**MPA Comments before the Environmental Quality Council regarding the Rules on Green House Gas being considered by the Board of Environmental Review.**

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January 8th, 2010

1. MPA is very concerned with the course of action taken by the US Environmental Protection Agency with regard to GHG emissions. EPA has taken steps to regulate green house gases prior to any Congressional approval of climate change legislation. In an attempt to make its action more palatable, EPA has arbitrarily proposed a second rule (the so-called "tailoring" rule) to limit the *first round* of requirements to sources over 25,000 tons. However, there is nearly a legal consensus that there is no legal basis for this cut-off under the Clean Air Act and that it will not survive legal challenge. Nevertheless, EPA is trying to convince states to proceed with state-level tailoring rules, even though EPA itself has not yet actually adopted any rules, and know one knows what form any final rules may take.

2. MPA firmly believes that the EPA does not have the legal authority to regulate GHG emissions under the Federal Clean Air Act in the manner the Agency proposes. MPA is not alone in its concerns. Over 40 states and governmental entities, including the State of Montana, have filed comments challenging or objecting to EPA's proposed rules and its proposed unilateral procedure.

   The Air Quality Program managers from Nevada, North and South Dakota, Utah and Montana submitted comments to the EPA expressing concern on the EPA so-called "tailoring" rule. MPA believes these comments highlight many, although not all, of the deficiencies with EPA's proposed course of action. I invite your attention to those comments. I would like to share with you some of the points they make:

   - EPA has seriously underestimated the number of facilities that will be affected, the economic impacts, and the resources required of both sources and regulators of its actions.

   - Many of the sources that will be subject to EPA's proposed rules either have never been required to obtain an air permit before, or have previously only been subject to minor source permitting. For many of these sources EPA is creating a need to issue a permit for which there are no identifiable controls.

- PSD reviews will be required to be conducted at significant expense to the affected facility and the regulatory agency, yet they will result in very little additional environmental benefit.

- EPA's estimate of 60 hours to process a new major source is ridiculously low. Experience shows that a major source permit requires 1000 hours or more.

Our point is that our own Montana DEQ and nearly every state air quality program recognizes that regulating CO2 under the Clean Air Act in the way EPA proposes is of dubious legality and fraught with risk. Despite these justified concerns, the Board of Environmental Review has proposed to adopt on a rush basis a theoretically "contingent" version of EPA's draft tailoring rule. MPA believes this is a serious mistake.

3. In an attempt to buy time and avoid the theoretical impact of EPA's potential rules, DEQ has sought to anticipate the ultimate form of the rules. MPA appreciates DEQ's intentions, but we are concerned that, the DEQ does not have the legal authority to take this step --- and to defend a 25,000 TPY limit for GHG. If any of several EPA rules are adopted, Montana's "contingent" tailoring rule will automatically impose GHG permitting requirement for the first time on numerous Montana sources without legislative consideration or guidance. Moreover even if EPA's tailoring rule is struck Montana's rule would still remain in effect, unless EPA's regulation of light vehicles were also struck down. There is a significant risk that, despite DEQ's good intentions, that the proposed rule actually will increase the risk that requirements for permitting will be lowered to the levels of all other regulated pollutants for even the smallest sources.

   Just as damaging, if EPA's claimed authority to establish arbitrary exceptions for administrative convenience actually were to become rule, then the precedent would be that EPA could increase or reduce these limits for large and small facilities at their entire discretion --- or that third parties would sue to force this result.

4. MPA is concerned that if this rule is passed, and the EPA rules are adopted, but are not actually put into effect or are rejected by the courts, that the Montana DEQ will not be legally able to enforce the contingences or defend the exemptions in the rule, and Montana will become the first of 50 states to regulate GHG for emissions of trivial size. This would be the very result that EPA itself has called "absurd" and administratively impossible –it would be a death blow to any business in the state. And, if this situation is in fact what happens, these rules will be in direct violation of Montana's own the "No More Stringent" statue.

5. In the state comments to EPA that I mentioned before, Montana and its sister states ask EPA to consider a 100,000 TPY threshold and then phase in a lower standard over 4 years. If EPA did adopt that recommendation, the BER's proposed rule would put Montana in the unenviable position to have to re-write this rule to mirror the EPA. This example of arbitrary selection of threshold triggers goes to the heart of our concerns about the legality of such a rule.

In summary:

Over 40 states have filed individual or joint comments opposing or questioning the EPA tailoring rule. Is it necessary for Montana to be the only State to take this action when every State has the same impact to its permits program? If Montana's comments on EPA's draft tailoring rule are correct, as we believe they are, does Montana really want to undercut their own comments and take the risk of guessing correctly about the final results of federal rulemaking or legislation?

Has there been adequate analysis to conclude that Montana is obliged to regulate GHG by EPA fiat, and that its effort to anticipate an unadopted rule will withstand legal challenge? Could Montana be obliged to regulate every CO2 source down to the size of the smallest businesses, even if EPA is not doing so?

Today MPA asks this Council to consider sending a letter to the BER objecting to the rule noticed at MAR 17-299. At a minimum, this would allow you to evaluate the need and risk of proceeding with this rule At your March meeting we will all have more information and then you have the option of rescinding your objection or pursuing it in accordance with state law. My understanding of the time line on this rule is that a public hearing will be conducted by the BER on January 22, the comment period closes on February 5, and that they will consider final adoption on March 19th. That timeline gives the EQC until your March 4-5 meeting to do additional review and analysis.

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

RE: Comments on Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule

The state air regulatory agencies of Nevada, Montana, North Dakota, South Dakota, and Utah appreciate the opportunity to comment on the Environmental Protection Agency's (EPA's) proposed rule titled, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" also referred to as the Tailoring Rule. In addition, each state may submit individual comments on the proposed rule.

We strongly agree with EPA that the current Prevention of Significant Deterioration (PSD) applicability thresholds of 100/250 tons of greenhouse gases (GHGs) would create an absurd result and an unmanageable administrative burden. While we conceptually support the effort to establish more reasonable thresholds, EPA has seriously underestimated the number of facilities that will be affected at the 25,000 ton level that has been proposed. The proposal also fails to consider the minor source impacts and the administrative burden associated with synthetic minor permitting; fails to recognize the need for, and to provide, adequate time for state and local agencies to make the statutory and regulatory changes necessary to harmonize state and federal program requirements, and fails to ensure that adequate resources are available when the new requirements become effective.

**EPA's Evaluation of the Administrative Burden on Permitting Agencies**

In order for state and local regulatory agencies to effectively implement this rule, they must have the capacity to make technically creditable determinations on a timely basis. Accordingly, it is critical that EPA's evaluation of the resource impacts accurately reflect the likely burden on permitting agencies and that the environmental improvement resulting from each provision of the rule justifies the resources needed for implementation. There is a clear need to raise the PSD applicability thresholds for GHG from the current 100/250 tons per year (tpy) to some more reasonable value; however, the proposed value of 25,000 tpy $CO_2e$ does not resolve the permitting burden that will be placed on state air quality regulatory agencies for a number of reasons:

(1) The number of sources that will be subject to major source permitting has been seriously underestimated. We estimated that a facility using between 3.5 – 4.5 million therms of natural gas per year or approximately 2 million gallons of any kind of distillate fuel per year would be subject to these new requirements.

Similarly, a 38 MM Btu diesel-fired generator, a 47 MM Btu natural gas-fired boiler, a 40 MM Btu propane-fired boiler, a 1340 HP diesel internal combustion engine, or a 50 MM Btu/hr natural gas compressor engine operated on a full-time basis (24 x 7), would generate $CO_2e$ at levels that exceed the 25,000 tpy threshold. While the estimates vary somewhat from state to state, we have determined that the number of applicable sources, in the Mountain West alone, far exceeds the number of new applicable sources estimated in the proposed rule.

(2) Many of the sources that will be subject to this new rulemaking either have never been required to obtain an air permit before or had previously only been subject to minor source permitting. In either case, agencies will need to devote a significant amount of time to identifying and educating these companies on new and/or significantly more complicated permitting requirements. For many of these sources, EPA is creating the need to issue a permit for which there are no identifiable controls. These "hollow" permits will require agency resources to develop and issue, require the industry to spend time and money to obtain and will result in no environmental benefit.

(3) Under EPA's proposal, many current minor sources will be classified as major sources under the PSD program based solely on GHG emissions. Once they are classified as major, it is likely that a significant number of minor projects will be subject to PSD review for non-GHG emissions. The PSD reviews that will be required will be conducted at significant expense to the affected facility and the regulatory agency, yet they will result in very little additional environmental benefit.

(4) We anticipate that there will be a significant number of sources that will seek to avoid being classified as a major source by obtaining synthetic minor permits. In the proposal, EPA even suggests limitations on the hours of operation, production, consumption, etc to minimize the number of new major source permits. These synthetic minor permits are, in most cases, no less onerous than major source permits. They require the same level of environmental review, the evaluation of potential controls, and the development of enforceable limitations and operating parameters as permits for major sources. As a result, the burden to process these synthetic minor permits will be substantial and should not be discounted.

(5) EPA has estimated the burden based on "actual emissions" rather than a facility's "potential to emit" (PTE). This assumption is clearly wrong for a number of sources and under the current federal regulations, PSD classification determinations must be based on PTE levels, not actual emissions. By assuming "actual emissions" is equivalent to PTE, EPA has greatly underestimated the number of sources that are likely to require permits.

(6) EPA needs to recognize that regulating GHGs is more than just the development of a new permit. Through this action, states and local air agencies will be regulating six new pollutants: $CO_2$, methane, nitrous oxide, hydrofluorocarbons,

perfluorocarbons and sulfur hexafluoride. As clean air agencies, we have decades of experience regulating the existing criteria pollutants and air toxics, but the regulation of these pollutants will be brand-new. Monitoring and testing for many of these pollutants is not readily available and it is unclear that effective control technologies exist for many of the sources that emit GHGs. We have spent the past two decades pushing sources to more complete combustion as a way to minimize the emission of the current criteria pollutants. Regulating GHGs as a pollutant under the Clean Air Act may result in tradeoffs between the emissions of GHGs and the emissions of other criteria pollutants. The evaluation of those tradeoffs will also increase the complexity and resources needed to permit these new sources. All of these complications increase the potential for permits to be appealed and litigated, and

(7) It is currently not clear whether the BACT analysis would evaluate greenhouse gases as a single pollutant ($CO_2e$) or if the analysis would be on a pollutant-by-pollutant basis (i.e. $CO_2$, perfluorocarbons, sulfur hexafluoride, etc). $CO_2e$ is not a regulated pollutant and we do not believe a BACT analysis could be conducted for $CO_2e$. State and local agencies will be doing a pollutant-by-pollutant analysis and permitting agencies would, in essence, be conducting up to six separate BACT analyses.

EPA's estimate of 60 hours to process a new major source permit for GHGs is ridiculously low. Even for PSD permits issued for criteria pollutants that we have decades of experience regulating and permitting and for which there are known BACTs, it is not uncommon for such a permit to require a thousand or more hours of processing time and synthetic minor permits to take between 300 and 500 hours.

BACT Guidance and Streamlining Measures

In order for permitting agencies to write and issue permits by March 2010, EPA must develop comprehensive and timely guidance on Best Available Control Technology (BACT) and emission factors for GHG sources. We are aware that EPA has established a workgroup to develop BACT guidance, however EPA has typically been very delinquent (in some cases by over a decade) in developing similar guidance for other more traditional pollutants – pollutants for which the control technology is known. Because GHGs would be newly regulated, control technologies have never before been identified, emission limits or other compliance measurements have never before been established, and for a number of the greenhouse gases (such as SF6, perfluorocarbons and hydrofluorocarbons) monitoring has never been conducted. Therefore, it seems unlikely that EPA would be able to develop a comprehensive, workable document that has had adequate scrutiny and involvement by the end of March. The consequences of failing to provide such guidance are severe. A failure by EPA to develop timely and comprehensive guidance will result in significant uncertainty and delays. Without source specific BACT guidance that identifies control technologies and acceptable standards and limitations, permitting agencies will be forced to do case-by-case evaluations that will

paralyze the permitting process and result in a significant number of appeals and other litigation. EPA proposes in the preamble to use the initial six-year implementation period to develop streamlining measures and other ways to minimize the additional workload. Unfortunately, EPA's track record in meeting similar goals is not exemplary and we need them now.

Adoption of Rules

As proposed, EPA has established an extremely ambitious timeline for the implementation of these rules. However, even after the new federal threshold is established, state and local statutes and regulations will still contain the current 100/250 ton thresholds. EPA has not provided any time for states and local governments to harmonize their existing requirements with the new EPA limits, nor have they addressed the effect that inconsistent thresholds will have on the permitting process and the burden it would place on the states and local governments required to permit GHG emitting sources. Once the federal rule is promulgated, it typically takes 4-16 months to finalize a state rulemaking. Statutory changes will require two or more years to complete. Given the controversial nature of the rulemaking, these timelines are probably optimistic. During the interim between federal rule promulgation and state rulemaking, it is unclear whether both sets of requirements apply and who will implement the program. It is very likely that our permitting programs will grind to a halt because we will not have state authority to issue permits addressing GHG but will be required to by federal statute.

Availability of Resources

EPA suggests in their rulemaking that permitting agencies can use the next six years to ramp up to obtain the needed resources to meet this new permitting challenge. However, those resources will be needed immediately and EPA has not adequately considered the economic situation in which states find themselves today. At a time when state budgets are being cut and fee revenue is down, agencies are laying off staff, implementing furloughs, reducing salaries, enacting hiring freezes, and taking other cost-reducing measures. The ability to increase staff and obtain additional resources simply does not exist and will not exist for the foreseeable future. Even in good economic times, adding staff and obtaining authority for increased fees is difficult. Throughout the rule, EPA points to increases in Title V permitting fees as the preferred funding mechanism. However, under the Clean Air Act, Title V fees can only be levied for Title V permitting purposes. Even if states had the political and economic will to increase fees at a state level, increasing Title V fees cannot generate the funding necessary to support this program. In order to ensure that adequate funding is available to implement this rule, EPA needs to establish a fee in the rule. Such a rule would provide the basis for states to revise their fees, but would not require a state to modify its fees if it could demonstrate that the fee increase was not needed.

Modifying State Implementation Plans (SIPs) to Incorporate GHGs using CAA Section 110(k)(6)

We are also greatly concerned about the precedent EPA will be setting if the normal SIP development process is bypassed. Section 110(k)(6) was clearly not intended to allow EPA to substantially alter existing approved programs. The Clean Air Act was deliberately designed to ensure that many programs would be delegated to states, including the PSD and Title V permitting programs. The state programs must meet federal requirements, but they are adopted and implemented through state plans. This process was established to ensure state plans will meet the needs of the local community and will consider unique circumstances in different parts of the country; to allow states adequate time to adopt the appropriate and necessary state statutes and regulations; and, to ensure consistent, effective and timely implementation of new program requirements through a formal SIP approval process. EPA's proposal to use Section110(k)(6) of the CAA to incorporate these changes into state SIPs will bypass this process and, perhaps more importantly, will establish the precedent for EPA to change other aspects of state plans as an error without agreement from the state, and we are concerned EPA will continue to use this approach to mandate changes in the future. This provision of the CAA should not be used to make the SIP changes necessary to regulate GHGs.

Tailoring Rule vs. Reporting Rule

EPA should harmonize the applicability thresholds established under the proposed Tailoring Rule and the recently adopted Mandatory Reporting of Greenhouse Gases Rule to utilize the same units (i.e. either short tons or metric tons). By establishing different applicability thresholds, EPA has unnecessarily complicated how states will do evaluations in the future.

Recommendations

First, EPA must provide states with additional time before the regulations become effective. This should be achievable under the same two legal arguments EPA is using to raise the threshold. State and local agencies must be able to make the statutory and regulatory changes necessary to increase their own PSD and Title V thresholds above the current 100/250 tpy levels in order to avoid the "administrative impossibility" and "absurd results" forecast by EPA.

Second, given the inherent complexity and uncertainty in regulating a new pollutant and the likelihood that EPA's current burden estimates significantly under-predict the number of affected sources and the impact on state and local air agencies, we recommend that EPA raise the threshold for PSD and Title V even further and provide for a multi-year phase-in of GHG regulation.

Specifically, with respect to a phased-in approach, we recommend setting the initial threshold at 100,000 tpy $CO_2e$ and reviewing the threshold after three years to determine the next appropriate threshold based on the information obtained by EPA's new GHG

reporting rule and how state and local programs are progressing in permitting the 100,000 tpy CO2e sources. This approach would allow permitting agencies to more reasonably accommodate the additional workload, determine which sources will be affected and initially limit the number of industry types for which BACT must be determined. Based on EPA's own estimates[1], increasing the threshold from 25,000 tpy $CO_2e$ to 50,000 tpy $CO_2e$ would exclude only about 2% of the GHG emissions but would reduce the number of permitted sources by approximately 51% (see the table below). We believe that ensuring that the program is practicable is of greater importance than immediately adopting inflexible thresholds that may be too low to be administered.

| Year | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|
| **Threshold $CO_2e$** | 100,000 | 75,000 | 50,000 | | |
| **Typical Types of Sources Included** | Power Plants, Refineries, Landfills, Pipelines, Pipe Casting | Smaller Power Plants, Smaller Refineries, Universities | Manufacturing | | |
| **Percentage of $CO_2e$ Emissions Covered[2]** | 64% | 64-65% | 65% | | |
| **Number of Existing Facilities Covered[2]** | 4,850 | 4,850-7,245 | 7,245 | | |

Third, state and local agencies already face a tremendous funding shortfall from both EPA and state-generated revenue. EPA has not included in its proposal an appropriate mechanism for adequately funding this new program that is arguably the largest unfunded mandate environmental programs have ever experienced. Although EPA has suggested increases in Title V fees, as we discussed above, such increases are not likely to be supported and can only be used for Title V permitting. EPA should reevaluate the resource needs based on a reexamination of the total burden that state and local agencies face and establish a fee mechanism in the rule that would allow states to adequately cover the costs.

Finally, it is critical that EPA ensure the accuracy of its estimates regarding the administrative burden on state and local permitting agencies. Toward this end, EPA should reexamine not only its estimate of the number of permits that will need to be processed, but also all of the other impacts states will face as they are required to begin regulating GHGs. The agency should further ensure that it fulfills its promise to issue, by March 2010, comprehensive, practical guidance to state and local agencies on making

[1] Federal Register/Vol. 74, No. 206/Tuesday, October 27, 2009/Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule: Proposed Rule, Table VIII-2 Percentage of National Stationary Sources GHG Emissions From Affected Facilities at Different GHG Emission Thresholds, p.55333

[2] FR 74 55333, Table VIII-2 Percentage of National Stationary Source GHG Emissions From Affected Facilities at Different GHG Emission Thresholds

BACT determinations for GHGs. Specifically, we need EPA to establish the technologies that would be considered BACT for each source type, to address how energy efficiency would be incorporated into the analysis and the enforceability of such measures, and to provide guidance on how to address the trade-offs between reducing GHG emissions and criteria pollutant emissions.

Thank you for the opportunity to provide comments on the proposed Tailoring Rule. If you have any questions or require any further information, please contact any of the air directors in the states of Utah, Nevada, North Dakota, South Dakota, and Montana.