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

Attention: Docket No. EPA-HQ-OAR-2009-0517

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

Dear Sir or Madam:

The National Tribal Air Association (NTAA) is pleased to submit these comments to the U.S. Environmental Protection Agency (EPA) regarding its proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (hereinafter “tailoring rule”).

The NTAA is an autonomous organization of the National Tribal Environmental Council and has more than 50 principal member tribes. The NTAA’s mission is to advance air quality management and policies and programs, consistent with the needs, interests, and unique legal status of American Indian tribes and Alaskan Natives. As such, the NTAA provides its resources to support the efforts of all federally recognized tribes in protecting and improving the air quality within their respective jurisdictions.

The NTAA supports actions by the EPA to regulate greenhouse gas (GHG) emissions under the Clean Air Act (CAA), particularly in the case of large stationary sources. Such sources permitted without consideration of their GHG emissions and a requirement to control them would impact climate now and many years into the future.¹ The tailoring rule is a significant step towards regulating and reducing these emissions by enabling workable implementation of the Act’s Prevention of Significant Deterioration (PSD) and Title V operating permit mandates for stationary sources.

The NTAA also agrees with the Agency that taking a step-by-step approach toward such implementation of the full PSD and Title program requirements for stationary source GHG emissions is appropriate and necessary.

¹ Greenhouse gas emissions have negative radiative forcing impacts for 100 years or more due to the long atmospheric residence lifetime of carbon dioxide.

Climate Change and Indian Tribes

As the EPA's recent Endangerment Finding indicates, elevated levels of GHG emissions that are the result of human activity "endanger the public health and welfare of current and future generations."² Furthermore, "without substantial and near-term efforts to significantly reduce emissions," the accumulation of these GHGs will continue and "lead to ever greater rates of climate change."³ Because carbon dioxide and other GHGs have long lifetimes – from decades to centuries, "present day and near-term emissions" of these air pollutants will continue to influence world climate "for the remainder of this century and beyond."⁴ As such, the NTAA sees the tailoring rule as a necessary step on the part of the EPA to move toward significant reductions of GHG emissions and help reverse the adverse impacts of such emissions on the indigenous peoples of the world.

Federally-recognized Indian tribes -- sovereign nations with certain rights ensured by the U.S. Constitution, treaties and legal precedence -- are facing the immediate, adverse impacts of climate change. Tribes are also affected much differently than the rest of the nation as their cultures are integrated into the ecosystems of North America; and many tribal economies are heavily dependent on the use of fish, wildlife, and native plants.

Even where tribal economies are integrated into the national economy, tribal cultural identities continue to be deeply rooted in the natural world. As climate change disrupts biological communities, the survival of some tribes as distinct cultures may be at risk. The loss of traditional cultural practices, because important plants and animals are no longer available, may prove to be too much for some tribal cultures to withstand on top of the external pressures they have faced during recent generations.

Internationally speaking, indigenous peoples worldwide are faced with a grim future as a result of climate change and its impacts. A glimpse of this future was conveyed in the Intergovernmental Panel on Climate Change's 2007 Fourth Assessment Report which found that indigenous peoples have a limited adaptive capacity to deal with climate change outcomes such as health risks, sea rise, and environmental hazards; the impacts of climate change on indigenous communities are taking place in North America, Africa, Australia, New Zealand and the Polar Regions (not to mention communities in Asia, the Amazon and Andean nations); and there are variations in the vulnerability of indigenous peoples with respect to climate change.

Proposed Step-By-Step Approach

The NTAA favors the tailoring rule's phased approach of implementing the statutory mandates of the CAA's PSD and Title V programs by which the EPA would address

² See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under §202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66523 (Dec. 15, 2009).

³ *Id.* at 66,518.

⁴ *Id.* at 66,518-519.

larger sources under the first phase, namely those sources emitting GHGs beyond a 25,000 tons-per-year (TPY) threshold, for a 5-year period and subsequently consider inclusion of smaller sources under a second phase only if the information received and analyzed under the preceding phase warrants such inclusion and if acceptable streamlining techniques have been developed for PSD and Title V requirements for smaller sources of GHG emissions.

1. Increase in Sources Covered under PSD and Title V Programs

The applicable statutory thresholds for the PSD and Title V programs, namely 100 TPY and 250 TPY, would result in a sudden and dramatic increase in the number of sources subject to these programs based on their GHG emissions, particularly those located in Indian country.

With respect to the PSD program, the EPA indicates that there are more than one million sources in “other source categories [beyond the 28 categories identified under the current PSD program] with the potential to emit 250 tons per year of more” of GHGs that would be brought immediately under this program without a phased approach. While not all of these sources would immediately require permits because the requirement for existing sources to have a PSD permit is triggered upon major modification,⁵ some 20,000 modifications would be triggered per year⁶ for a total of some 40,000 new and modified source PSD permits annually if a 250 TPY applicability threshold were implemented. These numbers are in contrast to the current situation under which the EPA reports there are fewer than 300 new and modified sources triggering PSD review annually.

As for the Title V program, EPA estimates that absent a phased approach, the CAA’s requirement that “any” source emitting 100 tons per year or more of any air pollutant must hold a Title V permit⁷ would require approximately six million sources to apply for such Title V permits within a year as compared with the 14,700 existing permits.

As such, the EPA’s proposed phased approach of adjusting the applicable thresholds of the PSD and Title V programs is an approach that the NTAA supports as it would encompass nearly all of the sources in the 28 categories enumerated by Congress to bear heavier regulatory burdens under the CAA.⁸ It is also the kind of approach that the

⁵ See 42 U.S.C. §§ 7475(a), 7479(2)(C), (7411(a); see also 40 C.F.R. § 52.21 (a)(2) (iii)(PSD review required for “major” modifications of major sources).

⁶ At the two percent per year modification rate that the EPA asserts is representative of the current program.

⁷ See 42 U.S.C. § 7602(j).

⁸ Indeed, EPA’s data show that the vast majority of existing sources in these 28 industries are covered by the major source definition whether the GHG major source applicability threshold is set at 100 TPY or at 25,000 TPY.

Supreme Court has recognized as being appropriate,⁹ particularly with respect to climate change which continues to have adverse impacts on our country and its numerous tribal communities.

2. Administrative Burden on Regulatory Authorities

In addition to being concerned about the number of sources that would be brought under the PSD and Title V programs without the phased approach being proposed by the EPA, the NTAA is also concerned about the enormous administrative burdens which would be placed on tribal staff in carrying out the programs. As the Agency notes, permitting authorities would be overwhelmed by the application of the programs' statutory terms immediately upon GHGs becoming regulated pollutants. This would likely cause a subsequent breakdown of the permitting process, leading to a situation in which sources would either operate outside the bounds of the law or simply not be able to operate because of the long delays in receiving permits.

The aforementioned increase in the number of PSD permits to 40,000 from the current number of 280, if a phased approach was not adopted and implemented, would end up overwhelming permitting authorities with an unmanageable surge in demand for such permits, thereby preventing permit approval in a timely manner.¹⁰ Requiring the already mentioned six million sources to apply for Title V permits within one year as is statutorily required would create extraordinary burdens as well. Because Title V applicability effectuates a series of stepwise administrative, procedural and technical obligations to carry out the operating permit program, if all such sources were immediately swept into the program, the capacity of permitting authorities would be stretched well beyond their ability to implement the statutory command.¹¹ To meet this statutory command, the EPA estimates that the "average permitting authority would need 570 additional full-time employees (FTEs) to support its Title V program."¹² This does not, however, account for the fact that permitting authorities are already having difficulty keeping up with their existing permit workloads.¹³ Hence, the fundamental aim of the

⁹ In addressing climate change, the U.S. Supreme Court stated that "[a]gencies, like legislatures, do not generally resolve massive problems in one fell swoop, ... but instead whittle away over time, refining their approach as circumstances change and they develop a more nuanced understanding of how best to proceed." *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007).

¹⁰ See 74 Fed. Reg. at 55,301.

¹¹ [T]hese six million sources would be required to submit a title V permit application within 1 year. Permitting authorities would need to issue these permits within 18 months of receipt of a complete application, and these permits would need to include any requirements for non-GHGs that may apply to the source, such as provisions of an applicable SIP. For any such requirements, permitting authorities would also need to develop terms addressing the various compliance assurance requirements of title V, including monitoring, deviation reporting, six-month monitoring reports, and annual compliance certifications. 74 Fed. Reg. at 55,302.

¹² *Id.* at 55,303.

¹³ *Id.*

Title V program would be stifled by imposing protracted delays in updating operating permits, thwarting law enforcement, and ultimately obscuring the focus on transparency and accountability for large emitting sources that is the basis for environmental protection under the law.¹⁴

As a result of the tremendous administrative burdens that would be placed on permitting authorities when GHGs become regulated, the NTAA finds this as another convincing reason to adopt the phased approach that the EPA now proposes.

Additional Needs of Indian Tribes

Whatever the PSD and Title V thresholds adopted by the EPA, Indian tribes should be provided with sufficient resources to actively engage in such programs. Section 301(d) of the 1990 Amendments to the CAA authorized the EPA to treat Indian tribes “as States” under the Act, and required the Agency to issue a rule specifying the provisions of the Act for which it was appropriate to treat tribes as states. The EPA complied with this requirement in February of 1998 by finalizing the Tribal Authority Rule (TAR) which provides that tribes may be treated in a manner similar to states for virtually all provisions of the CAA. Tribes are not only eligible for section 103 grant funding to conduct air quality monitoring, emissions inventories, and other studies and assessments, but they may also obtain section 105 grant funding to implement CAA regulatory programs. In anticipation of the TAR, the EPA increased its tribal air grant funding during a time when few Indian tribes were conducting air-related activities. This funding, however, has remained relatively flat during the past 11 years, specifically between a range of \$10.7 million and \$11.05 million.¹⁵ At the same time, the number of tribes seeking 103 and 105 grant funding has substantially increased to the point that any carryover of tribal air funding from previous years has now been exhausted. The EPA and its regional offices are now being forced to turn away a number of tribes for 103 and 105 grant funding requests. Tribes, however, are facing many of the same air-related issues that neighboring state and local jurisdictions are facing, but are significantly underfunded to address such issues. Tribal air grant funding must therefore be increased to more accurately reflect the air quality-related needs of tribes across the nation, and in the case at hand, allow these same tribes the opportunity to implement the CAA’s PSD and Title V programs.

In addition, Indian tribes should be provided with funding from the EPA and other federal agencies to help them engage in such activities as:

- Compiling GHG emission inventories, conducting GHG emissions modeling, and monitoring GHG emissions;

¹⁴ *Id.* at 55,306.

¹⁵ For Fiscal Year 2010, \$13.3 million in grant funds were made available for Tribal Air Quality Management.

- Developing and deploying new technologies to tribal communities and their respective sources to help reduce and mitigate the impact of GHG emissions;
- Promoting energy efficiency; and
- Investing in renewable energy development.

Such resources will not only help Indian tribes reduce global GHG emissions but will also help them curb the adverse impacts of climate change facing tribal communities nationwide.

Conclusion

In summary, the NTAA is pleased to provide the aforementioned comments and recommendations concerning the tailoring rule. If you should have any questions or comments, please feel free to contact Bob Gruenig, NTAA Senior Policy Analyst, via phone at (505) 242-2175 or via e-mail at bgruenig@ntec.org.

Respectfully submitted,

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