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U.S. Environmental Protection Agency
EPA Docket Center, EPA West (Air Docket)
Attention Docket ID No. EPA-HQ-OAR-2009-0517
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

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

Docket ID EPA-HQ-OAR-2009-0517

Dear Ladies and Gentlemen:

The Northwest Mining Association (NWMA) appreciates this opportunity to comment on the U.S. Environmental Protection Agency's (EPA) Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule), 74 Fed. Reg. 55,292 (October 27, 2009).

Introduction

NWMA is a 114 year old non-profit mining industry association based in Spokane, Washington with 1,850 members residing in 40 states. Our membership represents every facet of the mining industry, including geology, exploration, mining, engineering, equipment manufacturing, technical services, legal services, and sales of equipment and supplies.

NWMA believes that a legislative solution is far preferable to Clean Air Act (CAA) regulation and we are prepared to continue to work with Congress, EPA and other policy-makers and stakeholders on such an approach. We therefore urge EPA to defer further action on CAA regulation until Congress has an opportunity to act. If EPA, however, decides to press forward, we urge the agency to carefully consider our comments and those of other members of the business community and the public at large. A wrong step by EPA in an area with such overarching implications for every sector of the economy could seriously undermine efforts by the country to restore job creation and economic growth.

Summary

EPA intends for the proposed Tailoring Rule to adjust the CAA to increase the statutory thresholds of the Prevention of Significant Deterioration (PSD) and Title V permit programs to address greenhouse gas (GHG) emissions from stationary sources. EPA has identified one of the principal complications that could arise for the agency and regulated entities once it promulgates GHG regulations under any program of the CAA: the potential for other sectors of the economy

to face immediate and burdensome regulations related to obtaining permits for new construction and major modifications to stationary sources of GHG emissions.

EPA has proposed GHG emission standards for light-duty vehicles (the motor vehicle rule) which, if finalized, would be the first regulatory program for GHG emissions under the CAA. The agency assumes that the motor vehicle rule would trigger PSD and Title V requirements by making GHGs “subject to regulation” under the Act. Indeed, EPA has accurately characterized in the proposed Tailoring Rule the overwhelming costs and burdens that would befall state, local and other permitting authorities, as well as the tens of thousands (and millions, in the case Title V) of sources, if regulations under these programs are indeed triggered. This includes the requirement under the PSD program that major sources of GHG emissions contemplating new construction or major modifications to existing sources install the best available control technology (BACT) to limit such emissions. This scenario would bring the permitting process to a virtual standstill.

EPA has proposed to rewrite the CAA to accommodate the perceptible differences between traditional pollutants and GHG emissions. Specifically, the proposed Tailoring Rule would revise the PSD and Title V programs by: 1) increasing statutory thresholds for major sources from 100 or 250 tons per year (tpy) to 25,000 tpy of carbon dioxide (CO₂) equivalent (CO₂e); 2) adjusting the PSD significance level for major modifications of existing sources to between 10,000 and 25,000 tpy; and 3) raising the statutory threshold of the Title V program from 100 tpy to 25,000 tpy.

Although EPA seems to understand that myriad consequences may result from the agency’s current policy course related to GHG regulation, the agency has grossly neglected to fully analyze the economic and regulatory implications of its actions. Further, EPA has failed to consider all available regulatory mechanisms to avoid the impending catastrophe. NWMA’s membership will be significantly impacted by this proposal, and the other proposals that constitute EPA’s effort towards regulating GHG emissions under the CAA. We have emphasized to EPA that the CAA was not built to accommodate regulation of CO₂ and other GHGs, and that attempting to do so prior to effective Congressional action will negatively impact virtually every sector of the American economy while delivering negligible environmental benefit.

For the following reasons, NWMA urges EPA to reconsider its current policy course pertaining to regulating GHG emissions, fully analyze the economic impacts and consequences that such action will trigger, and use its authority to ensure that the United States is taking reasonable and achievable steps towards addressing issues related to climate change.

EPA Should Not Use the Existing CAA to Regulate Stationary Sources of GHG Emissions

In previous comments to EPA regarding proposals relating to GHG regulation, NWMA has explained why the CAA is completely ill-suited for regulating CO₂ and other GHG emissions from stationary sources. The CAA also is ill-equipped to address the important and highly complicated policy decisions necessary to address climate change. The task of controlling GHG emissions is directly tied to overall U.S. energy and economic policy because CO₂ emissions are

the inevitable result of the combustion of fossil fuels and because fossil fuels represent 70 percent of the nation's energy usage.

The fundamental CAA programs are rigid and antiquated; they were adopted in 1970 and 1977 to address primarily direct effects of local and regional air pollution. They are not designed to address globally-circulating GHGs, where international emissions significantly exceed U.S. emissions and the where the emissions of developing countries are on an upward trajectory and will continue so regardless of whatever CAA regulation EPA may implement. EPA's own analyses of climate change legislation have previously highlighted how little impact such legislation would have on atmospheric GHG concentrations given international emissions. The same result will be obtained under CAA regulation – indeed, the result will be worse under the CAA because Congressional legislation, if designed correctly, can integrate and time U.S. efforts with those of the rest of the international community, whereas CAA regulation is not linked to international action.

The business community's repeated caution to EPA that GHG regulation under one program of the CAA would produce unintended consequences under other programs is now imminently upon us. Despite EPA's stated purpose of the proposed Tailoring Rule as protecting small sources of GHG emissions from the impacts of regulation, in fact the proposal is really an attempted solution to a problem the agency itself created by failing to heed projections about those consequences. Undoubtedly, EPA appears intent on regulating GHG emissions from stationary sources. However, by attempting to do so indirectly through PSD requirements triggered by finalizing the motor vehicle rule, EPA will in effect preclude permitting authorities and regulated entities alike from the needed time to adequately analyze emissions and available controls and otherwise prepare for source specific regulation. This result further exemplifies the inappropriateness of forcing GHG regulation under the CAA.

The Proposed Rule Fails to Protect All Small Sources From GHG Regulation

EPA's suite of GHG regulatory proposals portends unprecedented and sweeping implications for every aspect of the U.S. economy. Certainly, American industry and its representatives have been imploring EPA and Congress to fully analyze potential impacts of its policy course, not only with regard to the economy as a whole, but with a mind towards how large and small sources respectively will be impacted.

The Regulatory Flexibility Act (RFA) requires agencies to prepare and make public a regulatory flexibility analysis whenever an agency is required to publish a notice of proposed rulemaking for any proposed rule. The only exception to this requirement is if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

EPA stated in the preamble to the proposal that the rule will not have a significant economic impact on a substantial number of small entities. However, this certification is legally defective for a number of reasons. First, and most importantly, despite EPA's assertions to the contrary the rule will have a significant economic impact on a substantial number of small entities. As noted and as EPA itself acknowledges, the proposed motor vehicle rule would be the first regulation of GHGs under the CAA, and as such, will immediately and directly trigger CAA requirements

under both the PSD and Title V permitting programs. Accordingly, that rule does much more than to simply regulate the manufacture of automobile engines. At some point after it becomes final, regulation of GHGs will be triggered for every stationary source in the U.S. that emits more GHGs than the threshold levels of the PSD program.

EPA plays a game of Three-Card-Monte with its (lack of) analysis of the impact of these actions on small entities. First, the agency claimed that its GHG endangerment finding would not impose impacts on small entities. Next, EPA claimed in the motor vehicle rule that an RFA analysis was unnecessary and that the proposed rule would not impact small entities because auto engine manufacturers are not small. Finally, EPA indicates in the proposed Tailoring Rule that an analysis is not required because this rulemaking actually purports to raise the applicability threshold, thus reducing the burdens to small entities. As a result of this regulatory shell game, despite the requirement that a regulatory flexibility analysis be performed somewhere, the reality is that no analysis is performed anywhere. This willful blindness by EPA to the consequences of its actions cannot be allowed to stand unchallenged.

In addition to issues the Tailoring Rule may create for the mining industry, we are aware of small municipal electric utilities, small rural electric cooperative generators, automobile service centers, and small diesel generators in rural or remote areas that are small entities, yet emit above the proposed 25,000 ton threshold. Aside from the mining and electric generating sector, NWMA has reason to believe that similar small sources will be impacted throughout the U.S. economy.

This suspicion is reinforced by comments filed to this rulemaking docket by the Small Business Administration. The agency concluded that EPA should have determined there was a significant impact on a substantial number of small entities and convened a review panel prior to proposing the rule, stating: “there are many small entities [that] will immediately become subject to Prevention of Significant Deterioration/Title V requirements and they will not be deferred by the Tailoring Rule because they have CO₂ emissions above 25,000 tons per year.” (Summary of Interagency Working Comments on Draft Rule Under EO 12866, at 3, Document No. 2009-0517-0010)

As a part of the required analysis, EPA must estimate a range of costs expected regarding installation of BACT. Economic analyses that merely examine the costs of applying for new permits are inadequate because they do not consider the most significant cost to impacted facilities: the cost of installing BACT. EPA has performed these cost analyses in the past, and is fully capable of doing so in this rulemaking.

EPA Failed to Examine the Consequences of PSD and Title V Regulation on Large Sources

As stated, EPA’s policy direction with respect to GHG regulation under the CAA poses direct and significant implications for every sector of the U.S. economy. We have explained why it is in error for EPA to have attempted to avoid conducting a full analysis of the agency’s suite of proposals on small entities. EPA’s Regulatory Impact Analysis for this rulemaking is limited to the agency’s determined benefits of allowing some smaller sources to avoid PSD and Title V impacts. Regardless of those impacts, however, EPA has neglected to make any analysis on stationary sources, large or small.

It is perplexing that EPA justifies the proposed Tailoring Rule as necessary to address the catastrophe that the agency itself anticipates will result in the PSD/Title V programs once GHGs become subject to regulation under the CAA, yet deflects any analysis of the impacts stationary sources will face by that regulation. The PSD obligations EPA is proposing for power plants and mines will be costly, yet EPA seems to have determined that such costs will not impact the nation's power supply, generation, or use. This failure is amplified by the agency moving forward with regulation, giving entities no time to prepare for compliance and offering no guidance as to what BACT may be for GHG emissions.

The CAA requires owners and operators of major stationary sources of air pollution to obtain construction permits before constructing or modifying those sources through the New Source Review (NSR) Program. As part of that program, application of PSD results in a permitting process for construction of new major stationary sources and for major modifications of existing sources that concludes with the source having to install BACT for the pollutant in question. The Technical Support Document supporting the proposed Tailoring Rule indicates that approximately 13,600 sources economy-wide emit GHG emissions in excess of the proposed 25,000 tpy CO₂e threshold. This represents nearly all of the nation's fossil fuel-fired industrial base, and 99.9 percent of the CO₂e emissions from the electric generation sector.

Once PSD obligations under the CAA are triggered for these sources, none will be able to make a physical or operational change resulting in a CO₂e emissions increase without installing BACT to reduce GHG emissions and obtaining a PSD permit. EPA has not defined or analyzed in any of its proposed GHG rulemakings, however, what may constitute BACT for various industries. If EPA triggers GHG BACT requirements by finalizing the motor vehicle rule, EPA has the responsibility to ensure that states conform to statutory BACT requirements. Therefore, EPA has the obligation to analyze the severe costs and economic consequences that will result for stationary sources.

NWMA understands that EPA has formed an advisory committee to examine BACT options and that the agency intends to issue guidance on the subject in conjunction with final regulations. EPA has failed, however, to comply with its statutory obligations to analyze the cost of potential BACT to impacted industries. Whatever BACT is determined to be, complying with those requirements will pose significant cost to industry. If EPA has already gathered information on the type of BACT controls that may be required for industrial source categories, it has not made that information available as part of this rulemaking docket.

Incredibly, EPA is in the process of finalizing several rulemakings that will result in PSD regulation of large stationary sources of GHG emissions without addressing the costs of imposing those requirements on the U.S. economy, or soliciting any comments with regard to those impacts.

The CAA requires EPA to prepare a "statement of basis and purpose" before it engages in rulemaking which must include a summary of legal and policy considerations of the rule. EPA has made a severely inadequate assessment of the impacts of its GHG regulatory proposals collectively on stationary sources, which makes its determinations here arbitrary and capricious. EPA has set in motion significant regulation of GHG emissions from stationary sources, yet rejects obligations to analyze the impacts of that regulation. EPA is required by the CAA and

tenets of administrative law to provide the public with adequate information and an opportunity to comment on regulatory proposals of this magnitude. The agency's failure to do so not only jeopardizes this rulemaking, but threatens the entire regulatory program EPA has proposed.

EPA is not Compelled to Treat GHG Emissions as Subject to PSD, and Should Reopen the Comment Period and Solicit Comments on Alternative Approaches

The proposed Tailoring Rule is based upon the assumption that PSD and Title V requirements will be triggered for stationary sources at some point after the motor vehicle rule is finalized, resulting in regulatory complications and delay. EPA has not, however, analyzed other options available to it for avoiding or delaying PSD impacts on those sources.

For instance, EPA can use its authority to withdraw or delay the motor vehicle proposal. As is described below, the regulations proposed by EPA for motor vehicles almost entirely overlap with the fuel efficiency standards proposed by the National Highway Traffic Safety Administration (NHTSA). Further, EPA is not, unlike NHTSA, under any legal deadline to finalize its rule in the timeframe EPA has identified. Therefore, EPA could withdraw the motor vehicle rule, or at least delay the effectiveness of the rule without jeopardizing any environmental benefits. Given the uncertainty surrounding the impact EPA's suite of GHG regulatory proposals will have on the PSD and Title V permitting programs and permitting authorities, EPA should have analyzed and solicited comments on these options.

Additionally, EPA failed to analyze whether CO₂ emissions should be precluded from PSD requirements even if limitations for CO₂ are established under other programs of the CAA. CO₂ is fundamentally different than other pollutants subject to regulation under the CAA. CO₂ and other GHGs are naturally occurring, emitted by countless "small sources" and globally circulated, imposing no local effect.

The PSD program is designed to protect ambient air quality. CAA section 161 clearly directs states to adopt and implement necessary measures to address regional air quality issues caused by emissions that degrade the air that we breathe. CO₂ emissions mix globally in the atmosphere, and the resulting concentrations are not dependant on, or attributable to, local emissions. Therefore, local and regional controls would be ineffective in reducing or otherwise impacting atmospheric CO₂ concentrations.

As such, no local control measures of CO₂ emissions from stationary sources could be deemed "necessary" to "prevent significant deterioration" of local ambient air quality within the meaning of CAA section 161. EPA, therefore, cannot be compelled to regulate CO₂ emissions under the PSD program, even if it is technically authorized to do so.

Similarly, EPA has failed to analyze its authority to avoid the issues that will arise if Title V requirements are triggered. NWMA believes that EPA can and should determine that any source that arguably would be subject to the Title V permit program because its GHG emissions exceed the 100 tpy threshold of that program, need not submit a Title V permit application if the source is not subject to any substantive GHG emission limitations under the CAA.

It is also unclear why and how EPA arrived at the proposed 25,000 tpy CO₂e threshold level. Industry groups have demonstrated in previous comments that the environmental benefits EPA expects to achieve through its GHG regulatory proposals can be realized at threshold levels above 25,000 tons. At the very least, EPA has not adequately analyzed the potential impacts higher threshold levels would have on the regulated community and related permitting authorities. NWMA believes that setting a threshold level for GHGs at 100,000 tpy would do little detriment to EPA's objectives and protect even more entities from the burdens of regulation. EPA should analyze threshold levels above 25,000 tpy prior to finalizing this proposal.

NWMA urges EPA to reopen the comment period for this rulemaking and specifically solicit comment on these alternatives and the impacts of these proposals on stationary sources.

EPA's Legal Basis Justifying the Tailoring Rule is Questionable

The CAA does not allow EPA to unilaterally raise the thresholds identified in the PSD and Title V permitting programs. EPA itself recognizes that Congress never intended for PSD or Title V program requirements to apply to the number of sources that emit CO₂ and other emissions. EPA appropriately recognizes that such a scenario would result in "absurd results." However, the "absurd results" and "administrative necessity" doctrines upon which EPA justifies its attempt to raise the applicability thresholds of those programs are weak, and unlikely to hold up in court.

These "absurd results," are potential problems of EPA's own design. It is unclear why the "administrative necessity" doctrine should be invoked when EPA has failed, as stated above, to assess alternatives that would more appropriately obviate the absurdity.

EPA cites cases addressing the "absurd results" doctrine which establish that an agency must construe statutory language to avoid any "literal" interpretation that would frustrate congressional intent. Conversely, the "administrative necessity" doctrine applies when measures Congress intends to meet a certain result cannot obtain that result.

Therefore, if EPA believes, as it states, that Congress never intended to subject sources of GHG emissions to PSD and Title V requirements under the CAA, then EPA must construe the CAA to avoid such a result. For the "administrative necessity" doctrine to apply in this instance, however, EPA would need to show that Congress did intend for PSD and Title V permitting requirements to apply to GHG emissions, but that implementing that intent under the existing Act is impossible. Therefore, EPA cannot justifiably rely on both doctrines to explain the extraordinary steps it is attempting to take with this rulemaking.

EPA's reliance upon the "absurd results" and "administrative necessity" doctrines are unfounded in light of the agency's failure to examine alternatives that would avoid PSD implications altogether.

EPA is Not Required to Finalize the Light-Duty Motor Vehicle Regulations in the Identified Timeframe, and Should Use Its Authority Not To in Light of the Uncertainty Surrounding These Regulations

EPA joined with NHTSA to publish the Joint Motor Vehicle Proposal. The Joint Motor Vehicle Proposal includes both EPA's proposed motor vehicle rule and NHTSA's proposed new corporate average fuel economy (CAFE) standards for new motor vehicles under the Energy Policy and Conservation Act.

NHTSA is under a statutory obligation to promulgate CAFE standards by March 30, 2010. EPA has identified this same date as the date it must finalize the motor vehicle rule. EPA, however, is under no statutory obligation to promulgate this rule, nor a deadline to finalize its portion of the Joint Motor Vehicle Proposal.

Additionally, EPA's proposed motor vehicle emission standards are largely duplicative of the standards proposed by NHTSA. Therefore, EPA's proposed regulations would provide little or no additional benefit beyond what will be achieved by NHTSA's standards. As such, EPA's portion of the Joint Motor Vehicle Proposal is not necessary to achieving the public health and welfare benefits the agencies project will result from finalizing the joint proposal.

Because EPA has failed to fully analyze the significant impact a final motor vehicle rule will have on the economy and the PSD and Title V permitting process for stationary sources, and failed to provide the public an opportunity to engage in that analysis, EPA should withdraw its motor vehicle proposal.

In the alternative, EPA should at least postpone the effective date of the proposed regulations until it can adequately analyze the economic impacts, as well as the cost and development of appropriate technology.

With regard to EPA's proposed GHG motor vehicle emissions standards, PSD for GHGs should not be triggered for major stationary sources until those standards "take effect." In other words, a regulation should have to be effective and create an ongoing legal obligation on an entity to comply before it can render a pollutant subject to actual control and thus be "subject to regulation" for PSD purposes.

As stated, major stationary sources of GHG emissions will need time to develop and analyze appropriate technologies to meet BACT standards in a cost-effective way in accordance with the PSD program. Conversely, EPA will need time to develop guidance for regulated entities and state permitting authorities regarding what will constitute BACT and how such technologies will be implemented.

An interpretation in which PSD would apply either when a rule becomes final (on the date of publication in the Federal Register) or when a rule becomes "final and effective" (60 days after publication in the Federal Register, in accordance with the Congressional Review Act), would not allow adequate time for the agency or regulated entities to comply with PSD requirements.

Therefore, NWMA urges EPA to amend its proposed interpretation to clarify that PSD program requirements begin to apply when GHG regulations “take effect” and not automatically when the regulations become “final and effective” 60 days after publication of the rule. This will allow time for EPA to resolve the significant PSD issues that could be created for major stationary sources if and when the motor vehicle regulations are finalized. EPA has not adequately analyzed the implications the motor vehicle proposal and the proposed Tailoring Rule will have on major stationary sources. Adopting an interpretation that allows for the most time and flexibility for all parties is reasonable and consistent with key policy goals.

EPA May Lack Authority to Modify SIP Approval Without State Consent

Most states have implemented PSD and Title V regulations reflective of EPA’s federal 100 and 250 tpy thresholds for those programs respectively. It is clear that regardless of the ultimate success or effectiveness of the proposed Tailoring Rule, each of those states will need to raise their applicability thresholds in order to prevent the permitting consequences EPA hopes to avoid with regard to permitting in those states.

EPA, however, has no authority to change state laws and regulations. Because EPA has already approved the provisions of the state implementation plans (SIPs) in those states, EPA has proposed to retroactively amend its previous approvals of threshold levels set below 25,000 tpy CO₂e. Additionally, EPA encourages states to change applicable state programs to reflect the federal standards.

Indeed, it will take considerable time for states to change their laws and regulations before permitting authorities and regulated entities can expect to incorporate new thresholds into permitting application considerations. The processes by which states can amend their PSD programs, of course, vary from state to state; many SIPs are incorporated into state law, and can only be changed or revised through legislation.

In addition, EPA recognizes that it cannot force states to change their PSD programs in accordance with the federal PSD program. States may decide to set applicability thresholds at a level less than 25,000 tpy CO₂e, or even decide to keep thresholds at current levels. Given the precariousness of the proposed Tailoring Rule, states may also be inclined to wait to alter their programs until litigation over this and other GHG rulemakings is completed.

Congress has provided EPA with a regulatory mechanism to amend previously approved SIPs. CAA section 110(k)(5) allows EPA to review and revise SIPs deemed inadequate via a “SIP call.” The agency, however, is not pursuing SIP calls in this instance because it cannot complete the process in time to meet its self-imposed deadlines. NWMA believes this further supports EPA exercising its authority to defer action on GHG regulation and respecting the schedule provide the agency by Congress.

Instead of adhering to the provision of the CAA specifically designed for this purpose, EPA relies on its general rulemaking authority under CAA section 301(a) and Administrative Procedure Act (APA), 5 U.S.C. § 553(e) to reconsider actions and give interested persons the right to petition for the issuance, amendment or repeal of a rule. Additionally, EPA falls back on CAA section 110(k)(6), that gives EPA authority to correct mistakes in prior SIP approvals.

EPA relies on these general provisions to provide a solution to a problem that the agency itself created, while ignoring a statutory solution which Congress has specifically provided. EPA does not have broad authority under the Act to simply undo lawful actions that subsequently pose an inconvenience to new agency policy directives. Nor can EPA classify as a mistake a lawful action which conflicts with a subsequent proposal. Therefore, NWMA finds the agency's reliance upon 301(a) and 110(k)(6) to be insufficient to justify the proposed unilateral and retroactive "disapproval" of existing state SIPS, and at the very least, legally precarious.

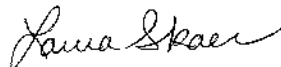
In summary, NWMA believes that even if states are inclined to amend state programs to reflect the provisions of the Tailoring Rule, it will undoubtedly take most states much longer than EPA expects to implement appropriate and legal changes. Further, we suspect that some states may be inclined to establish thresholds much below EPA's proposed level of 25,000 tpy CO₂e. Therefore, regardless of the ultimate success of this proposal, the very permitting complications EPA intends to avoid with this rulemaking will be fully realized, at least for some period of time, when EPA's motor vehicle rule becomes effective.

Conclusion

For the reasons stated in this letter, the agency should exercise its authority to withhold adoption of a final motor vehicle GHG rule at this time. Additionally, EPA should reconsider the assumption that final motor vehicle GHG regulations under CAA section 202(a) will trigger PSD and Title V requirements for stationary sources of GHG emissions. Even if EPA determines that such permitting requirements will be triggered, EPA should determine that they won't apply before requirements for motor vehicle engines go into effect in October, 2011. State permitting authorities and the regulated community need time to analyze control technologies and prepare for regulation. EPA should solicit public comment on, and fully analyze the significant impacts of its entire effort to regulate GHG emissions under the CAA.

Thank you for considering the comments of the Northwest Mining Association.

Sincerely,



Laura Skaer
Executive Director

