

Climate Change Regulation

EPA's Proposed New "Tailoring Rule": Cleaning Up the "Glorious Mess" by Turning Off the Lights

By V&E Partner Eric Groten

OCTOBER 2, 2009



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In 2008, Michigan Congressman John Dingell famously warned of a "glorious mess" were EPA to begin regulating greenhouse gases using mechanisms provided by the existing Clean Air Act.¹ EPA has begun: It intends to find that "greenhouse gas" (GHG) emissions from cars endanger public health and welfare,² and has proposed to regulate those emissions,³ with rules made final by March 2010. That final rulemaking will be EPA's first to limit emission of the pollutant called "greenhouse gases," adding it to the pantheon of "air pollutants" subject to Clean Air Act stationary source permitting requirements, which apply to sources of "any air pollutant."⁴ And so although these rules will directly regulate "only" car makers, their adoption will trigger regulation of much economic activity in the United States.

Various policymakers and judges have wrestled with the question of whether GHGs became subject to Clean Air Act permitting on April 2, 2007 (the day the Supreme Court declared greenhouse gases to be "air pollutants"),⁵ or won't be until March 31, 2010 (or whatever day EPA adopts regulations governing emissions of GHGs),⁶ or at some point in between.⁷ But almost everyone agrees that it's no later than the day EPA adopts its first limits on emissions. Most importantly, that is the present opinion of the current EPA Administrator, who proposed on September 30, 2009, to affirm a similar view held by her predecessor.⁸ And so the fuse is lit, set to go off no later than March 2010. What happens then?

The Glorious Mess

The Clean Air Act itself establishes very specific applicability thresholds for both its pre-construction (PSD)⁹ and operating (Title V) permit programs,¹⁰ none higher than 250 tons per year of pollutant emitted. But at these thresholds, EPA expects that "permitting

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authorities would receive approximately 40,000 PSD permit applications each year — currently, they receive approximately 300 — and they would be required to issue Title V permits for approximately some six million sources — currently, their Title V inventory is some 15,000 sources."¹¹ The resultant strains on both the regulators and the regulated are self-evident.¹² And so EPA on September 30, 2009, proposed a rule to — in effect — amend the Act to raise the thresholds to exclude a large fraction of the otherwise affected source populations, a so-called "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule."¹³

V&E **Obscuring the Mess**

Under the Tailoring Rule, “[f]or the PSD program, [EPA is] proposing to establish, as the first phase, the GHG ‘major stationary source’ emissions applicability threshold level at 25,000 tpy on a CO₂e basis.”¹⁴ Similarly, “for the title V operating permits program, [EPA] also propos[es] to establish the GHG emissions applicability threshold level at 25,000 tpy CO₂e for this first phase. That is, sources that emit at this level or higher would be considered ‘major sources’ and therefore would become subject to title V requirements.”¹⁵

According to EPA, these limitations will increase the number of PSD permits only about 30 percent above current levels,¹⁶ which EPA finds quite manageable.¹⁷

A similarly happy conclusion for Title V, which EPA estimates will apply to 13,600 sources at a 25,000 ton per year threshold:¹⁸ “[A]lthough this increase would pose some challenges to permitting authorities, EPA believes that this increase would not exceed the capacity of permitting authorities to implement the program.”¹⁹ More specifically,

[w]e estimate that the combination of title V permit revisions, modifications, and new permits that would result from a 25,000-tpy CO₂e applicability threshold would require an estimated additional 492 FTEs by permitting authorities nationwide, or an estimated 50-percent increase over current title V staffing levels, to meet the initial permitting requirements that would apply at the time title V applicability is triggered for GHG sources. We do not believe this 50-percent increase in resources would be administratively impossible to achieve, given that title V is self-funded, and that there are efficiencies gained in revisiting existing title V permits and sources with which the permitting staff are familiar.²⁰

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Note EPA’s observation that a 50-percent increase in Title V permit burden is made far less disagreeable because the Title V program is “self-funded.” What that means of course is that the source owner is paying for the privilege of getting a Title V permit, with the fee currently set at over \$40/ton.²¹ This is quite the carbon tax opportunity in Title V fee clothing.

Note, too, that EPA says far less about burden on the permitted than the permitter. And this is for the simple reason that EPA treats this rule as a *burden-reducer*:

We have therefore concluded that this proposed rule would relieve regulatory burden for a substantial number of small entities, and thus I certify that it will not have a significant economic impact on a substantial number of small entities.²²



Perversely, then, at the very time EPA takes action to sweep at least 13,600 new stationary sources into two of the most complex, expensive, and time-consuming regulatory programs in the world by its choice to regulate cars, all that counts is the social cost of having not regulated another 136,000 sources along with them:

In this way, EPA will have taken its most intrusive action ever under the Clean Air Act without ever having to account for the costs to those regulated.

EPA examined the social costs of this proposed rule. These social costs represent the foregone environmental benefits that would occur if regulatory relief were offered to small sources of GHG emissions as proposed.²³

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A Bigger Mess

EPA dedicates a substantial fraction of this 400+ page proposal to justifying its legal authority to adopt it. Indeed, it is quite necessary to rip some Clean Air Act seams in order to squeeze greenhouse gases into it.

Messing with the Statutory Thresholds. EPA thinks that Congress made a mistake: The low applicability thresholds don't work when EPA gets into the GHG control business, and so the problem must be that Congress didn't intend those thresholds to apply. The Tailoring Rule offers, at great length, two self-justifications for reading out of the statute some very specific directives.

The first is the rule of construction that allows an interpretation at odds with the literal language of a statute if the literal language would lead to an absurd result:

The U.S. Supreme Court has held that the plain meaning of a statutory provision is not conclusive “in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters’ ... [in which case] the intention of the drafters, rather than the strict language, controls.”²⁴

Principles of its application are discussed in EPA's 2008 ANPR:

To determine whether “the intentions of the drafters” differs from the result produced from “literal application” of the statutory provisions in question, the courts may examine whether there is a related statutory provision that conflicts, whether there is legislative history of the provisions in question that exposes what the legislature meant by those terms, and whether a literal application of the provisions produces a result that the courts characterize variously as absurd, futile, strange, or indeterminate.

See, e.g., *id.*, *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004); *United States v. American Trucking Association, Inc.*, 310 U.S. 534 (1940); *Rector of Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892).²⁵

The Tailoring Rule preamble goes on at length to conclude that Congress wouldn't have intended to overwhelm either the PSD or Title V permit programs for relatively little gain, a result EPA finds "absurd" enough to conclude that Congress didn't intend to apply the 250 ton threshold to GHGs.²⁶

A second judicially created escape hatch is the doctrine of administrative necessity, which actually has been applied directly in the context of the PSD program, to wit: In *Alabama Power v. Costle*,²⁷ the D.C. Circuit upheld EPA's decision to set *de minimis* exceptions to the obligation to permit every slight emission increase as a "modification." EPA reads *Alabama Power* to establish the following doctrine of administrative necessity:

[E]ven when a statutory requirement expresses a clear congressional intent, if the provision is impossible for the agency to administer, then the agency is not required to follow the literal requirements, and instead, the agency may adjust the requirements in as refined a manner as possible to assure that the requirements are administrable, while still achieving Congress's overall intent.²⁸

Applying this doctrine, EPA concluded that its decision to set thresholds orders of magnitude higher than Congress selected would be excused by a reviewing court, simply because compliance with the specific thresholds in the statute would have been administratively difficult. EPA's optimism seems very, well, optimistic.

Were it not for the Supreme Court's overwhelming commitment to the literal language of the Clean Air Act in the face of all extrinsic considerations to the contrary, EPA would not be in this glorious mess to begin with: The 5 - 4 majority in *Massachusetts* read the definition of

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air pollution so literally that it rendered the definition meaningless (effectively, "air pollution" = "air pollution" or even "air pollution" = "air"), despite EPA protestations at the time that it would lead to the exact absurdities we now address;²⁹ consequently, the Court may be very slow to agree that "fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input ... which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant," in fact can be read to mean "any source greater than 25 thousand tons per year."

There is nothing inherently absurd about making a beneficial regulatory program applicable to the widest array of sources, and so if Congress has intended greenhouse gases to be subject to PSD permitting at all, the more the merrier. Particularly, as EPA puts it, "if the programs are self-funding." A reviewing court might

not believe itself compelled to stand in the way of Congress’s decision to subject a large population of business and commercial activities to permitting requirements.

And as for administrative necessity, it seems that 25,000 tons is a bridge too far from 250. *Alabama Power* was about *de minimis* exemptions in a statute that didn’t set the *de minimis* thresholds itself. Here, the *de minimis* thresholds already are in the statute. And two orders of magnitude variation from that is hardly *de minimis*, anyway.

EPA says Congress cannot have intended it to require permits from all 250-ton/year sources of CO₂, because that would impose an impossible burden:

[A] literal application of the PSD and title V applicability requirements (i.e., the 100/250-tpy PSD major stationary source threshold and a “zero” significance level threshold, and the 100-tpy title V threshold) would result in a volume of permit applications that is so high that the PSD and title V programs would become impossible for state and federal authorities to administer. The PSD and title V permitting processes would become overwhelmed and essentially paralyzed. Under these circumstances, the judicial doctrine of administrative necessity authorizes EPA to undertake a process for rendering the PSD and title V requirements administrable.³⁰

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The impossibility of the statutorily assigned task cannot be a basis to write it out of the statute, or the Clean Air Act would be quite bare. Has EPA ever timely completed the five-year reviews of the national ambient air quality standards required by Section 109(d)? Approved a state implementation plan revision within the 12 months prescribed by Section 110(k)(2)? Timely completed the eight-year periodic review of each new source

performance standard as required by Section 111(b)(1)? Was the country devoid of nonattainment areas by around 1975, as Congress envisioned with the deadlines imposed by the Act in 1970? Congress frequently intends the impossible from EPA; a man’s reach should exceed his grasp and all that. Imagine the D.C. Circuit accepting an EPA rule that says, for

example, we will review only one of the NAAQS every five years because it impossible to do all of them every five years. The pending proposal is no different.

EPA may have a particularly thorny problem applying its legal theories to Title V requirements, because Section 502(a) of the Act expressly authorizes EPA to tinker with Title V’s applicability for the sake of “administrative necessity” in many respects, but specifically not to the point of allowing major sources to escape the program...

EPA may have a particularly thorny problem applying its legal theories to Title V requirements, because Section 502(a) of the Act expressly authorizes EPA to tinker with Title V’s applicability for the sake of “administrative necessity” in many respects, but specifically *not* to the point of allowing *major sources* to escape the program:

The Administrator may, in the Administrator’s discretion and consistent with the applicable provisions of this Act, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, *except that the Administrator may not exempt any major source from such requirements.*³¹

Nowhere in the Tailoring Rule does EPA mention any case allowing administrative exceptions to a statute in which Congress expressly withholds the authority to make them.

Messing with the States. EPA believes that the relief it intends to provide must be available on the day the mobile source rules appear; that is, at that moment, sources of CO₂ will become subject to PSD and Title V permitting for CO₂. While it certainly intends to adopt the Tailoring Rule at least an hour or two before the car rules, that would not have any immediate bearing on most PSD or Title V programs, which exist primarily as creatures of state law, run by state permitting authorities. All of those states have thresholds certainly no greater than the current Clean Air Act, and most also have a zero “significance” level for “any other pollutant regulated by the Act.” And so those thresholds are locked in both as a matter of state law and federal rule.

No problem, says EPA. We’ll just say we made a mistake 5, 10, 15 years ago when we approved your PSD program, and use our authority to correct mistakes to revoke our approvals to the extent you have thresholds below 25,000 tons per year for GHGs:

Once EPA has approved a SIP, if EPA determines that its action in doing so was in error, then, under CAA section 110(k)(6), EPA may conduct a rulemaking to correct the error without requiring any further action, such as submission of a request or a SIP revision, from the state. Specifically, section 110(k)(6) provides:

It is not clear that any reviewing court would accept revisionist history as a basis for regulatory action, nor that this is the sort of “mistake” that EPA has the inherent authority to correct...

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.³²

It is not clear that any reviewing court would accept revisionist history as a basis for regulatory action, nor that this is the sort of “mistake” that EPA has the inherent authority to correct: At least one court has found that “[a]n attempt to change a SIP 13 years after its creation, particularly when it results from a wholesale policy change in the interim, cannot be exempted from procedural requirements on the grounds that it is the correction of a mistake.”³³

If this attempt were allowed to work here, there would be little left of the state implementation plan process or Clean Air Act federalism: Any time EPA changes its expectations, it just says, hey, we made a mistake when we approved your SIP the last time. No need to make SIP calls, wait for the state to revise its laws, get the changes to EPA for approval, undergo notice and comment and then possible appeals.³⁴

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And EPA would undertake this disapproval not only retroactively but selectively: By eliminating the 250 ton threshold for a “regulated pollutant” and replacing it with one of 25,000 tons per year for “greenhouse gases,” it will have (perhaps) made each SIP more (or less) stringent than any state might have intended. Perhaps Massachusetts would have chosen a 10,000 ton threshold? Perhaps Texas would have chosen 1,000,000? EPA does not explain how this retroactive partial disapproval idea survives case law limiting its ability to alter a state’s intended plan by selective approvals,³⁵ especially when no state has yet had the chance to make in the first place any informed decisions on any “GHG SIP” at all.

And even if EPA’s creative approach were legal, it won’t work as a practical matter because it can’t change the state laws that actually govern source obligations under both the PSD and operating permits programs. No sovereign can delegate to another the ability to make its laws, and so changes in pollutants and applicability thresholds must be amended by some affirmative act by the state regulatory body to update or ratify those federal

law changes before they become effective.³⁶ EPA seems to understand that it cannot solve constitutional problem by rule, but offers a puzzling alternative solution:

It should be noted that if any state with these SIP provisions interprets their provisions to cover only pollutants regulated (or subject to regulation) at the time of SIP submission or approval, so that the provisions would not cover GHG emissions, then the state should so indicate during the comment period. EPA will take steps to resolve the proper interpretation of the provision. EPA proposes in this action that if EPA agrees that the SIP provision cannot be interpreted to cover sources of GHG emissions, then EPA will treat the state in the same manner as states that specifically list pollutants as subject to PSD requirements and do not include GHGs, as discussed below. Although EPA approved them, these SIPs were, and remain, deficient because by subjecting to the PSD requirements only the pollutants specifically listed, they fail to

reflect the EPA's longstanding requirements that PSD requirements apply to all pollutants subject to regulation under the CAA, which necessarily includes any newly regulated pollutants beyond those specifically listed.³⁷

We doubt EPA will get many volunteers, as few states are likely to be in a hurry to subject their citizens to GHG permitting.

Shining a Light on the Real Problem

What's all this trying to accomplish? A rational means of reducing CO₂ emissions to a specific environmental endpoint appropriate to the known scope of a problem? Not really.

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Perhaps with the best of intentions, EPA is just trying to turn off the lights so we don't see the mess, but of course that just makes it that much more certain that everyone in the room will stumble around for years in litigation and confusion (absent, of course, express relief from Congress).

to construction to make sure that its emissions would not interfere with national ambient air quality standards. To date, there is no real "BACT" for CO₂,³⁸ and there certainly are no NAAQS for it either.³⁹ PSD review for GHGs, then, would accomplish none of the objectives for which it was intended. But yet no one

EPA is "tailoring" not because it makes sense to apply PSD and Title V review to sources of CO₂ emissions, but because it does not. The PSD program was created as a means of compelling best available control technology on major new sources, and of reviewing a proposed source prior to construction to make sure that its emissions would not interfere with national ambient air quality standards. To date, there is no real "BACT" for CO₂,³⁸ and there certainly are no NAAQS for it either.³⁹ PSD review for GHGs, then, would accomplish none of the objectives for which it was intended. But yet no one can question that PSD review for GHGs will delay or even discourage new capital projects, the effect of which will be to delay or discourage the inevitable increases in energy efficiency/decreases in emissions associated with the displacing of the old by the new. As for Title V, its purpose was simply to codify in one place all of the requirements established for major source in other, independently applicable Clean Air Act regulatory regimes. To date, there are none for CO₂.⁴⁰

EPA is "tailoring" not because it makes sense to apply PSD and Title V review to sources of CO₂ emissions, but because it does not.

Accordingly, Title V review for CO₂ also is a meaningless paper exercise, but at a great administrative cost. The programmatic value of PSD and Title V review of CO₂ is almost zero, if not negative, and the costs are — charitably — at least as great as EPA describes in the preamble of the Tailoring Rule.

Environmental group leaders assure us that they will not challenge these Executive branch amendments to a legislative enactment.⁴¹ Although presented as a generous concession to administrative necessity, the real reason to want to keep this rule out of the courtroom is that it ultimately may turn the light back on the real cause of the mess.



The five justices deciding *Massachusetts* declined to consider any tools of statutory interpretation to determine Congressional intent because the definition of “air pollution” was so “unambiguous.” In a challenge to the Tailoring Rule, the reviewing court will be asked to find ambiguity in a far clearer definition (of “major emitting facility”) to avoid seemingly absurd results, all of which are precipitated by the decision to crowbar greenhouse gases into the Clean Air Act. No honest reader could find more ambiguity in the definition of “major emitting facility” than in that for “air pollution,” and so which should give way? Is it more absurd to apply the PSD thresholds to CO₂ or to put CO₂ into the PSD program (or the rest of the Act) in the first place?

No honest reader could find more ambiguity in the definition of “major emitting facility” than in that for “air pollution,” and so which should give way?

The permitting issue perfectly exposes the fact that Congress was not trying to solve global climate change in the Clean Air Act, and (whatever its current feelings on the subject) did not intend the Clean Air Act to address it. EPA effectively admits this:

In enacting the PSD requirements during the 1977 Clean Air Act Amendments, Congress, focused as it was on sources of conventional pollutants and not global warming pollutants, expected that the 100/250 tpy applicability thresholds would limit PSD to larger sources.⁴²

EPA’s 2008 ANPR identifies many other GHG round pegs and Clean Air Act square holes.⁴³ With the Tailoring Rule, EPA will need to argue that Congress wasn’t thinking about regulation of CO₂ in the Clean Air Act in 1977 (or 1970 or 1990), but now that the Supreme Court has imputed to Congress the intent to have done so, the courts must further amend the Act to make it work. The need for so many exceptions calls into question the rule.

Consequently, interests opposed to Clean Air Act regulation of greenhouse gases almost certainly will challenge an exemption nominally intended to help at least some of them. Given D.C. Circuit and Supreme Court tendencies to respect literal language,⁴⁴ it seems more

Given D.C. Circuit and Supreme Court tendencies to respect literal language, it seems more likely than not that the Tailoring Rule will not survive.

likely than not that the Tailoring Rule will not survive. And in the process, the appellate courts will have a chance to reconsider *Massachusetts v. EPA*, this time squarely faced with competing absurdities. At the time it heard *Massachusetts*, the Court was convinced it was deciding only that EPA had to make an endangerment finding for cars, one way or the other.⁴⁵ The Tailoring Rule may have the benign effect of illuminating the messes that *Massachusetts* created.

For further information on this topic, please contact V&E Partner [Eric Groten](#). Visit our website to learn more about Vinson & Elkins’ [Climate Change Regulation](#) practice.

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- ¹ *Wall Street Journal*, Apr. 12, 2008, available online at <http://online.wsj.com/article/SB120795796121309347.html>.
- ² 74 Fed. Reg. 18,885, 18,886 col. 1 (Apr. 24, 2009).
- ³ 74 Fed. Reg. 49,454 (Sept. 28, 2009).
- ⁴ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, EPA-HQ-OAR-2009-0517, at 18 (“Under EPA’s current interpretation of PSD and title V applicability requirements, promulgation of this motor vehicle rule will trigger the applicability of PSD and title V requirements for stationary sources that emit GHGs.”). Copy available online at <http://epa.gov/nsr/documents/GHGTailoringProposal.pdf>. Because the proposed rule has not yet been published in the *Federal Register*, we refer here to the proposal draft as posted by EPA on its website on September 30.
- ⁵ *Massachusetts v. EPA*, 549 U.S. 497 (2007). In various proceedings, project opponents have argued that the Act’s literal language compels permit review for any “air pollutant,” regardless of whether it is yet regulated. See, e.g., *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 (EAB 2008) (in challenge to sufficiency of permit issued to power project, Sierra Club argued that *Massachusetts*’ holding that CO₂ is an air pollutant “subject to EPA regulatory authority” sufficed to render CO₂ “subject to regulation”); *Friends of the Chattahoochee, Inc. v. Longleaf Energy Associates, LLC*, In the Superior Court of Fulton County, Georgia, Docket No. 2008CV146398, at 6-7 (state district court finding that the permitting authority should have considered CO₂ emissions because “there is no question that CO₂ is ‘subject to regulation under the Act’”), *rev’d, Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc.*, 681 S.E.2d 203 (Ga. Ct. App. 2009), petition for certiorari denied by the Georgia Supreme Court on Sept. 28, 2009 (holding that “[b]ecause no provisions of the CAA or the Georgia SIP control or limit CO₂ emissions, CO₂ is not a pollutant that ‘otherwise is subject to regulation under the [CAA].’ Thus CO₂ is not a ‘regulated NSR pollutant’ in the PSD program and was not required to be controlled by use of BACT.”).
- ⁶ In an effort to resolve an issue that had percolated inconclusively within EPA’s Environmental Appeals Board, departing EPA Administrator Stephen Johnson issued an interpretative memo concluding as follows: “EPA interprets the definition of ‘regulated NSR pollutant’ ... to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation promulgated by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.” Memorandum from Stephen Johnson to EPA Regional Administrators, “EPA’s Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program” (Dec. 18, 2008), at 2.
- ⁷ In other EAB proceedings, project opponents have argued that GHG monitoring rules amount to regulation sufficient to make the air pollutant subject to permit review. E.g., Sierra Club’s Petition for Review and Request for Oral Argument in *In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB), filed Oct. 1, 2007 (“Congress ordered EPA ‘to promulgate regulations’ requiring that hundreds of facilities covered by Title IV monitor and report their CO₂ emissions, and in Section 165, Congress required a BACT limit for ‘any pollutant subject to regulation’ under the Act. The combined effect of these two statutory mandates is that BACT limits are applicable to CO₂ pursuant to Section 165.”).
- ⁸ Shortly after taking office, Administrator Jackson agreed to reconsider the Johnson memo, *supra*, note 6, while maintaining it as EPA policy in the interim. Letter from EPA Administrator Lisa Jackson to David Bookbinder (Sierra Club), Feb. 17, 2009. In fulfillment of that commitment to reconsider, EPA issued a request for comment on September 30, 2009, which discusses a variety of possibilities, but continues to characterize the Johnson memo as expressing EPA’s “current views.” Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program, EPA-HQ-OAR-2009-0597 (available on line at <http://epa.gov/NSR/guidance.html>). While holding open the possibility of a different conclusion, one seems unlikely, as the question will be largely moot by the time the comment process is concluded.
- ⁹ Section 165(a) of the Act requires each “major emitting facility” to obtain a “prevention of significant deterioration” permit before it may be constructed or modified. 42 U.S.C. § 7475(a). A “major emitting facility,” in turn, is either one of about 30 specifically listed source types (such as “fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input”) “which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant,” or “any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant.” CAA Section 169(1), 42 U.S.C. § 7479(1).

- ¹⁰ Title V of the Clean Air Act requires — among other categories — each “major source” to obtain a permit to operate. CAA Section 502(a), 42 U.S.C. § 7662(a). A “major source” is “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.” CAA 302(j), 42 U.S.C. § 7602(j) (which is made applicable to Title V applicability determinations by Section 501(2)(B), 42 U.S.C. § 7661(2)(B)).
- ¹¹ Tailoring Rule, *supra* note 4, at 19.
- ¹² EPA has addressed this issue before, in the context of an Advanced Notice of Proposed Rulemaking issued in 2008 to explore the consequences of proceeding to regulate in the wake of the Supreme Court’s ruling in *Massachusetts v. EPA* that GHG’s are “air pollutants” potentially subject to Clean Air Act mandates. See 73 Fed. Reg. 44,354 (July 30, 2008). In response, “[c]ommenters expressed that the implications of all these sources becoming CAA-regulated stationary sources would cause a large permitting backlog, as states do not have the staff or training to take on such a large burden. In addition, commenters stressed that many of these sources have never needed an air permit before and would have to obtain basic knowledge of the permitting regulations and how to comply with them, which would also impose more burdens on the permitting authorities. Many of the new sources would be small emitters not previously regulated under the CAA.” Tailoring Rule, *supra* note 4, at 62.
- ¹³ Tailoring Rule, *supra* note 4.
- ¹⁴ *Id.* at 22. EPA’s proposal would set the same threshold to define “modifications”: “We are also proposing to establish in this first phase a PSD ‘significance level’ emissions rate for GHGs and are proposing a range for that value of 10,000 to 25,000 tpy CO₂e for comment.”
- ¹⁵ *Id.* at 23. Note that the thresholds would be compared to emissions determined by CO₂ equivalency:
We propose to identify the GHG metric as the group of six GHGs, on a CO₂e-basis. Using a CO₂e basis, a source’s emissions for any of the six primary GHGs that are “subject to regulation” under the Act, and therefore considered “regulated NSR pollutants,” are summed on a CO₂e basis using their GWP values. The summed CO₂e emissions would then be compared to the applicable permitting threshold to determine whether the source is subject to PSD and title V requirements.
Id. at 199.
- ¹⁶ *Id.* at 214. EPA estimates mild increases in burden on the government:
[W]e estimate that, at a 25,000-tpy CO₂e applicability threshold for PSD major sources, approximately 400 additional new or modified facilities would be subject to PSD review in a given year. These include approximately 130 new facilities and approximately 270 modifications at existing major sources that would be subject to PSD review as major modifications. Many, but not all, of these facilities would be subject to PSD review for other pollutants that they emit. These estimates compare to the 280 PSD permits that are currently issued in a typical year.
- ¹⁷ *Id.* at 218-19:
All told, the increase in burden for permitting authorities from including sources of GHGs at a 25,000-tpy CO₂e level, on a total national basis, would be approximately 112,000 staff hours at an additional cost of approximately \$8 million. This workload amount represents an increase of about 1.3 times, or 32 percent, in the current burden for permitting authorities on a nationwide basis. We believe that this additional burden is manageable, but that it will necessarily pose some challenge to permitting authorities, and that to accommodate the additional burden, permitting authorities may need to expand their resources or seek efficiencies in processing permits.
- ¹⁸ *Id.* at 236.
- ¹⁹ *Id.* at 235.
- ²⁰ *Id.* at 239. In fact, EPA is so confident about the prospects for ramping up to meet the new load that the preamble discusses at length a future phase of “tailoring,” in which more sources will be brought into the program. *Id.* at 245, *et seq.* We dedicate no space here to EPA’s future five-year plans, however, because there is more than enough to worry about these first five years.
- ²¹ EPA notes that the Clean Air Act requires only that each state’s Title V program assess a fee sufficient to cover the cost of running the Title V program. Tailoring Rule, *supra*, note 3, at 295. “The current presumptive minimum fee, effective through September 2009, is \$43.75.” *Id.* at 296. In many states, only the first 4000 tons per year are assessed a fee.
- ²² *Id.* at 312.
- ²³ *Id.* at 260.
- ²⁴ *Id.* at 79, citing *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

²⁵ ANPR, *supra* note 12, 73 Fed. Reg. at 44,503 cols. 1-2 (July 30, 2008).

²⁶ Tailoring Rule, *supra* note 4, at 62-67 & 78-104.

²⁷ 636 F.2d 323, 405 (D.C. Cir. 1979).

²⁸ Tailoring Rule, *supra* note 4, at 110.

²⁹ *See, e.g.*, Section II.A. of EPA Brief to Court in *Massachusetts v. EPA*, titled “Key Provisions Of The CAA Cannot Coherently Be Applied to Greenhouse Gas Emissions.”

³⁰ Tailoring Rule, *supra* note 4, at 106-107.

³¹ CAA § 502(a)(emphasis added);42 U.S.C. § 7661a (a).

³² *Id.* at 268.

As a drafting matter, EPA proposes to accomplish the limitations of approval by adding to the record of its action on each SIP, as found in the subparts to 40 CFR 51.21, the boilerplate statements that (i) EPA limits its approval of the PSD permitting threshold provisions to the extent those provisions require permits for sources of GHG emissions that equal or exceed 100 tpy CO₂e for sources in the 28 categories identified in CAA section 169(1), and 250 tpy CO₂e for all other sources, but that are less than 25,000 tpy CO₂e; and (ii) EPA limits its approval of the PSD significance level provisions to the extent those provisions treat as significant GHG emissions increases that are less than [10,000 to 25,000] tpy CO₂e.

Id. at 273.

³³ *See Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 780 (3d Cir. 1987). EPA’s preamble doesn’t have a word to say about this case.

³⁴ *See generally* CAA 110(k);42 USC 7410(k).

³⁵ An unbroken line of cases, starting with *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028 (7th Cir. 1984), holds that the Clean Air Act, placing in the states the “primary responsibility” for protecting air quality, does not allow EPA change the stringency of the plan as developed by the state; EPA may only approve or disapprove what the state submits. In one case rejecting EPA’s decision to approve a sulfur dioxide limit but not the averaging conventions that were part of the rule, Judge Posner offered words that might counsel against EPA using the SIP machete that it proposes in the Tailoring Rule:

... nothing in the Act or in any cases we have found suggests that the EPA, when asked to approve a revised plan, can, without pausing to decide whether a limitation in the plan that its authors may have thought critical to its soundness has any merit at all, approve the plan minus the limitation. The plan might be vastly better with than without the limitation, and the agency cannot determine that without examining the limitation. Even if it is not vastly better, section 110(a)(3)(A) requires the Administrator to approve a revised plan, limitations and all, if he determines that it meets the requirements of the Clean Air Act; and he cannot make that determination if he refuses to evaluate the limitations.

Indiana & Michigan Electric Co. v. U.S. Environmental Protection Agency, 733 F.2d 489, 491 (7th Cir. 1984); see also *Concerned Citizens of Bridesburg*, *supra* note 33, 836 F.2d at 781 (“Because the states have primary responsibility for achieving air quality standards, the EPA has limited authority to reject a SIP.”).

³⁶ *See, e.g., Ex parte Elliott*, 973 S.W.2d 737, 740 (Tex. App. — Austin 1998, pet. refused) (if Texas statute incorporating EPA definition of hazardous waste is read to mean that the definition changes from time to time at the will of EPA without intervention by or guidance from the legislation, then the constitutionality of the statute would be in doubt because it would essentially delegate lawmaking powers to a federal agency).

³⁷ Tailoring Rule, *supra* note 4, at 283 fn. 36.

³⁸ Although EPA made the following observations about the sources it intends to “exempt” from permitting, they apply equally to any source: “We expect the emissions differences due to BACT controls for such sources to be relatively small due to the lack of available capture and control technologies for GHG at such sources that are akin to those that exist for conventional pollutants and sources, as well as the likelihood that even in the absence of BACT such sources would already be installing relatively efficient GHG technologies to save on fuel costs.” Tailoring Rule, *supra* note 4, at 263.

³⁹ As noted in the Tailoring Rule preamble, “the basic purpose of the PSD program ... is to safeguard maintenance of the NAAQS ...” *Id.* at 90.

⁴⁰ “It is important to remember that a title V permit does not add new requirements for pollution control itself, but rather collects all of a facility’s applicable requirements under the CAA in one permit. Therefore, the compliance benefits above are less when title V permits contains few or no CAA applicable requirements.” *Id.* at 261.

⁴¹ *Greenwire*, Sept. 1, 2009.

⁴² Tailoring Rule, *supra* note 4, at 66.

⁴³ See ANPR, *supra* note 12. In fact, the ANPR finds poor fits with all of the Act's other programs, from NAAQS development and state implementation under Section 110, to NSPS development under Section 111, to hazardous air pollutant regulation under Section 112.

⁴⁴ E.g., *Chevron v. NRDC*, 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue."). *Chevron* established the modern standard of review of an agency's interpretation of its governing statutes in the very context of how to interpret the definition of "major stationary source" in Section 302(j) of the Clean Air Act. The *Chevron* opinion, written by the same Justice (Stevens) who wrote for the *Massachusetts* majority, concluded that Congress left the "stationary source" part of "major stationary source" open for EPA discretion. But there is nothing meaningfully ambiguous about the "major" part ("which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant").

⁴⁵ The Court rejected EPA's argument that GHG regulation was a policy decision of "such economic and political magnitude" that Congress would not have delegated it to an administrative agency, especially in "so cryptic a fashion," because it accepted the Petitioners' representation that that "[a] judgment in favor of petitioners will not mandate regulation of air pollutants associated with climate change":

Here, in contrast [to *Brown & Williamson*], EPA jurisdiction would lead to no such extreme measures [as a ban on tobacco]. EPA would only regulate emissions, and even then, it would have to delay any action "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance," §7521(a)(2).

Massachusetts v. EPA, 549 U.S. 497, 531 (2007).

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