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# INDUSTRY CRIES FOUL TO EPA'S ATTEMPT TO REGULATE GHG EMISSIONS USING THE CLEAN AIR ACT

by William J. Walsh, Mark A. Erman, & Jane C. Luxton\*

## INTRODUCTION

The U.S. House of Representatives passed a comprehensive, albeit flawed, climate change bill, the Waxman/Markey bill, in June 2009,<sup>1</sup> and the Senate Environment Committee voted to bring a similar, but measurably more demanding, bill, the Kerry/Boxer bill, to the floor of the Senate.<sup>2</sup> The House and Senate bills cover the same greenhouse gases (“GHGs”) and facilities, require an eighty three percent reduction in emissions between 2005 and 2050, and create a GHG emission allowance trading program, which lowers the cost of compliance, generates funds to provide incentives for the use of carbon capture and sequestration, and encourages use of more energy-efficient buildings, among other things.<sup>3</sup> The Senate bill: (a) requires covered sources to reduce their GHG emissions twenty percent below 2005 levels by 2020, as opposed to the House bill’s seventeen percent reduction; (b) codifies the Environmental Protection Agency (“EPA”) Clean Air Act (“CAA”) GHG rule (ensuring the worst of both worlds (cap-and-trade and command and control CAA regulation)); (c) imposes a lower offset limit, which will increase the price of allowances and the cost of the program, according to the EPA; (d) reduces the total amount of free allowances, primarily to reduce the national deficit, and (e) provides a \$28 price cap on GHG emission allowances, lower than the House bill’s cap.<sup>4</sup> After this strong beginning, both bills stalled, however, and prospects for passage remain uncertain.

As the year wore on, the climate change spotlight moved dramatically from the legislative arena and complementary international efforts<sup>5</sup> to the development of EPA’s CAA regulations that will impose GHG-related requirements on industry. In particular, EPA’s proposed Prevention of Significant Deterioration (“PSD”) tailoring rule (“PSD Tailoring Rule”) will require the installation of “best available control technologies” (“BACT”) on new or modified “major” sources that exceed certain GHG thresholds.<sup>6</sup> Even if—as some believe—the Obama Administration’s motivation in proposing to use the CAA to reduce GHG emissions is to provide leverage for a legislative solution, now that EPA has proposed the PSD Tailoring Rule, industry has had no choice but to comment on it. This article provides an overview of these industry comments regarding the merits of the CAA PSD Tailoring Rule.<sup>7</sup>

## BACKGROUND AND SUMMARY OF THE PROPOSED PSD TAILORING RULE

In 2007, the Supreme Court in *Massachusetts v. EPA* held that carbon dioxide (“CO<sub>2</sub>”), the most common GHG, was a “pollutant” under the CAA, and, although the Court did not compel regulation of GHGs, it did require an evaluation of whether GHG

emissions from all sources were causing an endangerment to public health and the environment, whether automobile emissions were contributing to that endangerment, and whether regulation of mobile sources was required.<sup>8</sup> The Court also directed EPA to “ground its reasons for action or inaction in the statute.”<sup>9</sup>

The CAA requires PSD permits in attainment areas (areas that comply with air quality standards) when a new or modified major source causes a significant net emissions increase, but this only applies for “each pollutant subject to regulation.”<sup>10</sup> Once GHGs are “subject to regulation” under the CAA, the regulatory authority must assess if a technology that meets the definition of BACT exists for GHGs and, if so, must mandate installation of such BACT as part of the PSD permitting process.<sup>11</sup>

EPA’s pre-2009 interpretation was that only a pollutant that is *presently* subject to a statutory requirement or regulatory provision that requires actual control of a pollutant is “subject to regulation” under the new source review (“NSR”) program described above. Under this interpretation, CO<sub>2</sub> is not “subject to regulation” because EPA has not established a National Ambient Air Quality Standard (“NAAQS”) or New Source Performance Standard (“NSPS”) for CO<sub>2</sub>, classified CO<sub>2</sub> as a Title VI substance, or otherwise regulated CO<sub>2</sub> under any other provision of the Act.<sup>12</sup>

In response to the remand in *Massachusetts v. EPA*, EPA discussed its options in an Advance Notice of Proposed Rulemaking (“ANPR”) in June 2008,<sup>13</sup> and the new Administration proposed on September 28, 2009, to regulate GHG emissions from light-duty vehicles (based on EPA’s proposed endangerment finding).<sup>14</sup> On December 7, 2009, EPA found that GHG emissions from all sources endanger public health and welfare and that mobile source emissions contributed to that endangerment.<sup>15</sup>

On October 27, 2009, EPA proposed its PSD Tailoring Rule to address industrial stationary sources of GHG emissions.<sup>16</sup> EPA felt that such a rule was necessary because, once the light-duty vehicle rule is final, GHGs will be “subject to regulation,” and, therefore, the GHGs from stationary sources will also immediately be “subject to regulation” under the PSD program.<sup>17</sup>

For criteria pollutants (i.e., nitrogen oxides, sulfur oxides, particulates, lead, ozone, and carbon monoxide), the CAA PSD and Title V programs define “major” sources as those that emit more than 100 tons per year for applicability and 250 tons per year

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for PSD significance. If these thresholds are applied to GHGs, hundreds of thousands, if not millions, of companies (including many small businesses) will be, in EPA's words, "burdened by the costs of individualized PSD control technology requirements and permit applications . . . State permitting authorities would be paralyzed."<sup>18</sup> To avoid this, EPA invoked the judicial doctrines of avoiding absurd results and administrative necessity<sup>19</sup> in a two-phase approach. First, EPA proposed establishing applicability thresholds of 25,000 tons per year of CO<sub>2</sub> equivalents ("CO<sub>2</sub>e") and a PSD significance level of between 10,000 and 25,000 tons per year of CO<sub>2</sub>e. Then, EPA proposed that it would issue a rule within six years that will either confirm the first-phase permitting levels or establish revised levels or other streamlining techniques.<sup>20</sup>

### COMMENTS ON THE PROPOSED PSD TAILORING RULE

The Proposed PSD Tailoring Rule has the potential to adversely affect millions of plants from an extremely diverse range of industries and of widely differing sizes. All industry comments concluded that the rule, if issued as written, will significantly impact industrial operations in the United States. More than 5,800 comments (many from individual companies, trade associations, and industry coalitions representing thousands of companies) were filed on the PSD Tailoring Rule.<sup>21</sup> These comments express an interesting diversity of views, as well as some clear and consistent messages.

#### CONGRESS DID NOT INTEND TO REGULATE GHG EMISSIONS USING THE CAA

Virtually every industry comment stated the obvious and irrefutable fact that Congress simply did not have GHG emissions in mind when it originally drafted the CAA in 1970 or subsequently amended it in 1977 to include the PSD program.<sup>22</sup> The nature of GHG emissions (i.e., a global, very long-term impact on climate) and their control are fundamentally different from the criteria pollutant emissions intended to be addressed by the original CAA (i.e., protection of local or regional ambient air quality). Thus, the square peg of GHG emissions does not fit the round hole of the CAA. This is precisely the reason why Congress has devoted so much time to considering climate change legislation and why the presidential candidates from both parties in the last election favored legislation during the campaign.

#### REGULATION OF GHG EMISSIONS PURSUANT TO THE CAA IS *NOT* REQUIRED BY THE SUPREME COURT

Most industry comments argued persuasively that regulation of GHG emissions pursuant to the CAA is *not* required by *Massachusetts v. EPA* (see discussion above). Some comments, but by no means all, argued that climate change regulation was so important that it should be addressed by Congress, but such comments naturally provided little detail concerning what such legislation might include. In essence, some argue that GHG is a political issue of global impact that should be decided by Congress. Congress, however, could decide to take no action.

### INDUSTRY SPLIT CONCERNING WHETHER THE ABSURD RESULTS AND ADMINISTRATIVE NECESSITY DOCTRINES APPLIED

Interestingly, the industry comments split concerning whether, on one hand, the "absurd results" and "administrative necessity" legal doctrines applied to GHG emissions at all. Thus, some comments concluded that, if EPA was required to regulate stationary sources, EPA was compelled to regulate every source emitting more than 250 tons per year, arguably an absurd result to be avoided. This legal argument also provides an incentive for Congress to intervene by amending the CAA to bar or at least delay use of the CAA to regulate GHG emissions, and proposed legislation along those lines has already been introduced. The question remains whether there are enough votes in the House and Senate to pass legislation barring use of the CAA, no less override an anticipated Presidential veto.

On the other hand, some industry comments argued not only that these doctrines applied but that they dictated that EPA must delay application of the CAA until a regulatory scheme crafted to address the unique challenges presented by GHG emissions was developed.

#### INDUSTRY OPPOSED ACTING BEFORE A MORE REASONED SCHEME COULD BE DEvised

Many of the comments argued that EPA should delay any regulation—or at least its effective date—for three to six years. This delay will prevent or minimize *ad hoc* industry-by-industry and plant-by-plant determinations of whether BACT exists and will otherwise avoid inadvertently establishing a regulatory program without assessing whether it will accomplish the desired ends, will be cost-effective, or may otherwise result in unintended adverse consequences.

Such an *ad hoc* approach to regulating GHG emissions through permit challenges and enforcement actions presents several problems. For coal-fired electric-generating plants, converting to oil and gas means using more expensive and less reliable alternative fuels. Forcing the relocation of a coal-fired plant to another location fails to reduce GHG emissions and may actually increase them, because of the inefficiency involved in transmitting power over distance. There has not been a successful large-scale demonstration of the technical, economic, and environmental performance of geological carbon sequestration, which is considered to be one of the most promising GHG emission reduction technologies.<sup>23</sup> Immediate application of the PSD applicability threshold and triggers will result in unacceptable delays in permitting and, therefore, in the construction of new industrial plants and major modifications of existing plants, a cost not advocated by Congress.<sup>24</sup> Such delays will have a direct and significant adverse economic impact (including a disincentive to convert to "green" technologies, which would also need permits).

This concern about delay is more than theoretical. Environmental groups have filed administrative or legal challenges in more than 166 existing coal-fired electric plant permit proceedings, with 113 claimed "victories" (which includes remands, delays, and other non-final determinations).<sup>25</sup> In fact, the Sierra

Club settled one lawsuit in exchange for the utility “voluntarily” agreeing to add a legally enforceable permit provision that requires capture and sequestration of fifty eight percent of the CO<sub>2</sub> generated by the plant.<sup>26</sup>

Also, as some comments noted, there is precedent in EPA’s implementation of the CAA for delaying implementation of aspects of the PSD program in order to avoid administrative impracticability. For example, the 1980 PSD regulations contained a number of transition provisions that delayed applicability to certain classes of sources. EPA, in effect, has deferred application of PSD provisions based on PM<sub>2.5</sub> emissions, despite adoption of National Ambient Air Quality Standards for PM<sub>2.5</sub> in 1997, relying on PM<sub>10</sub> (larger-sized particulate matter) instead because of problems measuring and modeling PM<sub>2.5</sub> emissions.<sup>27</sup> As a practical matter, delaying any regulatory decision would provide Congress a reasonable amount of time to act.

### ONE SIZE DOES NOT FIT ALL EMITTERS

Some industries argued that EPA should not use a one-size-fits-all approach but rather should tailor the trigger to each industry (i.e., apply an industry-specific applicability and GHG emission trigger). A plant-by-plant BACT determination is cost-ineffective and, in any case, either will inevitably result in a determination that there is no BACT, as discussed below. However, the mere existence of such a process creates uncertainty in planning, obtaining capital, and reacting nimbly to new business opportunities (such as expanding the production of renewable energy and more energy-efficient products).

Similarly, some industries argued that the global nature of endangerment required EPA to take into account on an industry-by-industry basis, not the percentage of U.S. emissions covered, but the percentage that each facility within each industry represents compared to worldwide GHG emissions from all sources in all countries.

Many industries noted that EPA simply had not performed even the bare minimum level of evaluation needed to promulgate a regulation of this magnitude and import. Various comments demanded that EPA gather sufficient information to tailor its rules to the circumstances of each industry before issuing a rule. In evaluating the significance of the GHG emissions from an individual industry, the EPA should take into account the larger quantities of GHGs emitted compared to other CAA-regulated pollutants, the level of significance compared to total GHG emissions, the effectiveness on a global scale of such regulation (e.g., the carbon leakage issue) for a particular industry, and the other issues discussed in the various comments.

### HIGHER THRESHOLDS SHOULD APPLY

Many industries<sup>28</sup> argued for higher thresholds than 25,000 tons per year because the PSD program was intended to regulate only the “major” emitters, such as electric generating plants, which are financially able to bear the regulatory costs of PSD and are collectively responsible for most of the nation’s air pollution. One industry, in effect, recommended changes that result in a threshold of 777,000 tons per year.<sup>29</sup> PSD was not designed to cover the small- and medium-sized emitters that form a substantial

portion of the nation’s core manufacturing base, but the proposed rule would do so.<sup>30</sup>

EPA estimated that if the major source threshold is set at 25,000 tons per year, 13,661 facilities would exceed this threshold, which would cover sixty-eight percent of national stationary source emissions.<sup>31</sup> At 100,000 tons per year, 4,850 facilities would be covered, corresponding to sixty-four percent of national GHG emissions.<sup>32</sup> Thus, increasing the threshold from 25,000 to 100,000 tons per year would reduce the number of “major emitters” by almost two-thirds but would only decrease the GHG emissions subject to regulation by four percent. This marginal incremental benefit is not consistent with the intent of the PSD program. One solution presented by an ethanol industry trade group is to subject plants to PSD for GHGs only if the plant is already covered by BACT requirements for other regulated pollutants such as nitrous oxides or sulfur oxides.<sup>33</sup>

The Small Business Administration’s Office of Advocacy also took issue with the 25,000 tons per year threshold by arguing that EPA improperly certified that the Tailoring Rule would not harm a substantial number of small businesses, thus evading the Regulatory Flexibility Act’s requirement that a special Small Business Regulatory Enforcement Act (“SBREFA”) panel be convened.<sup>34</sup> Under EPA’s Regulatory Flexibility Act Guidance, rules cause a significant economic impact when the compliance cost for a small business is one to three percent of operating revenues. If less than 1,000 small entities are significantly affected, the rule is presumed to be ineligible for a SBREFA panel.<sup>35</sup> The Small Business Administration asserted that, had EPA thoroughly analyzed the potential reach of the GHG permitting requirements on small entities, it would have learned that the Tailoring Rule would adversely affect much more than 1,000 small businesses; therefore, EPA would have to convene a SBREFA panel prior to promulgating its rule.<sup>36</sup>

### PROCESS EMISSIONS SHOULD BE EXCLUDED

Those industries that utilize intense heat to process raw materials naturally containing carbonate (e.g., the cement industry, the limestone mineral processing industry, and the glass manufacturing industry) will release CO<sub>2</sub>, and there simply is no BACT for these process emissions. Typically, there are no substitutes for these raw materials and nothing as a practical measure can be implemented to reduce these emissions. Moreover, some of these industries meet new tough energy efficiency requirements or make products that will reduce GHG emissions when utilized in other energy-saving applications downstream. Nothing in EPA’s administrative record to the PSD Tailoring Rule demonstrates that GHG emissions from process emissions can be significantly reduced with any existing technology. Put simply, there is nothing meaningful that can be required at this time. Attempting to regulate these industries will be a useless act.

### THE TAILORING RULE SHOULD NOT APPLY TO PLANTS THAT MIGHT RESULT IN CARBON LEAKAGE

Several industries and industry coalitions noted that so called carbon leakage is almost certain to increase the net global GHG emission if the PSD Tailoring Rule prompts regulated entities

to move operations abroad. Many manufacturing industries are energy-intensive and trade-sensitive, according to EPA,<sup>37</sup> industry groups' testimony to Congress,<sup>38</sup> the General Accountability Office,<sup>39</sup> and the comments provided in this rulemaking.

The costs (direct transactional costs, delay costs, and the regulatory uncertainty's effect on ability to raise capital) will increase at U.S. plants in regulated industries. Additional costs will be imposed if costly BACT is required by states (with little reduction in GHG emissions). Since no comparable costs will be imposed on such energy-intensive industries in developing countries, their U.S. counterparts will suffer a competitive disadvantage. EPA's and virtually every other analysis has found that such competitive disadvantage moves production from the United States to other countries with less stringent GHG controls.<sup>40</sup> Thus, carbon "leakage" occurs and, in reality, the total global emissions increase, not decrease, thereby increasing the endangerment, not reducing it. The law should not (and does not) require such a truly absurd result.

### THERE ARE NO BACTS

None of the traditional air pollution controls are designed to control CO<sub>2</sub> since it has not yet been regulated. Industry comments could not identify any BACTs for any industry. Even carbon capture and sequestration ("CCS") has not been implemented in the United States at a large coal-fired electric generating plant. In fact, the Department of Energy is offering billions of dollars in research to establish whether such technology can be implemented. The smaller the GHG emission source, the less likely that such a technology will be considered BACT under EPA's "top-down" analysis, which eliminates technologies that may have a high removal efficiency, but low cost-effectiveness. Finally, the EPA CAA regulations do not include GHG emission allowances. As a result, unlike the House and Senate bills, free GHG emission allowances cannot be provided to utilities as incentives to offset the enormous cost of CCS.

### THE RULE SHOULD PROVIDE INCENTIVES TO INDUSTRIES THAT PRODUCE PRODUCTS THAT REDUCE GHG EMISSIONS OR USE RENEWABLE ENERGY

Some comments urged EPA to provide an incentive to industries that initiate modifications and produce products to support other GHG emission reduction programs like manufacturers of

components or assemblers of renewable energy sources (e.g., solar cells, wind power, and biomass energy), materials that meet energy efficiency standards for buildings, and other energy efficiency standards. Thus, EPA should consider the net GHG emission impact of the entity's project and the purpose for which it was conducted.

### CONCLUSION

In summary, addressing climate change is a scientific, economic, and political challenge that raises equity issues within nations and regions, and between developed and developing nations. The inherent complexity is reflected in the fact that it took more than 1,400 pages to address all of these climate change issues in the House bill.

EPA's "regulatory fix," although elegantly simple, is also fundamentally unworkable. The CAA is a technology-forcing statute that EPA is attempting to use in a situation where there is little likelihood that GHG reduction technologies will be developed in the foreseeable future. The rigid command and control approach is in stark contrast to the market-based cap and trade approach of legislative measures, which is anticipated to lower the cost of compliance.

Most of industry (including some companies and industries that support comprehensive federal climate change legislation) oppose utilizing the CAA to regulate GHG emissions. The tone and even anger expressed in many of these comments is extraordinary for comments in a rulemaking, which may be due to the frustration faced by industry. These comments demonstrate that the proposed PSD GHG Tailoring Rule is not only broken, but seems unfixable, at least in the short- to medium- term.

Legal challenges to the rule are already in the works. Senator Murkowski has proposed a bill that vetoes the endangerment finding, thereby preventing the EPA from regulating GHGs using the CAA. Senator Rockefeller has offered a more moderate bill that will simply delay the effective date of the tailoring rule requirements for two years. In reaction to the industry comments and Congressional interest, EPA Administrator Jackson announced that EPA intends to use a threshold substantially higher than the 25,000-ton limit that EPA originally proposed and perhaps as high as 75,000 tons. The future of this regulation is uncertain.



## Endnotes: Industry Cries Foul to EPA's Attempt to Regulate GHG Emissions Using the Clean Air Act

<sup>1</sup> H.R. 2454, 111th Cong. (2009).

<sup>2</sup> S. 1733, 111th Cong. (2009).

<sup>3</sup> See H.R. 2454; S. 1733.

<sup>4</sup> See S. 1733.

<sup>5</sup> See Conference of the Parties Fifteenth Session, Copenhagen, Den., Dec. 7-18, 2009, *Copenhagen Accord* U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009), available at [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cop15\\_cph\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf) (encouraging nations to commit to GHG emission goals

by "tak[ing] note of the Copenhagen Accord"). See generally United Nations Framework Convention on Climate Change, 1771 U.N.T.S. 107, S. Treaty Doc No. 102-38, U.N. Doc. A.AC.237/18(Part II)/Add.1, 31 I.L.M. 849 (1992), available at <http://unfccc.int/2860.php> (providing other United Nations administered environmental agreements and texts).

**Endnotes:** Industry Cries Foul to EPA's Attempt to Regulate GHG Emissions Using the Clean Air Act *continued on page 61*

## ENDNOTES: INDUSTRY CRIES FOUL TO EPA'S ATTEMPT TO REGULATE GHG EMISSIONS USING THE CLEAN AIR ACT

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<sup>6</sup> See Notice of Issuance of the Administrator's Interpretation, 73 Fed. Reg. 80,300 (Dec. 31, 2008); Memorandum from Stephen L. Johnson, Administrator of EPA, to Regional Administrators of EPA (Dec. 18, 2008), [hereinafter Memorandum], available at [http://www.epa.gov/nsr/documents/psd\\_interpretive\\_memo\\_12.18.08.pdf](http://www.epa.gov/nsr/documents/psd_interpretive_memo_12.18.08.pdf) (proposing and financing its endangerment finding and advocating an interpretation of "subject to regulation" that permits public comment).

<sup>7</sup> See generally EPA, New Source Review: Fact Sheet (Sept. 30, 2009), <http://www.epa.gov/NSR/fs20090930action.html> (last visited Feb. 5, 2010) [hereinafter Fact Sheet] (summarizing the regulation from the EPA's perspective).

<sup>8</sup> *Mass. v. EPA*, 549 U.S. 497, 533 (2007) (stating that EPA "can avoid taking further action . . . if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion," but "not reach[ing] the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding").

<sup>9</sup> *Id.* at 535 (emphasis added).

<sup>10</sup> See Clean Air Act, 42 U.S.C. §7475(a)(4) (1990). *But cf.* EPA Protection of Environment, 40 C.F.R. § 52.21(b)(50)(iv) (2010) (using very similar language to include more regulated pollutants).

<sup>11</sup> See Regulating Greenhouse Gas Emissions under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008).

<sup>12</sup> See Memorandum, *supra* note 6.

<sup>13</sup> See Regulating Greenhouse Gas Emissions under the Clean Air Act, 73 Fed. Reg. at 44,354 (explaining that the classification of GHGs individually or as a class has impacts on the determination of BACT requirements).

<sup>14</sup> Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (Sept. 28, 2009) (to be codified at 40 C.F.R. pt. 86 and 600).

<sup>15</sup> See EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act (Dec. 18, 2009), <http://www.epa.gov/climatechange/endangerment.html> (last visited Feb. 28, 2010) (clarifying that though the finding does not impose new requirements, it is a prerequisite to regulation).

<sup>16</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009) [hereinafter PSD and Title V

GHG Tailoring Rule] (to be codified at 40 C.F.R. pt. 51, 52, 70 and 71). See generally Fact Sheet, *supra* note 7 (describing the proposal as addressing "large facilities emitting over 25,000 tons of GHGs a year").

<sup>17</sup> PSD and Title V GHG Tailoring Rule, 74 Fed. Reg. 55,292.

<sup>18</sup> *Id.*

<sup>19</sup> See *id.* (citing *Ala. Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979)).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., National Association of Manufacturers, National Association of Manufacturers' Form Comment Page, <http://namissvr.nam.org/minisites/EPA/index.aspx> (last visited Jan. 31, 2010) (encouraging comment on the EPA's tailoring rule from the perspective of the manufacturer).

<sup>22</sup> See, e.g., H.R. REP. NO. 95-294, at 144-45 (1977); S. REP. NO. 95-172, at 96-97 (1977) ("Such a [permitting] process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually."). See also *Ala. Power Co.*, 636 F.2d at 353-54 (stating that Congress's "intention [in passing the CAA] was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air. . . . [A] further look at the legislative history reveal[s] that Congress was concerned with large industrial enterprises—major actual emitters of air pollution. The draftsmen were of the view that certain small industrial facilities within these categories might actually and potentially emit less than the threshold amount."). *Id.*

<sup>23</sup> *But see* MIT, THE FUTURE OF COAL (2007), available at [http://web.mit.edu/coal/The\\_Future\\_of\\_Coal.pdf](http://web.mit.edu/coal/The_Future_of_Coal.pdf). The cost of carbon sequestration is about \$30/ton of CO<sub>2</sub>, although the estimate is uncertain. See *id.* at 91.

<sup>24</sup> See, e.g., S. REP. NO. 94-717, at 23 (1976) (noting that Congress did not intend to simply create delays or impair economic growth). See Clean Air Act, 42 U.S.C. § 7470 (1990) (The PSD program was intended "to insure that economic growth will occur in a manner consistent with the preservation of existing clear air resources."); H.R. REP. NO. 95-294, at 154 (1977) (legislation "not only

protect[s] public health and welfare but also assur[es] future air resources will be available for continuing the industrial and energy development so necessary for the growth of the Nation”).

<sup>25</sup> E.g., Sierra Club, Stopping the Coal Rush, <http://www.sierraclub.org/environmentallaw/coal/plantlist.asp> (last visited Feb. 5, 2010) (listing coal plant projects by state and reporting where Sierra Club is in the response process); *Lawsuit by Utah Utility Reflects GHG Woes for Coal Industry*, CARBON CONTROL NEWS, Aug. 27, 2007, available at <http://publicutilities.utah.gov/news/lawsuitbyutahutilityreflectsghgwoesforcoalindustry.pdf> (discussing the lawsuit initiated against a Californian energy company for removing its support for a power plant because of the passage of additional California laws); David Hodas, *Changing the Course Towards an Energy-Efficient Future*, ABA TRENDS, Nov./Dec. 2007, at 8 (reporting that Florida’s Public Service Commission rejected a proposal to build a \$5.7 billion coal-fired plant near the Everglades because of concerns about global warming); Patricia T. Barmeyer & John C. Bottini, *Longleaf: Georgia Court of Appeals rules in coal-fired power plant appeal*, ABA TRENDS, Nov./Dec. 2009, at 15 (illustrating that even if the utility prevails, the project is delayed).

<sup>26</sup> See Letter from Mike Simon, Stationary Source Program Manager, Idaho Department of Environmental Quality, to Tom Hornyak, Manager, Southeast Idaho Energy, LLC (Nov. 30, 2009), available at [http://www.deq.idaho.gov/air/permits\\_forms/ptc\\_final/se\\_idaho\\_energy\\_power\\_county\\_ptc\\_1109\\_permit.pdf](http://www.deq.idaho.gov/air/permits_forms/ptc_final/se_idaho_energy_power_county_ptc_1109_permit.pdf) (issuing the permit under agreed terms).

<sup>27</sup> See Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers, 73 Fed. Reg. 28,321, 28,324 (May 16, 2008) (allowing the surrogate level to be used “until certain difficulties were resolved, primarily the lack of necessary tools to calculate the emissions of PM<sub>2.5</sub> and related precursors, the lack of adequate modeling techniques to project ambient impacts, and the lack of PM<sub>2.5</sub> monitoring sites”).

<sup>28</sup> See, e.g., Letter from the Solid Waste Ass’n of N. America to Env’tl. Prot. Agency (Dec. 23, 2009), available at [http://swana.org/Portals/Advocacy/SWANA\\_Comments\\_on\\_Tailoring\\_Rule.pdf](http://swana.org/Portals/Advocacy/SWANA_Comments_on_Tailoring_Rule.pdf) [hereinafter SWANA Comments] (arguing that the rule disproportionately negatively impacts the waste industry); Letter from Pamela A. Rygalski, Head of Env’t, Health, and Safety, to EPA (Dec. 23, 2009), available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a72213> (alleging that the rule disproportionately negatively impacts glass manufacturers).

<sup>29</sup> See SWANA Comments, *supra* note 28.

<sup>30</sup> S. REP. NO. 95-172, at 96-97 (1977); *Ala. Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979).

<sup>31</sup> PSD and Title V GHG Tailoring Rule, 74 Fed. Reg. at Table VIII-2.

<sup>32</sup> *Id.*

<sup>33</sup> See Letter from Tom Buis, Chief Executive Officer, Growth Energy, to Lisa P. Jackson, Administrator, EPA (Dec. 23, 2009), available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a707df> (recommending that the rule have limited applicability to GHG emission from fuel ethanol plants).

<sup>34</sup> See Letter from Susan M. Walthall, Acting Chief Counsel for Advocacy, Small Business Administration, to Lisa P. Jackson, EPA Administrator (Dec. 23, 2009), [hereinafter SBA Comments], available at [http://www.sba.gov/advo/laws/comments/epa09\\_1223.html](http://www.sba.gov/advo/laws/comments/epa09_1223.html).

<sup>35</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, NO. GAO/GGD-00-193, REGULATORY FLEXIBILITY ACT: IMPLEMENTATION IN EPA PROGRAM OFFICES AND PROPOSED LEAD RULE 13 (2000), available at [http://www.sba.gov/advo/laws/gao00\\_193.pdf](http://www.sba.gov/advo/laws/gao00_193.pdf).

<sup>36</sup> See SBA Comments, *supra* note 34; Robin Bravender, *Small Businesses See Devil in Details of EPA Greenhouse Gas Rule*, N.Y. TIMES, Jan. 11, 2010, <http://www.nytimes.com/gwire/2010/01/11/11greenwire-small-businesses-see-devil-in-details-of-epa-g-41923.html> (last visited Feb. 5, 2010) (arguing that the EPA did not sufficiently evaluate the effects of the tailoring rule on small businesses).

<sup>37</sup> See EPA, EPA ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009: H.R. 2545 IN THE 111TH CONGRESS: APPENDIX 75 (2009), available at [http://www.epa.gov/climatechange/economics/pdfs/HR2454\\_Analysis\\_Appendix.pdf](http://www.epa.gov/climatechange/economics/pdfs/HR2454_Analysis_Appendix.pdf) (clarifying that this bill attempts to preserve domestic competitiveness).

<sup>38</sup> See *Hearing on Trade Aspects of Climate Change Legislation: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 111th Cong. (2009) (statement of John J. McMackin on behalf of The Energy-Intensive Manufacturers’ Working Group on Greenhouse Gas Regulation), available at <http://waysandmeans.house.gov/media/pdf/111/mcm.pdf>.

<sup>39</sup> See Letter from Loren Yager, Director, International Affairs and Trade, U.S. Government Accountability Office, to Sen. Max Baucus, Chairman of S. Committee on Finance (July 8, 2009), available at <http://www.gao.gov/new.items/d09724r.pdf> (attaching U.S. GOV’T ACCOUNTABILITY OFFICE, NO. GAO-09-724R, CLIMATE CHANGE TRADE MEASURES: CONSIDERATION FOR U.S. POLICY MAKERS (July 2009)).

<sup>40</sup> See discussion *infra* notes 28-30. See generally *Climate Change Trade Measures: Estimating Industry Effects: Hearing Before the S. Comm. on Finance*, 111th Cong. (2009) (statement of Loren Yager, Director International Affairs & Trade, Gov’t Accountability Office), available at <http://www.gao.gov/new.items/d09875t.pdf>; TREVOR HOUSER ET AL., LEVELING THE CARBON PLAYING FIELD: INTERNATIONAL COMPETITION AND US CLIMATE POLICY DESIGN (Peterson Inst. for Int’l Econ. & World Res. Inst. 2008), available at [http://pdf.wri.org/leveling\\_the\\_carbon\\_playing\\_field.pdf](http://pdf.wri.org/leveling_the_carbon_playing_field.pdf).