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June 17, 2010

The Honorable Barbara Boxer
Chairman
The Honorable James M. Inhofe
Ranking Member
Committee on Environment and Public Works
United States Senate

The Honorable Henry A. Waxman
Chairman
The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Environmental Protection Agency: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Environmental Protection Agency (EPA), entitled “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (RIN: 2060-AP86). We received the rule on May 14, 2010. It was published in the *Federal Register* as a final rule on June 3, 2010, with an effective date of August 2, 2010. 75 Fed. Reg. 31,514.

The final rule tailors the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Clean Air Act (CAA or Act). EPA believes that this rulemaking is necessary because without it PSD and title V requirements would apply, as of January 2, 2011, at the 100 or 250 tons per year (tpy) levels provided under the CAA, greatly increasing the number of required permits, imposing undue costs on small sources, overwhelming the resources of permitting authorities, and severely impairing the functioning of the programs. EPA is relieving these resource burdens by phasing in the applicability of these programs to GHG sources, starting with the largest GHG emitters. This rule establishes two initial steps of the phase-in. The rule also commits the agency to take certain actions on future steps addressing

smaller sources, but excludes certain smaller sources from PSD and title V permitting for GHG emissions until at least April 30, 2016.

Enclosed is our assessment of EPA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that EPA complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Nicole Owens
Director, Regulatory
Management Division
Environmental Protection Agency

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
ENVIRONMENTAL PROTECTION AGENCY
ENTITLED
"PREVENTION OF SIGNIFICANT DETERIORATION
AND TITLE V GREENHOUSE GAS TAILORING RULE"
(RIN: 2060-AP86)

(i) Cost-benefit analysis

EPA examined the economic impacts of the final rule including the expected benefits and costs for affected sources and permitting authorities. EPA believes that this final rulemaking does not impose economic burdens or costs on any sources or permitting authorities, but should be viewed as regulatory relief for smaller GHG emission sources and for permitting authorities. According to EPA, there are no direct economic burdens or costs as a result of this final rule for larger sources of GHGs that will be required to obtain title V permits and/or comply on PSD requirements. EPA states that although larger sources will become subject to permitting on January 2, 2011, those impacts are not attributable to the present rulemaking because they are mandated by the CAA and existing regulations and automatically take effect independent of this action. EPA also examined the social costs which will impose costs to society in the form of foregone environmental benefits resulting from GHG emission reductions that, absent this rule, might otherwise have occurred at sources deferred from permitting during the phase-in period.

According to EPA, the net benefits of this GHG tailoring rule represent the difference between the benefits and costs of this rule to society. EPA states that the net benefits of the final rule for Steps 1 and 2 are $\$193,598 + B - C$ million for the 2 and one half year period where B denotes the unquantified benefits and C the quantified costs of this final rule. EPA states that these unquantified benefits of this rule include the avoided PSD best available control technology (BACT) costs for new and modifying sources and relate to the foregone environment benefits or GHG emission reductions that might be possible during the 2.5 year Step 1 and 2 phase-in period. EPA notes that these estimates are subject to significant uncertainties. EPA states that all dollar estimates shown are based upon 2007 dollars.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

EPA certifies that this final action will not have a significant economic impact on a substantial number of small entities. For purposes of assessing the impacts of this final action on small entities, EPA defined small entity as: (1) a small business that is

a small industrial entity as defined in the U.S. Small Business Association size standards (*see* 13 C.F.R. § 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for profit enterprise that is independently owned and operated and is not dominant in its field.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

EPA states that this rule does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any 1 year. EPA notes that only those few states whose permitting authorities do not implement the federal PSD and title V rules by reference in their state implementation plans (SIPs) will have a small increase in burden. EPA believes that these states will have to amend their corresponding SIPs to incorporate the new applicability thresholds, since the burden reducing thresholds that EPA is finalizing with this rule will not otherwise apply to the PSD and title V programs. Thus, EPA concludes that this rule is not subject to the requirements of sections 202 or 205 of UMRA. EPA states that this rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. EPA expects this rule to result in cost savings and an administrative burden reduction for all permitting authorities and permittees, including small governments.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

The final regulations were issued using the notice and comment procedures found at 5 U.S.C. § 553. On October 27, 2009, EPA published a proposed rule entitled “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule.” 74 Fed. Reg. 55,292. EPA received over 400,000 written public comments which are addressed in the final rule.

EPA also intends to issue a supplemental notice of proposed rulemaking (SNPR) in 2011, in which it will propose or solicit comment on a third step of the phase-in that would include more sources, beginning by July 1, 2013. In the same rulemaking, EPA states that it may propose or solicit comment on a permanent exclusion from permitting for some category of sources, based on the doctrine of “absurd results,” within the *Chevron* framework. EPA is establishing an enforceable commitment that it will complete this rulemaking by July 1, 2012, which will allow for 1 year’s notice before Step 3 would take effect.

Additionally, EPA notes that although it did not propose any sort of permanent exclusion from PSD or title V applicability based on lifecycle considerations of

biogenic CO₂, it plans to seek further comment on how it might address emissions of biogenic carbon dioxide under the PSD and title V programs through a future action, such as a separate Advance Notice of Proposed Rulemaking (ANPR). EPA explains that this action would seek comment on how to address biogenic carbon under PSD and title V, and the legal and policy issues raised by options regarding implementation. EPA states that it will provide an opportunity for public comment before adopting any final approach.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

EPA states that this action does not impose any new information collection burden. However, EPA explains that the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.*, 40 C.F.R. § 52.21) and title V (*see* 40 C.F.R. parts 70 and 71) and has assigned OMB control number 2060–0003 and OMB control number 2060–0336. The OMB control numbers for EPA’s regulations in 40 C.F.R. are listed in 40 C.F.R. part 9.

Statutory authorization for the rule

EPA states that the authority for this action is provided by sections 307(d)(7)(B), 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. §§ 7401, 7411, 7414, 7416, and 7601). EPA notes that this action is also subject to section 307(d) of the CAA (42 U.S.C. § 7407(d)).

Executive Order No. 12,866 (Regulatory Planning and Review)

EPA states that this action is an “economically significant regulatory action” because it is likely to have an annual effect on the economy of \$100 million or more. Accordingly, EPA submitted this action to OMB for review under Executive Order 12,866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

Executive Order No. 13,132 (Federalism)

EPA determined that this action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, or otherwise have a federalism implication under the Order.