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U.S. Environmental Protection Agency
Air and Radiation Docket and Information Center
Attention Docket No. OAR-2009-0597
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1200 Pennsylvania Avenue, NW
Washington, DC 20460

To Whom It May Concern:

Pursuant to the solicitation for public comment published in the *Federal Register* on October 7, 2009 (72 FR 21260), the National Association of Clean Air Agencies (NACAA) is pleased to provide the following comments on the U.S. Environmental Protection Agency's (EPA's) proposed reconsideration of its prior regulatory interpretation of the phrases "subject to regulation" and "regulated pollutant" as those terms are used in the Clean Air Act (CAA), 42 U.S.C. 7401, et seq., and its implementing regulations. NACAA generally supports EPA's proposed reconsideration of its prior interpretation and agrees that neither (1) the CO₂ monitoring rules, (2) the state rule regarding ammonia controls (and similar situations) nor (3) an endangerment finding should trigger PSD and Title V program applicability for a pollutant. NACAA also agrees that EPA's proposed greenhouse gas (GHG) regulations for mobile sources¹ likely would result in the application of these programs to the identified pollutants, including emissions of carbon dioxide (CO₂). However, NACAA believes that the proposed broadening of the current narrowly crafted interpretation is unwise and recommends that any future determinations of whether a pollutant is "subject to regulation" be made on a case-by-case basis, considering all of the relevant facts.

NACAA has substantial concerns that a possible consequence of EPA's proposed mobile source GHG regulations may be an overwhelming administrative workload that could not be managed either by EPA or by state and local permitting authorities and that might be counterproductive to our shared environmental goals. NACAA recognizes that EPA has proposed a number of measures in its "tailoring

¹ See, 74 FR 49454, September 28, 2009. The comment period on this proposal closed on November 27, 2009. NACAA submitted comments on this proposal to EPA on November 24, 2009.

rule” for Prevention of Significant Deterioration (PSD) and Title V² programs and will submit comments on those proposals. However, there is at least one interpretation of “subject to regulation” that can and should be adopted as part of the current regulatory action that is appropriate, limited in scope and needed to enable a reasonable transition to the incorporation of GHG emissions in existing PSD and Title V programs. Moreover, EPA has established precedent that suggests that it may adopt a different interpretation for Title V program applicability than for application to the PSD program.

As explained in detail below, NACAA recommends that EPA carefully consider a narrow interpretation, limited to controls imposed under Title II, that incorporates the statutory determination of the effective date for such controls in its determination of when PSD and Title V program limits become effective. If EPA were to adopt an interpretation, limited to Title II regulations, that held that GHG emissions were subject to regulation only at such time as Model Year (MY) 2012 vehicles are certified, state and local permit authorities would have an estimated 15 months from promulgation of the GHG mobile source regulation in which to promulgate regulations and/or seek legislative changes needed to secure a feasible implementation of PSD and Title V permitting of major GHG emitting sources³.

BACKGROUND

In the Deseret Power Electric Cooperative matter⁴, the Environmental Appeals Board (EAB) addressed a challenge to a PSD permit by the Sierra Club, which contended that the permitting authority must set Best Available Control Technology (BACT) limits for CO₂ emissions for a proposed coal-fired power plant. The Sierra Club maintained that CO₂ reporting requirements under section 912 of the CAA led to CO₂ being a “regulated pollutant” and thereby triggered PSD program requirements. In its decision, the EAB noted that the phrase was ambiguous and that prior agency actions were insufficient to establish the then-current EPA interpretation as binding precedent. In response, in a December 18, 2008, memorandum (the Johnson memorandum), EPA formally interpreted the relevant language so that regulations that only require monitoring of pollutants do not cause PSD requirements to be applied to emissions of CO₂. On February 17, 2009, the EPA Administrator granted a petition for reconsideration of the regulatory interpretation in the memorandum.

On April 24, 2009, EPA proposed limitations on emissions of GHG from light-duty motor vehicles. Comments on EPA’s proposal were due on November 27, 2009 and EPA anticipates issuing a final rule early in 2010. Most would concede that, if adopted, these proposed limitations would clearly subject the affected pollutants to “regulation” and trigger the

² See, 74 FR 55292, October 27, 2009. NACAA anticipates submitting comments on a number of additional options to provide adequate time and resources to implement PSD and Title V permit programs should EPA decide to adopt its proposed GHG regulations for mobile sources.

³ These changes would be similar in scope to those proposed in EPA’s tailoring rule and would be needed to establish as a matter of state law the narrowing of scope of PSD and Title V programs that EPA’s proposed rule would accomplish under federal law.

⁴ PSD Appeal No. 07-03 (EAB Nov. 13, 2008).

applicability of BACT at new and modified major facilities under the CAA. Since the statutory thresholds for the PSD and Title V programs are either 100 or 250 tons per year (depending on the source category), EPA has estimated that, in the absence of any other action, several million sources would be subject to Title V requirements and hundreds of thousands of sources would require PSD permits. To address the “administrative impossibility and absurd results” of such an abrupt increase in permitting requirements, EPA has proposed what it styles as its “tailoring rule” that would, at least on a temporary basis, increase the applicable thresholds to 25,000 tons per year (or more) of CO₂ equivalent (CO₂e) and undertake other streamlining measures. In addition, on October 30, 2009, EPA promulgated a final rule⁵ that expanded on the requirements of section 821 of the CAA and required reporting of GHG emissions from a wide variety of sources.

COMMENT

EPA SHOULD ADOPT AN INTERPRETATION OF THE STATUTE THAT PROVIDES FOR ORDERLY IMPLEMENTATION OF ITS REQUIREMENTS

As a general rule, the CAA provides a period of time for EPA and state and local permitting agencies to implement new programs. This can be seen in the structure of Titles I, III, IV and V. Where the CAA does not explicitly prohibit an implementation period and within the discretion provided to it by Congress, EPA should adopt interpretations of the Act that allow for such an implementation period. EPA attempts to do so to some degree in its proposed tailoring rule. However, EPA’s proposed tailoring rule, while necessary, is not sufficient in that it would not modify PSD and Title V programs that are SIP-approved (i.e., those programs developed under state law) or other state laws and regulations that are not part of the federally approved SIP. State and local permitting authorities must be provided a sufficient opportunity to modify those state programs under applicable state laws governing modification of state requirements so that they will be consistent with EPA’s final tailoring rule. If they are not provided this opportunity, there is a substantial risk that the overwhelming number of permitting actions forecast by EPA will be required. In such an event, the administrative impossibility that EPA seeks to avoid in its tailoring rule would occur even with adoption of the rule. For this reason, EPA should explore in the current regulatory action all options available to it to provide an implementation period for the new programs that would flow from adoption of the proposed motor vehicle GHG regulation. We recognize that EPA is seeking to do so in its suggestion that it could delay the effective date of the new programs for a period of time after “promulgation” of the regulation on the basis of the review period provided by the Congressional Review Act. While directionally correct, the 75 additional days that such an interpretation might provide is

⁵ See, 74 FR 56260, October, 30 2009. The rule relies on authorities under sections 114 and 208 of the Act and requires reporting of annual emissions of carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), sulfur hexafluoride (SF₆), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and other fluorinated gases (e.g., nitrogen trifluoride (NF₃) and hydrofluorinated ethers (HFEs)). This requirement generally applies to sources emitting greater than 25,000 metric tons of CO₂e per year and certain upstream suppliers of fossil fuels and industrial gases and is effective December 29, 2009.

clearly not sufficient for state and local jurisdictions to modify state laws and underlying regulations.

In order to provide an additional opportunity for state and local permitting authorities to modify programs along the lines suggested in the tailoring proposal, NACAA recommends that EPA consider two approaches not discussed in either proposal. The first approach relies on the fairly unique nature of Title II regulation under the CAA. Those parts of the CAA that are normally relevant to stationary sources typically provide specific phase-in periods for sources and permitting agencies to implement new programs. Analogous provisions for mobile sources can be found in the lead time provision of Title II, which provides that “[a]ny regulation...shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology...” 42 U.S.C. 7521(a)(2). Given this language, NACAA suggests that when Title II regulations⁶ are the trigger for PSD and Title V permitting, it may be permissible for EPA to interpret “subject to regulation” to mean when the regulation “takes effect” under the CAA. In this instance, EPA is proposing that its GHG regulation of light-duty vehicles would “take effect” in MY 2012. Since MY 2012 vehicles would ordinarily be certified in the summer of 2011, this interpretation would likely provide an additional 15 months after the anticipated promulgation of the regulation for states to take critical actions to respond to the initial impacts of the new programs.⁷ While it does delay the start of the BACT program, this approach allows the states sufficient time to revise state law to provide similar exemptions for the millions of smaller sources and to adjust Title V fees as necessary⁸ so as to have resources in place at the time additional permit applications are anticipated. Such an interpretation would mitigate, but not fully resolve, the anticipated administrative issues associated with EPA’s regulation of motor vehicle GHG emissions. This interpretation would complement EPA’s proposed tailoring rule in that it would provide an opportunity for states to adopt higher applicability thresholds and other streamlining approaches suggested in the tailoring proposal. It would not eliminate the need to adopt rules along the lines discussed in that proposal.

In addition, sources subject to EPA’s new GHG reporting requirements must identify themselves and submit emission reports by March 2011. Deferring implementation of the PSD and Title V GHG programs until after the GHG emission reports are received will greatly facilitate implementation of those programs by state and local permitting authorities.

In its implementation of programs regulating PM_{2.5}, EPA asserted that it could maintain different interpretations of the phrase “subject to regulation” for NSR nonattainment programs and for PSD programs. This forms the basis for a second option available in this regulatory

⁶ The lead time and stability requirements for heavy-duty trucks are more prescriptive, see 42 U.S.C. 7521(a)(3)(C).

⁷ NACAA recognizes that there is some possibility that some MY 2012 vehicles may be certified as early as January 2, 2011.

⁸ It should be noted that there is no parallel constraint that would limit the applicability of section 165(a)(2) to GHG to a time in the future. To the extent that it was concerned that new sources could be permitted over the next 15 months without any consideration of GHGs EPA could simply remind sources that under current law and in light of its endangerment finding any source whose criteria pollutant emission levels exceed statutory thresholds must undergo a PSD permit review that “considers alternatives” to the adverse air quality and other impacts of its proposed GHG emissions.

action that could complement the measures being evaluated in the tailoring rulemaking – EPA should consider adopting different interpretations of the “subject to regulation” provisions for the Title V program as distinct from the PSD program. The administrative burden and environmental benefit associated with incorporating GHGs are substantially different in these programs and may provide a basis for establishing a priority in application of these programs to GHG emissions.

MONITORING RULES SHOULD NOT TRIGGER PSD OR TITLE V APPLICABILITY

Some have argued that the phrase “subject to” regulation should be read to mean “amenable to” or “susceptible to” regulation by EPA. NACAA believes that such a reading goes too far. EPA has very broad authority under section 309 of the CAA to regulate pollution in whatever form it may occur if there is an imminent and substantial endangerment and so under section 309 one could argue that all pollutants are “subject to” regulation. Congress could not have intended the BACT obligation to apply today to all pollutants that EPA might theoretically have reason to regulate in the future. This concept is reinforced by the language of the statute that appears to use the terms “subject to regulation” and “regulated” interchangeably.⁹ Rather, it seems that emissions of the pollutant must actually be regulated (i.e., controlled by operation of law) in some fashion. EPA has issued fairly clear guidance over the years concerning what constitutes an emissions limitation, as opposed to a monitoring requirement, and should incorporate those concepts in its final guidance.

EPA has broad authority under sections 114 and 208 of the CAA to require monitoring of emissions, by regulation or otherwise, and has historically done so well in advance of any decision to limit emissions of any pollutant. Such monitoring requirements do not regulate emissions of pollutants. Instead, they govern other conduct by the operator in a way that does not constrain emissions, just as the obligation to identify a contact person at a facility may be required of a Title V source, but does not constitute an emissions limitation. NACAA agrees with the policy arguments advanced by EPA and others that EPA’s critical information gathering activities will be constrained, with likely adverse environmental and public health consequences, if monitoring requirements are necessarily associated with the potentially significant implementation and compliance costs and resource constraints of the PSD and Title V programs.

THE STATE-SPECIFIC RULE GOVERNING AMMONIA EMISSIONS (AND SIMILAR SITUATIONS IN THE FUTURE) SHOULD NOT TRIGGER PSD OR TITLE V APPLICABILITY

Many state statutes contain broader environmental goals than those set out in the CAA and the CAA preserves the right of a state to impose more stringent requirements than federal law. The “more stringent” requirement may be incorporated in the State Implementation Plan as

⁹ 40 CFR 52.21(b)(50),(j) defines a regulated NSR pollutant to include “Any pollutant that otherwise is subject to regulation under the Act” and requires BACT for “each regulated NSR pollutant.” The Clean Air Act requires BACT for “each pollutant subject to regulation under this Act,” sections 165(a)(4), 169. The United States Code refers to “each pollutant regulated under this chapter,” 42 U.S.C. 7475(a)(4), 7479(3).

necessary to meet the NAAQS, even though it goes beyond federal minimums. However, such a requirement should not obligate all other states to adopt similar controls (or go beyond the “more stringent” state’s requirements by mandating BACT). For these reasons, NACAA agrees that there should not be a broad interpretation that any EPA approval of a SIP controlling a certain pollutant triggers nationwide applicability of BACT controls for all new or modified sources of that pollutant.

In the situation addressed in the Johnson memorandum, one state had limited ammonia emissions from certain sources as part of its PM_{2.5} control strategy. NACAA also agrees with the Johnson memorandum’s conclusion that under the facts of that situation the state rule for ammonia emissions should not trigger PSD or Title V program requirements governing ammonia emissions nationwide even though such controls were put in place to meet a federal NAAQS. We also agree that if a similar situation were to occur in the future with another pollutant, such regulation of a pollutant by a limited number of states to meet a federal NAAQS should not trigger PSD and Title V applicability in all states. However, NACAA is concerned that an overly broad statement that attempts to define an outcome for all future situations – including situations where SIP controls were nearly universally applied for the pollutant and approved by EPA – will trigger litigation and generate uncertainty within the regulated community¹⁰. NACAA recommends that EPA articulate a position that approval of a SIP that limits emissions of otherwise unregulated pollutants, by itself, does not trigger PSD and Title V permitting, but also set out that such determinations will be based on a review of all relevant facts.

AN ENDANGERMENT FINDING SHOULD NOT TRIGGER PSD OR TITLE V APPLICABILITY

NACAA agrees that, as a general matter, a pollutant should not be "subject to regulation" until EPA has promulgated a regulation that requires control of emissions of that pollutant. In its proposed reconsideration of the Johnson memorandum, EPA asserts that an endangerment finding under section 202 of the CAA is merely a procedural step along the path to regulation and that such a finding should not trigger Title V or PSD applicability. EPA asserts that once it has made an endangerment finding it is “authorized” to issue motor vehicle emissions standards. However, section 202(a) of the CAA would seem to go beyond “authorizing” EPA to “requiring” control of the pollutants that were the subject of the finding. Section 202(a) states

“[t]he Administrator **shall** by regulation prescribe...standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles ...which in his judgment cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”
(emphasis provided)

¹⁰ EPA’s assertion - that ammonia would not be subject to regulation even if 45 states chose to regulate it for PM_{2.5} attainment purposes (and EPA approved their SIPs) - would appear to be a particularly attractive target for litigation. Such assertions are unnecessary under current circumstances since there is no showing that a majority of states seek to do so.

The Johnson memorandum did not address this issue and there is no immediate need to do so. The only circumstance in which this issue would arise is if EPA fails to adopt the GHG regulation for vehicles and fails to withdraw its endangerment finding¹¹.

EPA SHOULD PROVIDE A NARROW INTERPRETATION AND NOT ADDRESS ISSUES BEFORE THEY ARE RIPE

In many respects, the Johnson memorandum was far more narrowly crafted than the proposed reconsideration. In the proposed reconsideration, EPA revives issues that have been resolved (such as the ammonia PM_{2.5} issue) and seeks to address a number of issues that will be moot (such as the approval of the California waiver and the endangerment finding issue) or are unrelated to the current issues (such as whether a rule that only affects 49 states is sufficient to trigger PSD and Title V permitting). Rather than limiting its interpretation to the issues at hand, EPA proposes the following standard for when a pollutant is subject to regulation: “[t]hose pollutants subject to a nationwide standard, binding in all states, that EPA promulgates on the basis of its CAA rulemaking authority.” It appears that this standard is at once too narrow and too broad. California-certified vehicles do not have to meet federal emissions standards and so it could be argued that the federal motor vehicle GHG standard is not binding in all 50 states. On the other hand, it will likely be argued that such a standard is impermissible under the CAA as the statutory limitation would be too subject to gaming by the agency¹².

NACAA agrees that PSD and Title V applicability should only arise based on a conscious decision to broadly regulate emissions of a pollutant under the CAA, but is concerned that attempting to limit the form of future regulation will have adverse consequences. One of the largest concerns about EPA’s overall effort is the amount of litigation it is likely to engender. EPA is far more likely to achieve what is needed under these circumstances by limiting its interpretation to the CO₂ monitoring and light-duty vehicle GHG rules at issue rather than issuing a sweeping pronouncement that establishes a single factor that attempts to govern all future pollutants. Decisions respecting such future pollutants are better left to a review at the time they arise based on all of the relevant facts at the time. EPA seems to recognize this policy preference at some level, since the agency suggests that the best course of action is to resolve the BACT applicability issue at the same time as it promulgates the final light-duty vehicle GHG emissions standard. In the current circumstance – where EPA is pursuing a rulemaking that clearly would meet any reasonable reading of the term “subject to regulation” – such a broad interpretation is not necessary, may produce inappropriate results in the future and may delay the overall implementation of the program if it is challenged and overturned.

¹¹ EPA issued its endangerment finding on December 7, 2009.

¹² For example, one can imagine issues arising if EPA were to exempt a single state from an otherwise federally imposed national control strategy for a pollutant. If PSD applicability for a pollutant is imposed only when EPA explicitly chooses to do so, section 165(a)(4) has no meaning.

Thank you for this opportunity to provide NACAA's comments on this proposal. If you have questions or require any further information, please contact either of us or S. William Becker, Executive Director of NACAA.

Sincerely,



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