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Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments

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"takes effect"; and, based on the anticipated promulgation of the LDVR, that the GHG requirements of the vehicle rule would take effect on January 2, 2011.

On April 1, 2010, we finalized the LDVR as anticipated, confirming that manufacturer certification can occur no earlier than January 2, 2011. Thus, under the terms of the final notice for the Interpretive Memo, GHGs become subject to regulation on that date, and PSD and title V program requirements will also begin to apply upon that date.

8.3 Requests for Specific Exemptions/Deferrals from Applicability

Although we did not propose any categorical exemptions, many commenters request exemptions from major source and major modification applicability determinations under title V and PSD for certain types of GHG-emitting sources or certain types of GHG emissions.

8.3.1 Source Categories

Comment:

Many commenters request complete and permanent exemptions from the applicability or other requirements of the permitting rules with respect to GHG emissions as set forth in the proposal with respect to a wide variety of sources, source categories, and types of emissions.

Requests for exemptions for small sources, such as farms, homes, and other residential or commercial buildings:

- Smaller sources such as residential homes (4522), commercial buildings (4522), retail stores (4522), small space heaters (4522), and pool houses (4522) should be exempt from GHG permitting. Another commenter believes that sources such as agricultural, residential, and small businesses (as defined by the SBA) should be exempted from this rule during the first 5-7 years to allow EPA and permitting authorities time to gain experience with the program (5367). In addition, small businesses and service providers must be provided with education, resources, and tools to help small business owners understand whether and how they will be impacted by the rule and how they can report and comply (5367).
- Four commenters (3953, 4572, 5168, 5743) state that EPA anticipates at some future date to require the "absurd results" of having entities emitting more than 100 or 250 tpy of GHG to comply with PSD and title V permitting requirements. Thus, under the Tailoring Rule, it presumably is not a question of if permitting will be applied to farms, ranches and other small entities, but a question of when such requirements will be applied. The distinction between exemption and deferral for such entities becomes important when considering that PSD is a pre-construction program because exempt entities can begin building, but deferred entities may not be on as solid legal ground. Thus, small entities like farms and ranches will not escape PSD or title V requirements, even with the Tailoring Rule.

The semiconductor industry should be exempt (5141, 5143), including solar and LED (8640); or at least defer action on the semiconductor industry pending further study of alternatives for this industry (8460) because:

- PSD is ill-suited to regulate GHG from the semiconductor industry. (8640)
- These sources have a small contribution to the total GHG inventory, comprising only 0.1 percent of the total U.S. inventory of GHG. (5141, 5143, 8640)
- The industry is making substantial efforts to reduce GHG emissions under a partnership with EPA. (5143)
- Significant competitiveness issues for this industry to be permitted (5141, 5143, 8640). It is not realistic for this industry to be subject to PSD permitting considering the substantial lead time needed to conduct monitoring and prepare an application (8640).
- The high GWP factors for the GHGs emitted by this industry will burden them with permitting. (5141, 5143)

For the semiconductor industry, short of an outright exemption, one commenter (5141) urges EPA to adopt other approaches to minimize burdens. At a minimum, such approaches should include a deferral until streamlining mechanisms become available, or a separate regulatory regime for the high GWP emissions, and different thresholds, especially for PFCs, which may trigger permitting at low volumes.

Energy-intensive trade-exposed (EITE) industries, industries that consume a great deal of energy and that are subject to intense international competitiveness should be exempted pending further analysis of the impacts on those industries, and pending international agreements covering industrial GHG emissions (4771, 5169, 5737). If not exempted, regulation of the manufacturing/industrial sector, or at least the EITE producers should be delayed until the "second phase" of regulation, after 6 years (5737). EPA has not carefully considered the environmental and economic consequences of this action because if we had, we would have exempted them for several reasons, including that other countries typically exempt similar sources from GHG cap and trade programs because the industries are making significant energy efficiency improvements absent GHG regulation, and because permitting such sources may cause many facilities to move to countries that have less regulation or no regulation for GHGs.

Regulation of the glass manufacturing industry will not achieve CO_2 emission reductions for the foreseeable future. Process emissions account for 20-30 percent of emissions, but there are no substitute raw materials to reduce emissions. Glass manufacturers already use low-carbon fuels and recycle scrap glass to the extent possible. (4771, 5169) In addition, glass products (e.g., windows and windshields) are often used to meet specified energy efficiency standards, and are used in solar cells. (4771)

The PSD program should exclude calcination emissions to encourage energy efficiency projects (5133). It is pointless to subject process emissions to the PSD program because it is already known that BACT for calcination emissions is no additional controls and fuel costs alone are sufficient to ensure that new and modified kilns will utilize the most energy efficient designs that are economically and technologically available. In addition, because less than 5 percent of the U.S.'s GHG emissions are from industrial process emissions, exclusion of calcination emissions from the PSD program will not have a material effect on air quality or global warming.

- Some generators may feel the need to accept a limit on hours of operation to avoid PSD or title V requirements, and that could impair communities' ability to obtain a reliable supply of electricity in emergency situations. (4122, 4318, 4523, 4749, 4770, 4992, 5080, 5038, 5089, 5114, 5128, 5257, 5317, 5327, 5601, 5741, 6459, 8301)
- Emissions from these emergency generation units are truly negligible including those generating units that meet the "black start" definition except where those units run more than 1,000 hours. (4122, 4318, 4523, 4992, 5038, 5052, 5080, 5089, 5114, 5128, 5257, 5327, 5601, 5741, 6459, 8301)
- Becoming subject to PSD and BACT requirements could jeopardize their ability to meet the Nuclear Regulatory Commission (NRC) Reliability and Availability requirements, which would place nuclear power plants at risk of not being able to perform in emergency situations and thus not complying with their NRC-required Emergency and Security Plans. (5788)

Research and development facilities, including national labs involved in defense and homeland security should be exempt from the GHG requirements, especially minor GHG emissions from research activities, to avoid confusion with EPA's GHG Mandatory Reporting Rule. (8546)

The EPA should defer regulation of SF_6 in the transmission of electricity until the second phase of the PSD permit program because there are no known SF_6 controls and SF_6 is used to prevent arcing and death. If SF_6 is regulated, it should be controlled through BMPs – possession stewardship and good tank recycling practices for SF_6 delivery, use, and return of tanks. (5052)

Response:

Although the proposal for the Tailoring Rule generally addressed how the statutory requirements for major source applicability (100/250 thresholds) could be phased-in in ways that would offer relief to traditional and non-traditional sources, such as residences, farms, small business, and semiconductor manufacturers, it did so by establishing relatively high CO_2e thresholds during the early implementation period and lowering the thresholds over time as streamlining mechanisms become available to reduce administrative burdens. We did not propose any permanent exemptions of any kind or temporary exemption based on source category. Also, note that the proposal discussed energy efficiency, process efficiency improvements, recovery and beneficial use of process gases, and certain raw material and product changes in the context of short-term, low-cost means of achieving GHG emission reductions for small-scale stationary sources, but not in the context of exemptions.

As discussed previously, we are still considering whether permanent exemptions from the statute are justified for GHG permitting based on the "absurd results" legal doctrine. However, we do not have a sufficient basis to take final action at this time to promulgate any of the suggested exclusions on the grounds, described previously, suggested by the commenters. We did not propose any sort of permanent exclusion based on an interpretation of the statutory provisions of PSD or title V. Regardless of any arguments about the legality and advisability from a policy or economic standpoint of such exclusions, we would need to propose a PSD and/or title V specific legal and policy rationale that fits within the CAA, to specify details

regarding our implementation approach, and to provide an opportunity for public comment before adopting any such exclusion. Therefore we are not doing so here. We note, however, that nothing in this rule forecloses the opportunities we may have to explore such options in the future. Therefore, we are taking no action in this rule on these various commenters' requests for exclusions.

Some commenters also recommended that we create exclusions for their particular source categories for the specific purpose of avoiding overwhelming permitting burdens. We did solicit comment on alternative approaches to burden relief in the proposal. Some commenters suggested that the "administrative necessity" or "absurd results" rationale, each of which would be based on extraordinary administrative burdens, could be used to create at least temporary exclusions that would allow more sources to escape permitting than what we proposed. However, commenters have not, to date, provided specific information about the costs and administrative burdens associated with permitting their source categories. In addition, we have finalized steps 1 and 2 using the threshold-based approach, which applies the various legal doctrines, in the context of the Chevron framework, in a way that effectively exempts all small sources during this part of the phase-in, while assuring the administrability of the permitting programs for the sources that remain subject to them. Furthermore, specifically with respect to high GWP gases as discussed previously, we are maintaining the statutory mass-based threshold, and this should address commenters' concerns regarding the inclusion of those gases. Therefore, we reiterate that we are not finalizing any such exclusions in this rule and, as noted above, we are not taking final action in the commenters' requests for exclusions.

Concerning the comment that we did not take appropriate economic and environmental considerations into account for this rulemaking action, we disagree. The approach we finalize in this notice for steps 1 and 2 minimizes economic burdens by limiting permitting to the largest GHG emission sources. We further note that the PSD program as applied to the sources that are covered in steps 1 and 2 contains an express requirement to take energy, environmental, and economic considerations into account when making control technology (i.e., BACT) decisions and accordingly many of the concerns about control costs will be able to be accounted for in that analysis. Also, EPA, in collaboration with the SBA, conducted an outreach meeting with small entities to brief them on the Tailoring Rule and its environmental and economic impacts and to seek advice and recommendations from them on the proposal. (*See* Docket No. EPA-HQ-OAR-2009-0517-19130).

Several commenters were concerned that the proposal defers, rather than exempts, permitting at the statutory thresholds (100/250 tpy), and thus, that small sources will eventually be subject to permitting that those thresholds. In response, we do not have adequate information at this time to conclude that the statutory thresholds will ever be administrable for permitting GHG sources, so the commenters are premature in assuming that the statutory thresholds will apply to any particular source categories, or anyone, in the future. We explain in the preamble for the final rule how we will address smaller sources in a future rulemaking based on the 5-year study – we explain that in no event will sources below 50,000 tpy CO_2e be subject to PSD or title V permitting, nor will PSD modification be triggered for emission increases below 50,000 tpy CO_2e, during the 6-year period ending April 30, 2016, which is the date by which we have committed to complete a rulemaking action based on the 5-year study to determine exemptions