se* make it available for other uses at the facility. As the EPA notes, any consideration of an option that changes the "*primary* fuel" that a source would use is improper. This discussion inappropriately expands the scope of BACT review just when it is most important to retain its focus. The EPA needs to clearly and unequivocally state that requiring fuel switching improperly redefines a source and is prohibited.

C. Carbon Capture and Storage (CCS) Is Not an "Available" Technology

CCS is intended to capture carbon dioxide emitted from power generation and transport it to geological formations where it may be permanently stored. Large-scale deployment of CCS has not been accomplished for at least two reasons: 1) the prohibitively high cost of capturing, transporting and storing carbon dioxide emissions that to date, reflect the marketplace's assessment that any benefits of CCS are far outweighed by their costs; and 2) the lack of a sufficiently mature legal and regulatory infrastructure to guide this process, including pore space ownership, long-term stewardship and CERCLA and RCRA implications.

As a result, it is unclear why the EPA proclaims CCS "available for large CO_2-emitting facilities," *id*. at 33, and demands, in numerous instances, "comprehensive" consideration of this experimental technology. *Id*. at 37. CCS is not "available." It has been attempted only on a small scale in pilot projects, and these efforts do not prove that indefinite storage of CO_2 will be available in the short or long term. The Guidance's suggestion that enhanced oil recovery alters this conclusion is entirely unfounded. *Id*. at 43. Enhanced oil recovery is not an emission-control technology because it provides no guarantee that the carbon dioxide will be *stored*. To the contrary it is an *end-use* of carbon dioxide. The Manufacturers support the government's efforts to try to make CCS technology available, but the Guidance should make clear that it is not yet "available" under Step 1 of the top-down process.

The Guidance also fails to address other important considerations, including, for example, that CCS imposes parasitic power loads of up to 32 percent on facilities. *See* GAO-10-675 (June 2010). This would have the dual effect of reducing energy efficiency and increasing emissions of criteria pollutants. Yet, the Guidance provides absolutely no suggestions on how permitting authorities should address the tradeoffs or of any other environmental or economic tradeoffs implicated by CCS. It does no good to simply pass the buck to permitting authorities

and applicants on these issues; the EPA should plainly state that CCS is not an "available" technology.

D. BACT Review at New, Greenfield Facilities Is Limited To Emitting Units

The EPA properly concludes that BACT review at modified units is limited to the modified emitting unit. Guidance at 24. The Guidance, however, also states that at new Greenfield sources, the EPA interprets CAA § 169, 42 U.S.C. § 7479 to allow consideration of "control methods that can be used facility-wide" in the BACT Process. *Id*. This is not a correct statement of the law, under which permitting authorities are limited to evaluating *emitting units* that emit a pollutant for which the source has significant emissions. This established view is well supported by, and consistent with the EPA's regulatory definitions: "Emissions unit means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant." 40 C.F.R. § 52.21(b)(7). The Guidance may not be used to modify this established interpretation of the scope of BACT analyses. *See e.g.*, *Appalachian Power Co.*, 108 F.3d at 1024; *American Mining Cong.*, 995 F.2d at 1109-1110.

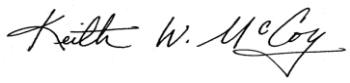
Furthermore, the EPA may not expand the PSD program to achieve goals for which the PSD program was not intended. As the EPA acknowledges, providing permitting authorities a mandate to evaluate energy efficiency at an entire facility is an expansion on current BACT practice. Thus, the EPA's suggestion that this new mandate could allow permitting authorities to decide which types of light bulbs should be used in a facility's cafeteria goes too far (although, admittedly, the Guidance suggests that such an evaluation may not be the best use of a permitting authorities' time and resources). Guidance at 32. Under the Guidance, the only limit on the scope of this new, intrusive review is a permitting authority's unrestricted discretion to conclude that some choices might be so trivial that they are not worth the time to evaluate. The EPA does not explain the statutory authority for this kind of *de minimis* exception, nor does it provide any definitive or objective threshold to guide the exercise of a permitting authority's discretion. A policy which provides that, *in principle*, affected parties must conduct unlimited energy audits reaching into light bulbs and vending machines in a *preconstruction* permit for industrial facilities large and small is patently absurd. Through suggestions like this, the Guidance simply adds to the uncertainty surrounding GHG permitting that will inevitably restrict investments in new facilities.

E. THE EPA MUST MODIFY THE GUIDANCE AND STAY GHG PERMITTING REQUIREMENTS IN THE INTERIM

The Manufacturers remain extremely concerned about the prospect of permitting gridlock, causing a construction freeze or ban across much of the country. The EPA's Guidance, unfortunately, does nothing to ease those concerns. It does too little too late and will simply create greater uncertainty about GHG permitting. The EPA should take this opportunity to delay these requirements and modify its Guidance to allow for a smoother transition to the significant burden created by the new GHG permitting requirements.

The Manufacturers thank the EPA for the opportunity to comment on this proposal and appreciate the consideration given to our industry. Please do not hesitate to contact me if you have any questions about these comments.

Sincerely,



Keith McCoy
Vice President
Energy and Resources Policy
National Association of Manufacturers

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

NATIONAL ASSOCIATION OF MANUFACTURERS, ET AL.	)	
v.	)	Various Consolidated Cases
ENVIRONMENTAL PROTECTION AGENCY	)	

SUPPLEMENTAL DECLARATION OF BLISS M. HIGGINS

1. I make this Supplemental Declaration in support of the motion filed by the National Association of Manufacturers, et al., to stay the U.S. Environmental Protection Agency's (EPA's) regulatory program for the permitting of greenhouse gas (GHG) emissions from stationary sources pursuant to the Clean Air Act (CAA). The purpose of this Supplemental Declaration is to respond to certain statements in the EPA Response to Stay Motion, including in particular Exhibit 13, Declaration of Regina McCarthy (McCarthy Dec.), and in the State and Environmental Intervenors' Joint Response to Motions to Stay (Intervenors Res.).

I. Summary Status of the States Preparedness to Implement PSD for GHGs

2. Although EPA and the Intervenors imply that every State[1] other than Texas is "poised" to "manage" the PSD permitting program for GHGs at the Tailoring Rule thresholds,[2] a close examination demonstrates at least 29 of the 52 existing State managed jurisdictions are

[1] Throughout this declaration, the term "State" is generally used to refer collectively to state and local jurisdictions, including U.S. territories and the District of Columbia. According to EPA, there are a total of 99 States for purposes of implementing the PSD program nationwide. (See McCarthy Dec. ¶98.) The use of lower case ("states") or proper names refers solely to the states or to the named jurisdictions themselves.

[2] See Intervenors Res. p. 25 and McCarthy Dec. ¶4.

certain or very likely to suffer immediate and real adverse impacts if EPA's PSD program for GHGs takes effect on January 2, 2011.

3. Overall, there are a total of 52 jurisdictions with EPA-approved SIPs currently in place through which the State is the PSD permitting authority. Of these, EPA's own assessment reveals that more than half will certainly suffer disruption and harm in the GHG PSD program transition. According to EPA's count, effective beginning January 2, 2011, at least 5 jurisdictions will be subject to a construction ban, at least 10 will be "obligated" to implement PSD for GHGs at the statutory thresholds, and at least 8 will be required to relinquish their permitting authority to EPA under FIPs. (See McCarthy Dec. ¶98 and Attachment 1.) In addition, based on a review of the actual status of State rulemaking and EPA SIP approvals, and as further explained in this declaration, it is reasonable to expect that an additional 3 jurisdictions will suffer the construction ban and an additional 3 jurisdictions will be "obligated" to implement PSD for GHGs at the statutory thresholds, and EPA already plans to impose a FIP in at least 3 additional jurisdictions later in the year. Further, if EPA fails to complete its planned FIP rulemaking timely for the Category 2 States, or if the partial rescission of SIP approvals fails or is not complete timely for the Category 3 Group 2 States, then 8 additional States would also be subjected to the construction ban and 28 total jurisdictions would be subjected to the statutory thresholds for GHGs under federal law.

4. The following table provides an overview of the impacts that will occur to States and regulated stationary sources during the early implementation of the PSD program for GHGs absent a stay of EPA's rules and interpretations. The basis for the determination of which States will suffer or are reasonably expected to suffer these impacts is drawn primarily from the EPA Response and other EPA and State information sources as explained further herein.

Table I
Adverse Impacts to States if GHG PSD Program in Effect on January 2, 2011

States Subject to Construction Ban because No Permitting Authority Established			
State	**Certain/ Likely**	**Date of Impact**	**Basis**
Connecticut	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Nebraska	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Texas	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
CA Sacramento Metro	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Nevada Clark County	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Alaska	Likely	Jan. 2, 2011	State rule not final; EPA approval not proposed
Kentucky	Likely	Jan. 2, 2011	State rule not final; EPA approval just proposed
KY Louisville Metro	Likely	Jan. 2, 2011	State rule not final; EPA approval not proposed
States Subject to PSD Statutory Thresholds for GHGs - Permitting Gridlock			
State	**Certain/Likely**	**Date of Impact**	**Basis**
Alabama	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Maine	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Missouri	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
New York	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Rhode Island	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
South Dakota	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Tennessee	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
CA Mendocino County	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
CA N. Coast Unified	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
NM Albuquerque	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Maryland	Near Certain	Jan. 2, 2011	State rule not yet proposed
Wisconsin	Near Certain	Jan. 2, 2011	State rule not yet proposed
CA Sonoma County	Near Certain	Jan. 2, 2011	State rule not yet proposed
States Subject to Imposition of GHG PSD FIP to Avoid or End Construction Ban			
State	**Certain/Likely**	**Date of Impact**	**Basis**
Arizona	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Arkansas	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Florida	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Idaho	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Kansas	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Oregon	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Wyoming	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Arizona Pinal County	Certain	Jan. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Connecticut	Certain	Est. Mar. 2, 2011	Acknowledged by EPA in McCarthy Dec.
Texas	Certain	Est. Dec. 2011	Acknowledged by EPA in McCarthy Dec.
CA Sacramento Metro	Certain	Est. Feb. 1, 2011	Acknowledged by EPA in McCarthy Dec.
Alaska	Likely	Est. 2011	SIP status and need to end construction ban
Kentucky	Likely	Est. 2011	SIP status and need to end construction ban
KY Louisville Metro	Likely	Est. 2011	SIP status and need to end construction ban
Nebraska	Likely	Est. 2011	State rule just proposed; need to end const. ban
Nevada Clark County	Likely	Est. 2011	SIP status and need to end construction ban

5. Importantly, this situation will create vastly differing regulatory requirements for GHGs from State to State, creating significant inequities among the business communities and regulated stationary sources. In some cases, a regulated stationary source will be unable to obtain a permit and commence construction of a project affecting GHGs at all. In other cases, major industrial sources will be subject to PSD review for any increase above zero of GHGs. In still other cases, regulated sources will only be required to undergo PSD review if the project would increase GHGs by 75,000 tpy. Given these gross inequities, which EPA itself admits will occur on January 2, 2011, EPA's efforts to date clearly are not indicative of a "carefully developed plan…that will provide for smooth implementation of PSD…requirements for GHG-emitting sources." (See McCarthy Dec. ¶4.)

II. Mischaracterization of State Responses

6. Both Assistant Administrator McCarthy's declaration and the Intervenors' Response cast a very optimistic and unified picture of the States' actions related to EPA's aggressive implementation of PSD and Title V permitting for stationary sources of GHGs, mischaracterizing both in tone and substance the States' statements to EPA and the current status of preparedness to implement EPA's new rules imposing PSD and Title V permitting on GHG sources. For example, Assistant Administrator McCarthy goes so far as to claim that "come January 2, 2011, when GHG requirements will take effect, there is every reason to expect that the permitting authorities…will be fully able to manage the permitting process." (See McCarthy Dec. ¶4.) The Intervenors suggest that "every state but one is poised to ensure that sources can obtain preconstruction permits [for greenhouse gases] under the Clean Air Act…by January 2, 2011 or shortly thereafter." (See Intervenors Res. p. 25.) They go on to suggest that rulemaking actions "will be implemented in time to avoid any potential permitting delays, in all states except

Texas," and further that the injury done to Texas is self-inflicted. (See Intervenors Res. p. 25 – 28.) But the actual status of current State SIPs, State rulemaking activity to revise those SIPs, and EPA rulemaking to approve those SIP revisions belies that rosy picture and reveals the true landscape on the horizon for the early stages of the GHG PSD program – construction bans in some jurisdictions, application of PSD for very small sources and at any increase in other areas, and the relinquishing of State primacy to EPA under a FIP in yet other areas.

7. Beyond whitewashing the substantive impacts of the impending GHG PSD program on the States and regulated stationary sources, EPA mischaracterizes the tone and disposition of the States' responses, stating that "in almost all cases, the states are working closely with us" (McCarthy Dec. ¶4), as if the States were a single collective, save one, wholly in support of EPA's rush to implement CAA permitting for GHG sources. This broad brushed characterization conveniently ignores the glaring fact that not only one, but ***18 states*** are engaged in legal action either directly or as intervenors to challenge one or more of EPA's suite of four GHG rules that would impose PSD and Title V permitting requirements on GHG sources effective January 2, 2011.[3] These states could not make their concerns and objections any more clear.

8. In fact, not only one but several States were explicitly clear in their 30-day or 60-day letters to EPA that their quick action to undertake rulemaking to adopt EPA's Tailoring Rule into state rules was not intended as a signal of support for EPA's approach, but rather is designed to protect the State's interest. For example, South Dakota's 60-day letter to EPA specifies that the state will move forward to adopt EPA's "subject to regulation" definition "without waiving the State of South Dakota's rights to appeal the various GHG regulations…"

[3] Alabama, Louisiana, Mississippi, Nebraska, North Dakota, South Carolina, South Dakota, Texas, Virginia, Alaska, Florida, Georgia, Hawaii, Indiana, Kentucky, Michigan, Oklahoma, Utah.

Likewise, Louisiana DEQ "emphasizes that it does not support the manner through which EPA has chosen to regulate greenhouse gases under the Clean Air Act."

9. Rather than taking action in solidarity with EPA, many States are clearly acting in an effort to avoid or minimize the impacts that will result from EPA's rules and interpretations if a stay is not affected. Through a series of interpretations and rulemakings, EPA has created circumstances that place many jurisdictions in an untenable situation commencing January 2, 2011, facing either a construction ban for GHG sources (in jurisdictions without a permitting authority in place to issue the permits EPA claims would be required), or the imposition of the PSD permitting program on thousands of comparatively small sources (in jurisdictions without the Tailoring Rule thresholds in place). Neither the McCarthy Declaration nor the Intervenors' Response refutes this outcome (in fact they acknowledge it), and neither demonstrate that these harms will be satisfactorily resolved without a stay, as this supplemental declaration will explain.

III. EPA's Category 1 – The Existing FIPs and Delegated States

10. For jurisdictions that currently do not have PSD SIPs, EPA is the PSD permitting authority. Accordingly in these areas, absent a stay of the EPA GHG rulemakings, EPA will commence application of PSD program for GHGs in accordance with the Tailoring Rule for permit actions taken on or after January 2, 2011. Category 1 includes 7 states, 4 territories, the District of Columbia, and 35 local jurisdictions (47 States in total). Six of these states and 7 of the other Category 1 jurisdictions are delegated authority to implement the PSD program acting as EPA's agent.

11. In the Category 1 jurisdictions a FIP is already in place, and EPA apparently intends to apply the Tailoring Rule as an automatic self update to the existing FIP, therefore EPA asserts that these 47 States generally will not suffer the same types of implementation adversities

occurring in other States. However, EPA has not addressed the extent to which the affected FIPs and delegation agreements may need to be updated for States in this category.

12. It is possible that existing delegation agreements, much like incorporations of rules by reference, provide authority to States to act on EPA's behalf to implement the PSD rules as adopted on a specific date. In such cases, the delegation agreements would require updating in order to assure that the State agency has authority to issue GHG permits and that the Tailoring Rule thresholds are implemented. Furthermore, it is likely that existing delegation agreements will need to be updated to specifically agree upon the appropriate terms for regulating GHG sources, because States with delegation for criteria pollutant PSD reviews are not necessarily equipped to handle GHG reviews. EPA has ignored these delegation issues completely for Category 1 jurisdictions.

13. In addition, some delegated States, while acting as EPA's agent to implement the federal PSD program, have also adopted PSD regulations under state law. For example, both Hawaii and Michigan have adopted PSD rules at the state level that are identical to or substantially the same as EPA's PSD pre-GHG rules,[4] and both are delegated authority by EPA to act as EPA's agent in issuing PSD permits. Neither the Hawaii nor the Michigan PSD rules incorporate EPA's new Tailoring Rule provisions, and neither State has published proposed rulemaking revisions to update the State PSD rules.[5] These rules may be an impediment to the States' delegation of PSD for GHG sources, and may also be interpreted to independently

[4] See *Hawaii Title II, Chapter 60.1, Subchapter 7, Prevention of Significant Deterioration Review*, and *Michigan Air Quality Division, Air Pollution Control Chapter 336*.

[5] Throughout this declaration, information regarding the status of current State rules and recent rulemaking activities is based on research using the CyberRegs® online regulations database, which is updated daily, including a search of the USA States, Proposed Regulations, 2010 Documents data set for each jurisdiction, and supplemented in many cases by a direct search of the state or local government agencies webpage or other online data sources. Information about the status of past and current EPA SIP approvals is based on a search of each EPA Regional Office webpage SIP map, supplemented in many cases by a search of Federal Register notices and/or state and local agency webpages. All searches were performed November 4 through November 8, 2010.

impose PSD under state law on many very small sources commencing January 2nd, much like EPA's Category 3, Group 2 jurisdictions.

14. In sum, despite EPA's assurances that all is well with regard to GHG PSD permitting authority and Tailoring Rule threshold implementation in the Category 1 jurisdictions, uncertainty remains for the delegated jurisdictions.

15. Furthermore, beyond the questions of who the permitting authority will be and whether the Tailoring Rule thresholds will be in place at both the state and federal levels, regulated sources in these jurisdictions are subject to the same uncertainties and harms related to determinations of PSD applicability and substantive requirements as are sources in other jurisdictions, as discussed in my initial declaration and further below.

IV. EPA's Category 2 – The GHG Construction Ban or the FIP

16. EPA's Category 2 consists of states and local jurisdictions with existing approved PSD SIPs that clearly do not provide authority for regulating GHGs. EPA assigns 16 States to this category, including 12 states and 4 local jurisdictions (See McCarthy Dec. Attachment 1, Table II). EPA is ignoring the 3-year time period provided by EPA's own regulation[6] for States to revise their SIPs, during which time the existing EPA-approved SIP would remain the federally enforceable law in each such State. Further, EPA is deviating from the agency's long-held position that the EPA-approved SIP remains the federally enforceable law in any jurisdiction until such time as that SIP is revised and approved by EPA or until EPA imposes a FIP (which can only occur after due process, including a "SIP call" with a reasonable time for response). Instead of following the procedures outlined by rule and traditionally used to update

[6] See Higgins Dec. ¶78, and 40 CFR 51.166(a)(6)(i).

the PSD program in SIP-approved States, EPA is asserting that the recently revised federal PSD rule automatically supplants the current approved SIP in each jurisdiction on January 2, 2011.

17. Having declared that the recently adopted definition of "subject to regulation" will automatically apply in each State, thereby rendering GHG projects subject to PSD permitting regardless of the approved SIP provisions to the contrary, EPA next concludes that neither the State nor EPA has the authority to issue such permits in the Category 2 jurisdictions, thus a construction ban must be imposed absent further action to establish a GHG permitting authority.

A. Status of the GHG Construction Ban

18. If EPA's rules and interpretation remain in effect, to avoid a construction ban effective January 2, 2011, these 16 jurisdictions must either complete rulemaking at the State level ***and*** secure EPA approval of the revised State rule, or accept a FIP by that date. With less than two months remaining before January 2, 2011, ***not a single one of the 16 jurisdictions has accomplished the required State and federal rulemaking and SIP approval***. Only 8 of the 16 jurisdictions have proposed a rule revision, and of those 8, EPA has proposed SIP approval of only one.[7,8]

19. By EPA's own optimistic count, as a result of denying the regulatory 3-year time period for SIP revisions and asserting that the revised EPA rules automatically supplant the federally-approved SIP as federal law in every State, ***a construction ban <u>will be imposed</u> in at least 5 jurisdictions due to lack of a permitting authority to issue GHG PSD permits***, including 3 states and two local districts: Connecticut, Nebraska, Texas, California Sacramento

[7] See Footnote 5 for the source of EPA, state, local rulemaking activity information.

[8] Category 2 States that, based on our research, have not published a proposed rulemaking as of November 8, 2011 include Arizona, Arkansas, Florida, Texas, Wyoming, Arizona Pinal County, CA Sacramento Metro AQMD, and Nevada Clark County.

Metropolitan AQMD and Nevada Clark County. (See McCarthy Dec. Attachment 1, Table II). That is, the State or Local rulemaking and EPA approval process will not be complete nor will a FIP be in place by January 2, 2011.

20. Only two states and one local jurisdiction projected that they *could* meet the incredibly aggressive timeframes imposed by EPA for the completion of State rulemaking (and felt confident that EPA would also timely approve the SIP revision) by the end of the year, so as to avoid the GHG construction ban without having to turn PSD permitting over to EPA under a FIP. These include Alaska, Kentucky, and the Kentucky Louisville Metro District. Accordingly, EPA is not planning to impose a FIP in these areas. However, the status of the rulemaking efforts, described below, suggests that these three additional Category 2 jurisdictions could be subject to the GHG construction ban effective January 2, 2011, in addition to the 5 jurisdictions noted above.

21. Alaska proposed the state rule revision in June but has not acted to adopt it as a final rule, nor has EPA proposed approval of the draft SIP revisions. Thus, with less than 2 months time remaining, it seems highly unlikely the January 2nd deadline for a revised SIP approval can be met, indicating a construction ban is also likely in Alaska.

22. Kentucky has proposed but not yet adopted the final State rule revision, and EPA has only very recently proposed approval of the draft SIP revision, with a comment closing date of December 6, 2010. Given this public comment closing date and EPA's commitment to issue the SIP calls by December 1, 2010, Kentucky's fate is uncertain and a construction ban may reasonably be expected to ensue.

23. The local Kentucky Louisville Metro District (Jefferson County) has proposed but not finalized a PSD rule revision and EPA has not commenced a SIP approval process. EPA's

approval of Louisville's SIP revision suffers from an additional problem. Here, the currently approved SIP incorporates by reference, with exceptions, EPA's PSD rules as in effect in 2001 (an older version of the federal rules, pre-dating the significant changes made by EPA in 2003). The current Louisville Metro PSD rule in the County code, however, was adopted in 2009 and incorporates the EPA PSD rules as in effect July 1, 2008, with exceptions. EPA has not updated the approved SIP to incorporate changes adopted by Louisville between 2002 and 2010. Thus, in order to act on the rule currently being put forth by Jefferson County, EPA will have to address any changes made to rule since the last SIP-approved version. Given these circumstances, it seems likely that Kentucky Louisville Metro District is also facing a GHG construction ban.

24. In addition, it is not enough that these States complete their rulemakings by the end of the year. EPA must still approve the states' SIP revisions incorporating the new state law changes under federal law. Because of the unrealistically short time available for this to occur, EPA has proposed that it will "parallel process" the SIP revisions. In other words, EPA will review the states' draft regulatory and SIP revisions and take public comment on the SIP revision at the same time as public comment is taken on the proposed state regulatory revisions.

25. While EPA must undertake the SIP revisions in this manner due to the extremely compressed schedule it has forced upon the states, this approach introduces even more uncertainty into an already complicated process. Furthermore, EPA has only initiated parallel processing for one of the Category 2 States, Kentucky, and this was just done late last week.[9]

26. Moreover, delays or changes to the proposed rule in the state rulemaking process will cause delays in the federal approval process, but EPA's optimistic projection that their SIP approval process will be final by year's end is based on an assumption that no such delays will

[9] *Approval and Promulgation of Implementation Plans; Kentucky: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule Revision*, 75 Fed. Reg. 68,272 (Nov. 5, 2010).

occur. Ms. McCarthy states that "[i]f the final SIP submission was substantially similar to the draft SIP submittal upon which EPA solicited comment, then EPA would expeditiously move to take final action on the final SIP submission."[10] But, on the other hand, as EPA says, if, in response to comments, the state changes its proposed rule, then those changes must be "acknowledged" in EPA's final approval, and "[i]f the changes are significant, then EPA may be obliged to re-propose the action," meaning the approval could not take place by January 2, 2011.[11]

27. ***In sum, at this juncture a GHG construction ban is certain to occur in 5 jurisdictions and reasonably expected to occur in 3 additional jurisdictions.*** EPA's most optimistic projection is that the bans would be in effect until February, March, July, or in two cases, until December 2011 or later. In one case, EPA acknowledges that the ban would not be lifted "until December 2, 2011 at the earliest." (See McCarthy Dec. Attachment 1, Table II) Despite these dire predictions, EPA touts the ongoing success of its "carefully developed plan…that will provide for smooth implementation of PSD and Title V permitting requirements for GHG-emitting sources." (See McCarthy Dec. ¶4.)

28. The fact is, absent a stay of EPA's rules and interpretations, for each of these areas the construction ban would apply until such time as EPA acts to grant final approval of a revised State SIP or until EPA acts to implement a FIP. History demonstrates that EPA is notoriously slow to act on SIP submittals and a substantial SIP approval backlog already exists, as described in my earlier declaration, making EPA's promise that SIP approvals for GHG PSD SIP revisions will be "timely" speculative at best. (See Higgins Dec. ¶91.)

[10] McCarthy Dec. ¶46.

[11] 75 Fed. Reg. at 68,273.

29. Indeed, for the GHG PSD SIP rule revisions currently undergoing rulemaking at the State level, EPA's proposed SIP approval has lagged two to three months or more behind the State rule proposal, even using the "parallel processing" EPA purports to be the solution for quick SIP approval, and even knowing that time is of the essence.

30. Notably, EPA relies on euphemistic descriptions of these construction bans in an apparent attempt to minimize their significance. For instance, when EPA says, "No permit applications are expected to be submitted or affected during this 6-month period," (See McCarthy Dec. Table II), what is really meant is that, under EPA's interpretations, neither the State nor EPA will be able to review any permit application put before it or to issue any permit that would trigger GHG review during the full term of the construction ban. In such a situation, it is perhaps reasonable to expect that no GHG permit applications would be "submitted or affected," as there would be no one to receive or review them. This is not to say, however, that companies in the affected jurisdiction would not have a need or desire to undertake construction projects otherwise prohibited by the construction ban. In fact, it is to be expected that projects in the affected jurisdictions will be impacted by the ban, leading to social and economic consequences.

B. Status of the Category 2 GHG FIPs

31. Recognizing that meeting the aggressive schedule imposed by EPA to accomplish both a State SIP revision rulemaking and an EPA SIP-approval rulemaking was virtually impossible, a number of Category 2 States indicated their willingness to accept a FIP in order to avoid a construction ban.

32. EPA is planning to take over as the PSD permitting authority to implement GHG permitting in 7 states and 1 local jurisdiction effective December 23, 2010,[12] posing this move as a "friendly" takeover being offered as an alternative to the (EPA-created) construction ban. For an additional 2 states and 1 local jurisdiction,[13] EPA is already planning to impose a FIP at some point in 2011, in order to end the construction ban the agency intends to impose effective January 2, 2011. For the remaining 3 states and 2 local jurisdictions,[14] where construction bans will be or are likely to be in effect, the state or local authority will be placed under increasing pressure to accept a FIP.

33. Thus FIPs will be imposed in 11 of the 16 Category 2 jurisdictions, and may ultimately be imposed in all 16 jurisdictions, inserting EPA as the primary PSD permitting authority in areas where the State has heretofore enjoyed that role. EPA does not even attempt to estimate how long the federal FIP authority would remain in place. At least one State, Florida, recognizes that the FIP will not be short-lived, noting in its 60-day letter to EPA, "we anticipate EPA having to use, for an indefinite period of time, its Federal Implementation Plan authority for implementing the PSD program in Florida…"

34. Contrary to EPA's assertion that imposition of a FIP in currently SIP-approved States constitutes a "smooth implementation" of PSD for GHGs through a "friendly" takeover, such an approach is rife with transitional difficulties and uncertainties. In the first place, EPA's FIP proposal is only just that, a proposal. It was only proposed on September 2, 2010 and is not due to be finalized until on or around December 1, which assumes that EPA completes the rulemaking on an expedited schedule. Under the proposed FIP, for any PSD permit application,

[12] Arizona, Arkansas, Florida, Idaho, Kansas, Oregon, Wyoming, Arizona Pinal County

[13] Connecticut, Texas, California Sacramento Metro AQMD

[14] Alaska, Kentucky, Nebraska, Kentucky Louisville Metro APCD, Nevada Clark County

states would have control over the non-GHG issues and EPA would have control over the GHG issues. Such a division of authority for PSD permitting has never been attempted before. EPA states that "questions may arise" on this dual-permitting approach, and admits that it has not yet fully worked out how that process will work in practice.[15] This proposed dual-permitting FIP approach would cleave the PSD review for a single project into parts, each occurring in separate (State and federal) jurisdictions and venues for administrative review, creating serious concerns about the integrity of the process. (See Higgins Dec. ¶94.) Further, it cannot be predicted how long it will take in reality for EPA and the states to work out the terms of this joint approach, or how long it will take to get a PSD permit processed using this approach, given the necessity of meeting the concerns of two agencies reviewing different and sometimes competing aspects of the project.

35. The only way to avoid such a duality would be for the State to surrender its authority over the entirety of the PSD review for GHG projects to EPA. This approach would still create a disjointed permitting framework for the affected facilities, with existing permits issued by the State already in place and now two different permitting agencies acting as the authority depending on the particular project, resulting in multiple permits for the same emissions units and a high potential for conflicting terms and conditions.

36. With regard to EPA's claim that implementation of the FIP PSD programs can be returned to the States through delegation upon request, it is only necessary to note EPA's statement that the delegation agreements may be completed "as soon as the parties are able to agree upon the appropriate terms" to see that a FIP followed by delegation will not provide for a smooth and quick transition to PSD permitting for GHGs. (See McCarthy Dec. ¶20.)

[15] *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan*, 75 Fed. Reg. 53,883, 53,890/1 (Sep. 2, 2010).

V. EPA's Category 3 – The Interpretive Fix or the Partial SIP Approval Rescission and the Imposition of the Statutory Thresholds for GHG PSD

37. EPA's Category 3 States consists of jurisdictions with currently approved PSD SIPs which EPA interprets to automatically apply to GHGs as of January 2, 2011. All remaining PSD jurisdictions fall into this category, including 30 states and 6 local jurisdictions (36 total). Based on EPA's interpretations, jurisdictions in Category 3 will not suffer from lack of a GHG PSD permitting authority commencing January 2, 2011, because the State is considered to already have authority to permit GHGs, thus these areas would not be subject to the GHG construction ban.

38. Nonetheless, the Category 3 jurisdictions suffer from a different but equally severe problem. For these States, EPA has put forth the assertion that, unless the State can interpret its existing SIP-approved rules to embody EPA's recently adopted Tailoring Rule thresholds, PSD will be triggered at the statutory thresholds (i.e., a 100 or 250 tpy major source threshold and a significance threshold of *any* increase greater than zero that triggers PSD review) for GHGs commencing January 2, 2011. In an attempt to resolve this dilemma, EPA offered Category 3 States the choice of being placed in one of two groups: Group 1, comprised of States that would solve the problem through "interpretation" of the current SIP; or Group 2, comprised of States that would actually revise their regulatory thresholds for GHGs through notice-and-comment rulemaking and/or statutory changes. Recognizing that it does not have time to approve these Group 2 rule revisions through the notice-and-comment SIP-approval rulemaking process, EPA proposes to side-step the need for SIP approvals through a maneuver it describes as partially rescinding approval of the current SIP. Each of the Category 3 groups is discussed below.

A. Status of Category 3 Group 1 States – The Interpretive Fix

39. EPA refers to Category 3 States that will interpret their rules to already incorporate the Tailoring Rule and EPA's various other GHG program interpretations as Group 1 States. EPA's concept of the interpretive fix is that, for example, where the State rule clearly specifies major source thresholds of 100 and 250 tons per year for regulated air pollutants, the state could "interpret" that threshold as being at the much higher 100,000 tpy Tailoring Rule threshold for GHGs. Similarly, the State would interpret their current rules to embody all other aspects of EPA's new regulations, even where explicit rule language is in clear conflict with EPA's new rules. Not surprisingly, the majority of the Category 3 States informed EPA that they were unable to simply interpret their existing regulations to embody the full scope of EPA's GHG rules, including EPA's new definition of GHGs, the convoluted definition of "subject to regulation" for GHGs, the Tailoring Rule thresholds, and the phased-in Steps. In fact, only 8 jurisdictions, including 6 states and 2 local districts, concluded that they could do so.[16]

40. For States in Group 1, EPA maintains that no action is needed prior to January 2, 2011 because both EPA and the State will interpret the existing SIP to apply to GHGs at the Tailoring Rule thresholds. Nonetheless, EPA itself does not seem to truly believe that the state rules can reliably be "interpreted" to incorporate the significantly higher Tailoring Rule thresholds for GHGs. Thus, EPA told these States that, even if they avail themselves of EPA's "interpretation" approach to avoid a construction ban, they should nevertheless formally adopt the Tailoring Rule provisions through the requisite state rulemaking or legislative process "for purposes of clarity." This "clarification," however, would not have to occur until after January 2, 2011.

[16] Category 3 Group 1 includes Delaware, Michigan, Montana, North Dakota, Pennsylvania, West Virginia, California Monterey Bay AQMD and Pennsylvania Philadelphia District.

41. Thus, States in Category 3 Group 1 are not ultimately saved from the SIP revision and approval process but are merely delaying it while relying, by agreement with EPA, on a forward-looking interpretation of the SIP as a stop gap measure to avoid imposition of the statutory thresholds for GHGs as of January 2, 2011. These jurisdictions are still at risk, however, because laws so lacking in clarity and so open to interpretation clearly do not provide for "smooth implementation" and render State decisions subject to differing interpretations by third parties, and administrative or judicial review bodies.

B. Status of Category 3 Group 2 States – The Partial SIP Approval Rescission and Imposition of the Statutory Thresholds for GHG PSD

42. EPA refers to the remainder of the Category 3 States as Group 2 (i.e., those jurisdictions for which EPA maintains PSD would apply to GHGs at the statutory thresholds effective January 2, 2011 because they will not "interpret" their rules to incorporate the Tailoring Rule thresholds). These States are in the greatest predicament of all, as they are faced with implementation of PSD and Title V permitting for thousands of small sources, the very outcome EPA sought to avoid by adopting the Tailoring Rule.[17] Group 2 is comprised of 28 States, including 24 states and 4 local jurisdictions.[18]

43. EPA proposes to mend this injury by taking final action through rulemaking, prior to January 2, 2011, to partially rescind approval of each existing State PSD SIP, such that the SIP would no longer be approved to apply to GHGs below the Tailoring Rule thresholds.[19] EPA

[17] While the GHG construction ban will undoubtedly inflict the greatest harm on regulated industry, it is the expansion of the permitting program to include thousands of small sources that would inflict the greatest burden on the State permitting agencies.

[18] Category 3 Group 2 States include Alabama, Colorado, Georgia, Indiana, Iowa, Louisiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin, CA Mendocino County AQMD, CA North Coast Unified AQMD, CA Northern Sonoma County AQMD and New Mexico Albuquerque.

[19] EPA first floated this concept in the proposal of the Tailoring Rule, but set it aside in the final Tailoring Rule in favor of the approach to incorporate the GHG thresholds and steps in the definition of "subject to regulation," with

casts this heavy-handed action as necessary to assure that, under federal law, the Tailoring Rule thresholds are in place to limit the scope of the GHG permitting program. In other words, in order to avoid having to approve State SIP revisions to increase the state regulatory thresholds to the Tailoring Rule levels prior to January 2, 2011, EPA states that it will withdraw its approval of the States' pre-existing SIPs insofar such SIPs would be interpreted to apply to GHGs below the Tailoring Rule levels. EPA justifies this action as "correcting" an "error" it made when it approved these pre-existing SIPs. Although I will not comment on the legality of this approach, it seems odd for EPA to hold that it made an error years ago by not anticipating that it would someday regulate GHGs and that this regulation would require increased state thresholds at the Tailoring Rule levels. It seems much more likely that EPA should follow routine procedure under which the States submit SIP revisions to incorporate the new Tailoring Rule thresholds and then EPA approves these thresholds through notice-and-comment rulemaking, but of course this cannot be accomplished by the end of this year.

44. Furthermore, this "fix" is fatally flawed, because as EPA acknowledges it serves only to withdraw EPA's approval of the State rule for GHGs below the Tailoring Rule thresholds as it would be enforced under federal law; it does nothing to amend the State rule itself. Thus, EPA's analysis continues, ***as a matter of State law PSD will apply to GHGs at the statutory thresholds in every one of these 28 jurisdictions commencing January 2, 2011*** unless the State is able to complete a rule revision prior to that time. The statutory thresholds would remain in effect until such time as the State rule is revised to incorporate the Tailoring Rule thresholds.

45. To avoid the blast from this explosion of EPA rules and interpretations, the 28 States in Category 3 Group 2 are scrambling to revise their State PSD rules before year's end.

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the hope that States would avail themselves of an opportunity to "interpret" the phrase "subject to regulation" in their current rules to incorporate EPA's new rule. That hope having faded, with 28 States declining, EPA now returns to the partial SIP approval rescission approach.

Nonetheless, with less than two months remaining before January 2, 2011, 10 of these 28 jurisdictions have not yet proposed a rulemaking at the State level and only one has completed the process to adopt a final rule.[20]

46. A few States have indicated that they will utilize expedited or emergency rulemaking procedures in an effort to speed the process and minimize the impact of EPA's interpretations, and one State even adopted a Joint Resolution of the State Legislature in an effort to get the Tailoring Rule thresholds in place prior to January 2, 2011. These abbreviated procedures, however, will in most cases serve as temporary fixes at best, since emergency rules generally are effective only for a few months and further do not provide for public participation through notice and comment rulemaking. Importantly, in order to be submitted as a SIP revision, a State rule must be adopted as a permanent measure and must have undergone 30-day notice and comment. (See Higgins Dec. ¶¶83 – 85, and 40 CFR 51.166(a).)

47. Under a best case scenario, EPA itself acknowledges that at least 10 jurisdictions[21] will be subjected to implementing PSD for GHGs at the statutory thresholds as of January 2, 2010 because State rulemaking cannot be completed prior to that date. (See McCarthy Dec. ¶98 and Table III.) In most cases, it would be virtually impossible for a State to begin and complete the rulemaking process in the less than two months remaining before year's end. Thus, absent a stay of EPA's rules and interpretations, the imminent outcome is that a total of 13 jurisdictions (the 10 cited by EPA plus 3 other jurisdictions that have not yet actually proposed a State rule revision) are nearly certain to be subjected to implementing PSD permitting

[20] Category 3 Group 2 States that have not yet published proposed PSD rule revisions to adopt the Tailoring Rule thresholds include Maryland, Missouri, New York, Rhode Island, South Carolina, South Dakota, Wisconsin, CA Mendocino County AQMD, CA North Coast Unified AQMD, and CA Northern Sonoma County AQMD. (South Carolina established a temporary fix by enacting a Joint Resolution to implement the Tailoring Rule thresholds.)

[21] The 10 States that EPA acknowledges will be subject to statutory thresholds are: Alabama, Maine, Missouri, New York, Rhode Island, South Dakota, Tennessee, CA Mendocino County AQMD, California North Coast Unified AQMD, and New Mexico Albuquerque.

at the statutory thresholds for GHGs, without the Tailoring Rule "Steps" or thresholds in place. Further, the jurisdictions that have commenced but not completed rulemaking are also at risk, especially if significant comments are received during the rulemaking process on these highly controversial rules.

VI. Immediate Impact on Pending PSD Permit Applications

48. The impact of both the GHG construction ban in Category 2 states and the imposition of statutory thresholds in Category 3 Group 2 states would be real and immediate.

49. For example, according to the EPA Region 4 website,[22] there are currently 9 pending PSD applications and 2 draft PSD permits recently reviewed by Region 4 for proposed projects in the state of Georgia, a Category 3 Group 2 State (that is, the statutory PSD significance threshold of *any increase greater than zero* would be imposed under EPA's interpretation effective January 2, 2011 if a state rulemaking is not finalized adopting the Tailoring Rule thresholds). This means that for any of the pending PSD projects to obtain a final permit, the applicant would be obligated to revise the application to incorporate a review of PSD applicability for GHGs. If the applicability review concluded that *any increase* would occur, PSD review would need to be conducted for GHGs.

50. For the state of Kentucky, a Group 2 state where EPA does not plan to impose a FIP and the State rulemaking to establish GHG permitting authority is not yet complete (i.e., a construction ban will ensue absent EPA SIP-approval of a final State rule before January 2nd), Region 4 lists 6 pending PSD applications and 2 draft PSD permits. Under the construction ban, none of these proposed projects could receive a permit and commence construction on or after January 2, 2011 if the projects involve emissions increases of GHGs.

[22] www.epa.gov/region4/air/permits, "Recent PSD Permit Applications received by Region 4," last updated September 1, 2010, retrieved November 7, 2010.

51. Numerous other examples of actual pending PSD permit applications and/or draft PSD permits stand to suffer similar impacts absent a stay. In addition, the construction bans in some States and imposition of the statutory thresholds in others will impact projects currently in the planning stage, for which permit applications have not yet been developed or are being developed but have not yet been submitted.

VII. EPA Has Failed to Provide PSD Guidance in a Reasonable Timeframe

52. Beyond the considerable issues related to State permitting authority, SIP revisions and FIPs, EPA's GHG program for stationary sources continues to suffer from a complete lack of much needed technical guidance. In fact, EPA has promised but has not released any technical guidance related to PSD permitting for GHGs.

53. One of the more critical areas where guidance is needed relates to the determination of BACT for affected sources. While EPA says that the agency has developed at least 8 different guidance documents and a GHG Mitigation Strategies Database related to BACT for GHG sources, none of the documents or the database has yet been released. (See McCarthy Dec. ¶99.) Thus, the scope and content of these guidance materials is largely unknown. Of particular concern, EPA does not indicate whether the guidance will address the scope of the BACT review, including the extent to which the permitting authority can or must "redefine the source" by requiring a different fuel, equipment selection, process design, or location from the project as proposed.

54. Further, while the guidance EPA purports to have already prepared should prove helpful for future projects, the release of guidance documents in the last remaining month prior to the program effective date is of little assistance to facilities and States that must make preliminary BACT determinations for planning purposes for projects in 2011. As Louisiana

DEQ stated in the 60-day letter to EPA, "Having guidance available by the end of 2010 does not provide a reasonable period for implementation by the effective date of January 2, 2011."

55. Finally, with regard to the many other issues for which technical or policy guidance is needed, EPA remains silent. For example, EPA has not provided guidance on the many issues specific to the initial years of implementation of the GHG program related to the PSD applicability analysis, including PTE calculations, estimates of the baseline actual emissions, and the netting analysis, nor has EPA provided clarity regarding which elements of the PSD impacts analysis will be required for GHGs. (See Higgins Dec. ¶¶29 – 57.)

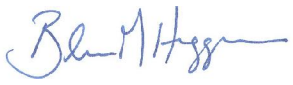
56. It is worth noting that, last May, EPA committed rolling out these guidance materials beginning in June. In a PowerPoint presentation given to a meeting of the Clean Air Act Advisory Committee, EPA said that a GHG mitigation strategies database with performance and cost data on current and pending GHG control measures, as well as enhancements to the RACT/BACT/LAER Clearinghouse, would be issued in the summer of 2010.[23] White papers summarizing technical information on specific control options applicable to numerous different sectors were to be rolled out beginning in June. Final PSD GHG guidance, streamlining techniques, training modules, workshops and webinars were to follow. The point of EPA's commitment in May to begin rolling out these tools in June was to give industry and the states lead time to prepare. That did not happen.

57. Without sufficient guidance in place with adequate time to support planning of projects advance of the program's initial effective date, projects and permitting decisions will be delayed with consequential harm to the regulated sources as well as the affected communities.

[23] Update on Prevention of Significant Deterioration Guidance for Greenhouse Gases, Anna Marie Wood, Acting Director, Air Quality Policy Division, OAQPS, U.S. EPA, May 27, 2010.

* * *

I, Bliss M. Higgins, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 8th day of November, 2010.



Bliss M. Higgins

Attachment 5

STEVEN A. THOMPSON
Executive Director

OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY

BRAD HENRY
Governor

July 15, 2010

Dr. Alfredo Armendariz, Regional Administrator (6RA)
U.S. Environmental Protection Agency – Region VI
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Subject: Information Requested in Greenhouse Gas Tailoring Rule

Dear Dr. Armendariz:

The U.S. Environmental Protection Agency (EPA) requested specific information from state air permitting authorities in its "Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring rule" published in the *Federal Register* on June 3, 2010 (75 FR 31513). The Department of Environmental Quality (DEQ) is the air permitting authority for the State of Oklahoma and administers the EPA-approved PSD and Title V permitting programs. In this letter, DEQ provides the information EPA requested in sections IV.C., V.C.5. and V.C.6. of the preamble to the final greenhouse gas tailoring rule.

DEQ intends to implement the provisions of the GHG tailoring rule if adequate resources are available but must change its existing rules to implement the thresholds in the federal rule. The definitions of "regulated NSR pollutant" in DEQ's existing permitting rules for the PSD program (OAC 252:100-8-31) and "regulated air pollutant" for the Part 70 (title V) program (OAC 252:100-8-2) could support an interpretation that DEQ has the authority to issue both PSD and title V permits to GHG sources on January 2, 2011. However, since DEQ must amend its rules to add the permitting thresholds in the federal rule and state rulemaking procedures mandate public review and transparency of all rulemaking, DEQ plans to initiate steps to adopt permanent rules to implement the provisions of the GHG tailoring rule. It will not be possible to have the necessary rule changes in place by January 2, 2011. The earliest date that DEQ will be able to have permanent rules in place will be July 2011. If the rulemaking process results in any controversy or unexpected problems regarding these modifications, the effective date for these changes may be delayed until July 2012.

If you have questions, please contact Eddie Terrill, Director, Air Quality Division Department of Environmental Quality at (405) 702-4154.

Sincerely,

Steven A. Thompson
Executive Director

BOBBY JINDAL
GOVERNOR

PEGGY M. HATCH
SECRETARY

State of Louisiana

DEPARTMENT OF ENVIRONMENTAL QUALITY

ENVIRONMENTAL SERVICES

6RA...Copy....6EN.....
6DRA.Copy...6WQ.....
6MD.....,...6SF.....
6OEJ.....6RC.....
6PD.Original.6XA..Copy.(2).
(Controlled)

August 2, 2010

Dr. Alfredo Armendariz
Regional Administrator
U.S. EPA Region 6 (6-RA)
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

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

Dear Dr. Armendariz:

As you are aware, EPA's "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" (Tailoring Rule) was promulgated on June 3, 2010.[1] The final rule requests that states submit certain information to their EPA Regional Administrator by August 2, 2010. This letter constitutes the Louisiana Department of Environmental Quality's (LDEQ's) response.

Notwithstanding this correspondence, LDEQ reiterates its position that global climate change is an issue that is best addressed through comprehensive federal legislation, rather than unilateral agency regulation, and emphasizes that it does not support the manner through which EPA has chosen to regulate greenhouse gases under the Clean Air Act.

Despite a clear need to proceed with the utmost caution in this important area, EPA has recently promulgated several actions with aggressive implementation schedules, including the Tailoring Rule. This rule will require certain PSD permits to address GHG emissions in as little as five months, in spite of the fact that EPA has released no guidance on BACT determinations. In many cases, there will simply be no add-on control technology that is both available and technically feasible for control of GHG emissions. Further, BACT determinations for CO_2, particularly those involving coal and other solid fuels, may invite complex questions related to "redefining the source" and EPA's longstanding position that BACT is not a valid means to redefine the basic design of a source or change the fundamental scope of a project when considering available control alternatives.

LDEQ understands that EPA has committed to "actively developing BACT policy guidance for GHGs that will undergo public notice and comment, and will culminate in training courses for state, local, and tribal permitting authorities," including "technical guidance and database tools" that "will be issued by the end of 2010."[2] Having guidance available by the end of 2010 does not provide a reasonable period for implementation by the effective date of January 2, 2011. This scenario results in an implementation schedule that is virtually unachievable, thereby delaying permitting decisions. LDEQ urges EPA to reconsider the implementation schedule to one more achievable by both permitting agencies and regulated entities. While the state of Louisiana can use "fast-track" rulemaking to adopt many of the

[1] 75 FR 31514
[2] 75 FR 31526, 31589

necessary regulations, factors beyond the control of the LDEQ, such as public comment, may prevent Louisiana from meeting the schedule provided in the Tailoring Rule.

EPA Request:

> [S]tates should explain whether they will apply the meaning of the term "subject to regulation" established by EPA in this action in implementing both their PSD and part 70 title V permitting programs, and if so, whether the state intends to do so without undertaking a regulatory or legislative process. If a state must revise its statutes or regulations to implement this rule, we ask that it provide an estimate of the time to adopt final rules in its letter to the Regional Administrator.[3]

LDEQ Response:

At this juncture, LDEQ intends to apply the meaning of the term "subject to regulation" consistent with EPA's final action entitled "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs" (Johnson Memo Reconsideration).[4] LDEQ does not envision the need to undertake rulemaking to do so, nor is legislative approval or statutory revisions required.

LDEQ is aware, however, that the Johnson Memo Reconsideration is currently being litigated. Should the D.C. Circuit Court of Appeals or United States Supreme Court find that EPA's interpretation is inconsistent with federal law or otherwise unnecessary, LDEQ reserves the right to interpret "subject to regulation" consistent with the court's opinion. Implementing a court's opinion which differs from EPA's interpretation should not subject permitted facilities to anti-backsliding provisions.

Louisiana, like most states, must revise its air quality regulations if it is to adopt the GHG thresholds set forth in the Tailoring Rule. To meet the mandates of the Tailoring Rule, LDEQ will initiate at least two rulemakings.

LDEQ will be able to revise the following regulations via fast-track rulemaking, an accelerated version of standard rulemaking:

- LAC 33:III.502.A (new definitions for "Carbon Dioxide Equivalent" and "Greenhouse Gas")
- LAC 33:III.502.A.*Major Source*
- LAC 33:III.509.B.*Major Stationary Source*
- LAC 33:III.509.B.*Significant*

Fast-track processing may be employed where:

1. the proposed regulation is identical, in terms of meaning and content, to a federal law or regulation applicable in Louisiana; and
2. there is no fiscal or economic impact resulting from the provisions in the proposed regulation.

According to the Tailoring Rule:

> This final rulemaking does not impose economic burdens or costs on any sources or permitting authorities, but should be viewed as regulatory relief for

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[3] 75 FR 31525

[4] 75 FR 17004, April 2, 2010

> smaller GHG emission sources and for permitting authorities. Although sources above the thresholds set in this rule will become subject to permitting on January 2, 2011, those impacts are not attributable to the present rulemaking. Rather they are mandated by the CAA and existing regulations and automatically take effect independent of this action.[5]

If this fast-track rule is proposed on October 20, 2010, it could be final as soon as December 20, 2010. However, although this proposed rule would be identical to a federal rule, public comments could delay its effective date.

In addition, as a consequence of GHGs becoming a "regulated" pollutant, revisions to other state air quality regulations will be necessary. This is because thresholds for small source exemptions, insignificant activities, etc. are set in terms of "regulated pollutants" or "regulated air pollutants." The provisions requiring modification include:

- LAC 33:III.211.B.13.e
- LAC 33:III.223, Table 1, Note 15
- LAC 33:III.501.B.2.d.i
- LAC 33:III.501.B.4.a.i
- LAC 33:III.501.B.5
- LAC 33:III.503.B.2
- LAC 33:III.523.A.1.b
- LAC 33:III.537.A, General Condition XVII
- LAC 33:III.2132.A.*Small Business Stationary Source*.4 & 5

Further, this second rulemaking would include the repeal of Item C.3 of LDEQ's Insignificant Activity List under LAC 33:III.501.B.5, which states that emissions of CO_2 "need not be included in a permit application." However, as currently written, this provision should not compromise LDEQ's ability to regulate GHGs. LAC 33:III.501.B.5 specifies that "any activity for which a federal applicable requirement applies is not insignificant," even if it meets the criteria prescribed in the Insignificant Activity List.

Even if initiated this year, this rulemaking will not be final before January 2, 2011.

EPA Request:

> We ask any state or local permitting agency that does not believe its existing SIP provides authority to issue PSD permits to GHG sources to notify the EPA Regional Administrator by letter, and to do so no later than August 2, 2010. This letter should indicate whether the state intends to undertake rulemaking to revise its rules to apply PSD to the GHG sources that will be covered under the applicability thresholds in this rulemaking, or alternatively, whether the state believes it has adequate authority through other means to issue federally-enforceable PSD permits to GHG sources consistent with this final rule.[6]

LDEQ Response:

Louisiana's PSD program, LAC 33:III.509, defines "regulated NSR pollutant" as follows:

> *Regulated NSR Pollutant—*

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[5] 75 FR 31599

[6] 75 FR 31582 - 31583

a. any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the administrative authority (e.g., volatile organic compounds and nitrogen oxides are precursors for ozone);

b. any pollutant that is subject to any standard promulgated under Section 111 of the Clean Air Act;

c. any Class I or II substance subject to a standard promulgated under or established by Title VI of the Clean Air Act; or

d. **any pollutant that otherwise is subject to regulation under the Clean Air Act**; except that any or all hazardous air pollutants either listed in Section 112 of the Clean Air Act or added to the list in accordance with Section 112(b)(2) of the Clean Air Act, which have not been delisted in accordance with Section 112(b)(3) of the Clean Air Act, are not *regulated NSR pollutants* unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under Section 108 of the Clean Air Act.

(emphasis added)

With respect to "any pollutant that otherwise is subject to regulation under the Clean Air Act," Louisiana's definition mirrors those found at 40 CFR 51.166(b)(49) and 40 CFR 52.21(b)(50).

LDEQ's current version of LAC 33:III.509, however, has not been SIP-approved. Because EPA has not acted on LDEQ's December 2005 SIP submittal, the February 20, 1995, version of LAC 33:III.509 remains the federally-approved rule.[7]

The provisions of the 1995 regulation apply to "any major stationary source and any major modification with respect to each pollutant subject to regulation under this Section." "Subject to regulation" is not further defined or otherwise limited by the provisions of the rule. Thus, it does not appear that LDEQ's SIP prohibits issuance of PSD permits to new major stationary sources or major modifications with significant GHG emissions.

EPA Request:

> [W]e ask each state to submit a letter to the appropriate EPA Regional Administrator no later than August 2, 2010 detailing the state's plan for permitting of GHG sources under the state's part 70 program. In that letter, states should explain whether they will adopt an interpretation of the terms "major source" or any of its component terms—"a major stationary source," "any air pollutant," or "subject to regulation," or the numerical thresholds—that is consistent with EPA's regulatory interpretation of these terms as codified at 40 CFR 70.2, and whether the state intends to adopt the interpretation without undertaking a regulatory or legislative process.
>
> If a state must revise its title V regulations or statutes to implement the interpretation, we ask that it provides an estimate of the time to adopt final rules or statutes in its letter to the Regional Administrator. If a state chooses not to (or cannot) adopt our interpretation, the letter should address whether the state has alternative authority to

[7] 61 FR 53639, October 15, 1996. See also 40 CFR 52.970(c) and 40 CFR 52.999(c)(69).

> implement the GHG tailoring approach or some other approach that is at least as stringent, but which also addresses the expected shortfalls in personnel and funding and delays in permitting that would exist if the state carried out permitting under part 70 program thresholds lower than those adopted by EPA in this final rule.[8]

LDEQ Response:

As noted previously, LDEQ anticipates having to revise its air quality regulations to adopt the GHG thresholds set forth in the Tailoring Rule by modifying the definitions of "major source" in LAC 33:III.502 and "major stationary source" and "significant" in LAC 33:III.509, at least until such time as all litigation on this matter becomes final. With respect to numerical thresholds, LDEQ does not believe it can interpret these terms consistent with their definition at 40 CFR 70.2 absent the rulemaking process. "Subject to regulation" is not defined within Louisiana's air quality regulations.

Also as noted above, where necessary changes to state regulations parallel the Tailoring Rule, LDEQ believes rulemaking can be accomplished prior to January 2, 2011, provided adverse comments are not received.

EPA Request:

> In our proposed rule, we also noted that a handful of part 70 operating permit programs may include provisions that would not require operating permits for any source of GHG emissions because, for example, the programs may apply only to pollutants specifically identified in the program provisions, and the provisions do not specifically identify GHGs. In these cases, states may be unable to interpret their regulatory provisions to interpret the term "any pollutant" to include pollutants "subject to regulation."
>
> Accordingly, we ask any state or local permitting agency that does not believe its existing part 70 regulations convey authority to issue title V permits to GHG sources consistent with the final rule to notify the EPA Regional Administrator by letter as to whether the state intends to undertake rulemaking to revise its rules consistent with these applicability thresholds.[9]

LDEQ Response:

R.S. 30:2053(1) and LAC 33:III.111 define "air contaminants" very broadly as "particulate matter, dust, fumes, gas, mist, smoke, or vapor, or any combination thereof produced by process other than natural." CO_2, when generated by any process other than natural, may be considered an air contaminant. LAC 33:III.Chapter 5, which establishes LDEQ's permit procedures, applies to owners and operators of sources that emit or have the potential to emit any air contaminant in the state of Louisiana.

LAC 33:III.502 defines "major source," in relevant part, as follows:

> *Major Source*—for the purposes of determining the applicability of 40 CFR Part 70 or of LAC 33:III.507, any stationary source or any group of stationary sources that are located on one or more contiguous or adjacent properties, that are under common

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[8] 75 FR 31584
[9] 75 FR 31584

control of the same person (or persons under common control), and that are described in Subparagraph a, b, or c of this definition:

* * *

b. **any stationary source that directly emits or has the potential to emit 100 tpy or more of any regulated air pollutant** excluding any air pollutant regulated solely under Section 112(r) of the Clean Air Act.

(emphasis added)

In sum, neither the Louisiana Air Control Law nor regulations promulgated thereunder specifically prohibit LDEQ from issuing Title V permits to major sources of GHG emissions. However, as noted above, several regulations will have to be revised to include GHGs within the permitting process and to revise PSD threshold limits.

The LDEQ's actions as outlined in this response are intended to ensure Louisiana is on a level playing field nationally with respect to permitting of GHG emissions while this matter is being litigated. While EPA maintains that state Title V permit programs must have fees adequate to administer the program, it is ill-considered at best for EPA to blithely assume states can simply adopt new fees to cover greenhouse gases by January 2, 2011. In fact, the LDEQ is precluded by law from fast-tracking the promulgation of regulations that increase or create new fees.[10] EPA also offers no additional funding to states through grants to address PSD permit actions triggered by this rule. This creates yet another unfunded mandate for states in these tough economic times.

Our Title V and PSD permitting programs have made great strides in the last few years, reducing backlogs and permit issuance timelines; however, this progress is now in jeopardy. The aggressive implementation of this rule, and other recent rules and policy changes, coupled with the immediate implementation of new standards such as the 1-hour NO_2 and SO_2 NAAQS[11] and accelerated implementation of the $PM_{2.5}$ NAAQS, would have a crippling effect on the permitting process. While EPA's zeal is commendable, the real world aspects of such impractical implementation schedules must be considered. It is irresponsible for EPA to make rules effective with the promise that guidance will be developed, in some cases several months ***after*** the effective date of the rule. This disturbing trend leads to a lack of predictability that makes meeting state and federal permitting deadlines[12] difficult, if not impossible, to accomplish.

The theory that the primary cause of climate change is anthropogenic in nature is still subject to much debate. Accordingly, we encourage EPA to consider all aspects of the climate change issue when making decisions that impact the states, and not to simply accept the position most

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[10] La. R.S. 49:953(F)(4)

[11] EPA's position is that the owner or operator of any major stationary source or major modification obtaining a final PSD permit on or after the effective date of a new NAAQS will be required, as a prerequisite for the PSD permit, to demonstrate that the emissions increases from the new or modified source will not cause or contribute to a violation of that new NAAQS. See EPA's memo dated April 1, 2010, entitled "Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards."

[12] For example, LDEQ's 2009-2010 Fiscal Year Performance Partnership Grant (PPG) with EPA Region VI states that LDEQ shall "issue 78% of major NSR permits within one year of receiving a complete permit application." Also, La. R.S. 30:2022(B)(2) and LAC 33:I.1505 generally require a final decision within 300 processing days from the submission date of an application for a new facility or substantial (i.e., major) permit modification.

currently popular. I leave you with quotes from Administrator Jackson's, Opening Memo to EPA Employees dated January 23, 2009, which stated:

> When Congress has been explicit, EPA cannot misinterpret or ignore the language Congress has used." ... The laws that Congress has written and directed EPA to implement leave room for policy judgments. However, policy decisions should not be disguised as scientific findings. I pledge that I will not compromise the integrity of EPA's experts in order to advance a preference for a particular regulatory outcome.

If you have any questions about this submittal, please contact Cheryl Sonnier Nolan, Assistant Secretary of the Office of Environmental Services, at (225) 219-3180.

Sincerely,

Peggy M. Hatch
Secretary

PMH:CSN

NCDENR
North Carolina Department of Environment and Natural Resources
Division of Air Quality

Beverly Eaves Perdue
Governor

Sheila C. Holman
Director

Dee Freeman
Secretary

August 2, 2010

Stanley A. Meiburg,
Acting Regional Administrator
US EPA, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303

Dear Mr. Meiburg:

In the preamble to the June 3, 2010 Greenhouse Gas Tailoring Rule, USEPA requested that each state submit a letter informing EPA of its plans for implementation of the June 3, 2010 rule. North Carolina operates an approved New Source Review (NSR) permit program and a title V permit program under an approved title V implementation plan.

North Carolina's current Prevention of Significant Deterioration (PSD) rule, 15A NCAC 02D .0530, incorporates many of the provisions of the federal PSD program as of a specific date of the Federal Guideline rules. The North Carolina rules adopt by reference the 2007 definition of the term "regulated NSR pollutant." See 40 CFR 51.166(b)(4). As a result, the North Carolina rule does not automatically incorporate the recent greenhouse gas tailoring provisions. North Carolina interprets its PSD regulation to provide that individual greenhouse gases will become regulated NSR pollutants when they are subject to actual control. Absent North Carolina revising its rule consistent with the Federal Tailoring rule, the major source threshold will remain at 100/250 tpy and the significant emission increase for individual greenhouse gases will be zero for existing major sources.

With respect to Title V provisions, North Carolina's Title V permitting rules incorporate by reference the definition of major source as contained at 40 CFR 70.2. Unlike the NSR regulation discussed above, this CFR reference automatically includes any later amendments. North Carolina would have to review its regulations, including Title V permit fees, to ensure sufficient resources to implement the Title V permit program following the inclusion of greenhouse gases.

To address this situation, North Carolina has begun its rulemaking process to incorporate by reference the federal greenhouse gas tailoring provisions in a new PSD rule specific to greenhouse gases, 15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases. The schedule for completion of this rulemaking is as follows.

1641 Mail Service Center, Raleigh, North Carolina 27699-1641
2728 Capital Blvd., Raleigh, NC 27604
Phone: 919-733-3340 / FAX 919-715-7175 / Internet: www.ncair.org

- 8/16/2010 Notice appears in the North Carolina Register
- 8/31/2010 Public Hearing
- 10/15/2010 Close of Comment period
- 11/18/2010 Environmental Management Commission action
- 12/16/2010 Rules Review Commission action
- 1/2/2011 Earliest Rule Effective date

As reflected above under the current rulemaking schedule, the earliest the state greenhouse gas tailoring rule can become effective is January 2, 2011. If letters of objection are received per the State Administrative Procedures Act, the tailoring rule will be forwarded to the next session of the legislature which begins in January 2011. If the legislature chooses to introduce a bill regarding the rule, the earliest the rule would become effective would be the end of the legislative session, which could be summer 2011, unless a bill is ratified that specifies another effective date.

If you have any questions regarding this matter, please contact me or Joelle Burleson at (919) 733-1474.

Sincerely,

Sheila C. Holman

Sheila C. Holman

STATE OF MISSISSIPPI
HALEY BARBOUR
GOVERNOR
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
TRUDY D. FISHER, EXECUTIVE DIRECTOR

July 28, 2010

Mr. A. Stanley Meiburg
Acting Regional Administrator
United States Environmental
Protection Agency – Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303-8909

Re: Implementation of the EPA Tailoring Rule

Dear Mr. Meiburg:

In response to the EPA's request for information from the states in implementing the greenhouse gas (GHG) tailoring rule, Mississippi Department of Environmental Quality (MDEQ) staff has analyzed state law and current Mississippi Commission on Environmental Quality (Commission) regulations to determine whether the state can implement the GHG tailoring rule. The state can implement the GHG tailoring rule.

Mississippi's law provides the Commission with statutory authority under Miss. Code Ann. §§ 49-17-1, *et seq.* to administer and regulate federal pollution control legislation and programs, including the Title V and prevention of significant deterioration (PSD) permitting programs. This authority gives the Commission the ability to implement the EPA's PSD and Title V GHG Tailoring Rule as well. The current regulations for the state PSD program (APC-S-5) are adopted by reference up to the June 15, 2007 Code of Federal Regulations. The Title V state regulations (APC-S-6) are not adopted by reference but are substantially similar, with the exception of the definitions promulgated by the new rule. These regulations (APC-S-5 and APC-S-6) must be amended in accordance with Miss. Code Ann. §§ 49-17-25 and 25-43-3.101, *et seq.* in order for MDEQ to be able to implement the GHG tailoring rule.

The regulatory amendment process to amend the regulations concerning the PSD and Title V programs should be completed by January 2, 2011, pending public interest and the potential controversy related to the EPA's PSD and Title V GHG Tailoring Rule.

Sincerely,

Trudy D. Fisher
Executive Director

TDF:jar

Fw: Docket No. EPA-HQ-OAR-2010-0107; comment from Pinal County, Arizona

Andrew Chew to: Laura Yannayon, Gerardo Rios 10/04/2010 05:47 PM
Cc: Shirley Rivera

Today, Don Gabrielson stated to me that in lieu of a letter in hard copy, this e-mail would serve as his agency's response to the proposed rulemaking for the SIP Call (75 FR 53892, 9/2/10).

- Andrew

Andrew Chew, P.E.
T: (415) 947-4197 | F: (415) 947-3579 | chew.andrew@epa.gov
U.S. EPA, Region 9, Air Permits Office (AIR-3) | 75 Hawthorne St., San Francisco, CA 94105

----- Forwarded by Andrew Chew/R9/USEPA/US on 10/04/2010 05:35 PM -----

From:	"Don Gabrielson" <Don.Gabrielson@pinalcountyaz.gov>
To:	Group A-AND-R-DOCKET@EPA
Cc:	"Eric Massey" <Massey.Eric@azdeq.gov>, Jared Blumenfeld/R9/USEPA/US@EPA, Andrew Chew/R9/USEPA/US@EPA, Colleen McKaughan/R9/USEPA/US@EPA
Date:	10/04/2010 04:04 PM
Subject:	Docket No. EPA-HQ-OAR-2010-0107; comment from Pinal County, Arizona

United States Environmental Protection Agency
c/o a-and-r-docket@apa.gov

Re: Docket ID No. EPA-HQ-OAR-2010-0107

To whom it may concern:

This responds to the EPA's proposed rule (75 FR 53892 [9/2/10]) as well as communication from EPA Region IX staff.

The EPA has identified Pinal County as a having a SIP-approved PSD permitting program that does not mandate application of PSD-permitting limitations to the newly defined category of greenhouse gas (GHG) pollutants.

Pinal's rules certainly do not include the EPA's new definition of GHG.

Whatever definitions prevail under our SIP-approved rules, the EPA's revision of its own definitions does not ipso facto revise the substance and meaning of Pinal County's air quality rules. An Arizona county is a creature of statute, and has only that authority conferred by the legislature or necessarily implied therefrom. Bone v. Bowen, 20 Ariz. 592 (1919). Long-standing legal precedent in Arizona precludes delegation of the legislative prerogative. Tillotson v. Frohmiller, 24 Ariz. 294, 271 P. 867 (1928).

Accordingly, Pinal County's prevailing PSD-permitting rules do not regulate GHG emissions,

nor do the EPA's recent regulatory actions revise those rules beyond their scope as adopted.

This response addresses two issues, which are framed in numbered quotes taken from an e-mail inquiry from EPA Region IX. Pinal County's responses are embedded below the EPA's questions.

#1) Will Pinal County AQCD respond to the FIP rulemaking and ask the PSD program to be FIP'ed (i.e., 40 CFR 52.21) immediately , rather than wait 12 months? This will prevent a construction ban from going into effect if any PSD applications are received.

- In keeping with the focus of Pinal County government generally, our principal focus is on serving the public. A construction ban sounds like the antithesis of public service. To the extent a prompt FIP will enable the avoidance of a construction ban, Pinal County Air Quality sees no choice but to ask for such a FIP.

#2) Assuming it is FIP'ed right away only for GHG, will PCAQCD seek a delegation agreement for GHG such that Pinal can continue to issue the entire PSD permit for a project; or because of AZ state issues regarding GHG, will PCAQCD rely on EPA to issue a separate PSD permit for GHG for a new PSD project?

- Again in keeping with the customer service focus, Pinal County Air Quality is interested in taking whatever action it can to avoid obligating anyone to engage in duplicative permitting from both Pinal County and the EPA. Since two Arizona counties, namely Maricopa and Pima County, have previously accepted PSD-related delegations from the EPA, clear precedent exists for a PSD-related delegation in favor of Pinal County. Therefore, please accept this as a request for a delegation whenever such action becomes timely.

- Pinal County Air Quality understands that a PSD delegation from the EPA involves a couple of administrative elements that differ from those under our SIP-approved program, most notably the ESA consultation requirement and the prospect that at least the delegated portions of a permit could be appealed to the EAB. To the extent the alternative would be requiring sources to obtain dual permits from Pinal and the EPA, we see no choice but to accede to whatever additional administrative requirements would attach to those elements of a permit issued under such a delegation.

- Lastly, Pinal County Air Quality also plans to ask the Board of Supervisors to amend our rules to address several practical issues. First, we will propose addition of a new definition of "pollutants regulated under the Act" to include coverage for GHG. (Currently, that actual phrase is not used anywhere in our rules.) Second, we will request revision of our synthetic minor rule to allow for federally enforceable limitations with respect to the newly defined "pollutants regulated under the Act." To the extent that rule allows sources to request federally enforceable limitations, which are reviewed by the EPA, that rule would actually allow sources to voluntarily request both synthetic minor as well as PSD (i.e. BACT) limitations in a permit. Third, we will request revision of our fee rule to clarify that pollutants regulated ONLY by

virtue of regulation under the new definition of "regulated under the Act" will not have any emission-based fee consequence. Those changes will all be processed as proposed SIP amendments, and we would appreciate the EPA's prompt processing of those proposed SIP revisions when they reach your agency.

If you have any questions, you may reach me at 520-866-6915, or Barbara Cenalmor at 520-866-6860.

Sincerely,

Don Gabrielson
Director
Pinal County Air Quality

ARIZONA DEPARTMENT
OF
ENVIRONMENTAL QUALITY

1110 West Washington Street • Phoenix, Arizona 85007
(602) 771-2300 • www.azdeq.gov

Janice K. Brewer
Governor

Benjamin H. Grumbles
Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

October 4, 2010

Attention Docket ID No. EPA-HQ-OAR-2010-0107 U.S. Environmental Protection Agency,
EPA West (Air Docket) 1200 Pennsylvania Avenue, NW.
Mail code: 6102T
Washington, DC 20460

Re: ADEQ Comments on Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call

Dear Sir or Madam:

The Arizona Department of Environmental Quality (ADEQ) submits the following comments on the proposed "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration [PSD] Program to Sources of Greenhouse Gas [GHG] Emissions: Finding of Substantial Inadequacy and SIP Call" published in the Federal Register on September 2, 2010, at 75 Fed. Reg. 53892.

As explained in ADEQ's August 27, 2010, letter to Assistant Administrator Gina McCarthy and Regional Administrator Jared Blumenfeld, a copy of which is attached, ADEQ strongly disagrees with the premise underlying EPA's proposed SIP call: that a state PSD program which does not apply to GHGs is somehow inadequate under the Clean Air Act. ADEQ believes that this state's PSD program is and will continue to be adequate to meet all Clean Air Act requirements authorized by Congress.

In the proposed SIP call, EPA asserts that a construction ban will apply to any state that lacks a state or federal PSD program covering GHG emissions on January 2, 2011, when the federal standards for GHG emissions from new passenger vehicles take effect. 75 Fed. Reg. at 53895. Since ADEQ does not agree that applying PSD to GHGs is required, the Department similarly disagrees with this assertion regarding construction bans. Nevertheless, federal enforcement actions or citizen suits based on EPA's attempted construction ban would be extremely disruptive to the state's economic recovery, even if, as ADEQ expects, such suits were ultimately determined to be without merit. The State of Arizona is putting a priority on jobs creation. The Department therefore must take EPA's threat of a construction ban and its potential impact on jobs seriously, regardless of its future sustainability in Congress and the courts.

EPA has given states, such as Arizona, that do not possess authority to apply PSD to GHG emissions two alternatives for avoiding a construction ban. The state may attempt to promulgate and obtain EPA approval of a SIP revision incorporating GHG requirements into the state PSD program by January 2, 2011, or accept the imposition of a federal implementation plan (FIP) imposing GHG requirements on GHG sources. In order to avail itself of the second alternative, the state must knowingly agree to an unachievable SIP revision submittal deadline.

This "choice" between EPA's two alternatives leaves states such as Arizona in an untenable situation. Obtaining EPA approval of even a simple SIP revision in four or five months is extremely unlikely. ADEQ is currently awaiting SIP approval on several SIP submittals, some dating as far back as 1994. Accomplishing this for a SIP revision implementing the extraordinarily complex PSD program is a practical impossibility given Arizona's requirements to make such revisions using a public process. In addition, as discussed in our August 27 letter, "the lawsuits that have been filed challenging the PSD and Title V GHG Rule make it difficult to justify expending any time on adopting the Rule."

ADEQ therefore has no choice but to accept the imposition of a FIP implementing PSD requirements for GHGs in Arizona. Consistent with EPA's directive at 75 Fed. Reg, 53892, 53901, ADEQ "expressly advises that it would not object to a shorter period - as short as 3 weeks from the date of signature of the final rule -" as the deadline for submission of the SIP revision demanded by the proposed SIP call. ADEQ does so without waiving any of its legal rights to challenge any element of the so-called Tailoring Rule or the associated rulemakings, including the SIP call and the threatened construction ban.

Sincerely,

Benjamin H. Grumbles
Director

cc: Ms. Gina McCarthy, Assistant Administrator, U.S. EPA

Mr. Jared Blumenfeld, Regional Administrator, U.S. EPA Region 9

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

Mr. Gerardo Rios, Chief, Permits Office
U.S. EPA Region 9

ARIZONA DEPARTMENT
OF
ENVIRONMENTAL QUALITY

1110 West Washington Street • Phoenix, Arizona 85007
(602) 771-2300 • www.azdeq.gov

Janice K. Brewer
Governor

Benjamin H. Grumbles
Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
VIA E-MAIL

August 27, 2010

Gina McCarthy, Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, DC 20760

Jared Blumenfeld
Regional Administrator
U.S. EPA, Region IX
75 Hawthorne Street, Air-1
San Francisco, CA 94105

Dear Administrator McCarthy and Regional Administrator Blumenfeld:

The Arizona Department of Environmental Quality (ADEQ) submits the following in response to the final Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Rule (75 Fed. Reg. 31514) and the August 12, 2010 proposed rule stating EPA's belief that Arizona's PSD program is substantially inadequate to meet Clean Air Act (CAA) requirements because it does not apply requirements to GHG-emitting sources.

Although Arizona's PSD program does not apply requirements to GHG-emitting sources, it still meets CAA requirements. EPA has taken an untenable position with regards to "tailoring" limits expressly set in the CAA through its own rulemaking. ADEQ does not agree that EPA's position has resulted in Arizona's program becoming inadequate. The regulation of GHGs should not occur through a convoluted rulemaking process initiated by EPA. The Agency has stated in its response to comments on the PSD and Title V GHG Rule that "comprehensive climate change legislation is a more effective way to address GHGs than through the [Clean Air Act] …", yet EPA has continued moving forward with the rule. Changes to limits set in the Clean Air Act require action by Congress, not administrative "tailoring" regulations to resolve "absurd results" created by a decision to regulate GHGs from stationary sources.

To make matters worse, EPA has now put Arizona, and other permitting authorities, in a difficult position by giving us very little time to evaluate and incorporate the "tailoring" regulations into state law. Like most states, Arizona administers the PSD program under rules approved by EPA as part of a state implementation plan (SIP). ADEQ does not have the authority to regulate GHGs under the PSD or Title V permitting programs. As a result, Arizona law would have to be amended before ADEQ could regulate GHGs under its PSD or Title V programs. Completing the rulemaking and SIP approval process in time

to avoid EPA's January 2011 construction ban deadline would be nearly impossible. Furthermore, the lawsuits that have been filed challenging the PSD and Title V GHG Rule make it difficult to justify expending any time on adopting the Rule.

Arizona is also frustrated by EPA's failure to exempt biomass combustion facilities from the new GHG permitting requirements. Regardless of EPA's opinion about the carbon-neutrality of biomass combustion facilities, these facilities do displace emissions from traditional fossil-fuel combustion facilities by burning forest slash and fallen trees that might otherwise be wasted. Arizona sees great opportunity in expanding the number of biomass combustion facilities and associated jobs within the rural areas of the State while taking advantage of the clean, renewable energy byproducts of an effective forest management program. EPA's approach under this rule and other recently proposed CAA rules create mounting disincentives for industries to consider economically viable renewable alternatives to fossil fuels Arizona is at the forefront in its efforts to promote the use of renewable energy. In January of this year, Governor Brewer issued an executive order directing Arizona agencies to assess impediments to the development and use of renewable energy. It is unfortunate that one of ADEQ's tasks will now be to challenge EPA's attempts to further regulate renewable energy sources like biomass combustion facilities.

Arizona is not in a position to expend significant resources chasing rules contrary to the State's policies on renewable energy and that may not survive legal challenge. This is particularly true as EPA insists on pursuing an unprecedented number of changes to the existing National Ambient Air Quality Standards. Instead, ADEQ plans to focus on problems we can solve using the clear authorities that exist under the CAA and provided to ADEQ by Arizona statutes and rules, and to advance Governor Brewer's "green and grow" strategy through coordination with Arizona citizens, businesses and communities.

If you have any questions, please contact me at (602) 771-2300, or Eric Massey, Air Quality Division Director, at (602) 771-2308.

Sincerely,

Benjamin H. Grumbles
Director

Cc: Deborah Jordan, U.S. EPA Region IX