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RE: Docket ID Number: EPA-HQ-OAR-2009-0517

To Whom It May Concern:

The North Carolina Division of Air Quality (NC DAQ), within the Department of Environment and Natural Resources (DENR), appreciates the opportunity to provide comments on the proposed rule *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, as published in the *Federal Register* on October 27, 2009 (74 Federal Register 55292).

We recognize that climate change is a complex issue and mitigating greenhouse gas (GHG) emissions will require sufficient time to carefully develop and implement programs that result in positive results for the environment, the economy, and jobs. Addressing climate change in a comprehensive manner through carefully planned mitigation and adaptation measures is a key initiative in our department's strategic plan. As an agency that is in charge of regulating industries that emit air pollution, NC DAQ must balance environmental regulation with economic and administrative impacts to the division and NC industries to ensure meaningful reductions occur. We support emission reduction programs that are well designed, complimentary, and coordinated with sufficient time and resources to implement them.

We agree on the necessity to reduce the burden associated with GHGs becoming subject to permitting requirements, as is the purpose of the Tailoring Rule. Our comments focus on additional steps and modifications to the Tailoring Rule that EPA must take to make this a workable program. We respectfully submit the following comments that benefit the needs of the states as well as the EPA.

EPA should be prepared for the potential impact of GHGs being regulated at the 100/250 tons per year (TPY) level.

NC DAQ has identified at least three possible scenarios that have the potential to result in an outcome where GHG emissions from stationary sources are regulated at the statutory threshold of 100 or 250 TPY.

First, EPA has indicated that the proposed rule *Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards*, expected to be finalized by March 2010, is the action that will trigger future requirements for permitting GHGs under the New Source Review (NSR) and Title V programs. In our comments to the Light-Duty Vehicle Rule (via the Southeastern States Air Resource Managers, Inc.), we strongly encouraged the EPA to carefully evaluate the impacts of such triggering, including the possibility that the GHG Tailoring Rule may not be finalized on or before the Light-Duty Vehicle Rule is finalized. This is a possibility since EPA must address thousands of comments received from both proposed rules and finalize them in less than three months.

Second, we are concerned that the legal arguments used by EPA to tailor the GHG threshold have the potential to be rejected. In the preamble, EPA provides a lengthy justification for adjusting the PSD and Title V statutory permitting thresholds by relying on the legal doctrines of “administrative necessity” and “absurd results.” If this rule is challenged, the court could hold that these arguments are unpersuasive given the circumstances (i.e., the existence of an excessive burden does not empower an administrative agency to modify the statute). The Court could conclude that the proper way to address an excessive burden imposed by a statute is to ask Congress to amend the Clean Air Act. Although these actions may take some time to work out, state agencies must deal with the uncertainty associated with GHG regulations triggered by the Light-Duty Vehicle Rule.

Third, NC DAQ is one of many states that manage SIP-approved programs that establish, through state rules, a 100/250 TPY threshold for pollutants subject to regulations under PSD and Title V. Until our state rule is modified, these major source thresholds will remain at the 100/250 TPY level for GHGs, and any source with the potential to emit (PTE) greater than this amount will be subject to NSR. In addition, major modifications to these sources that lead to **any** increase in any NSR regulated pollutant would trigger review under PSD, provided the increase is greater than the significance level. For regulated GHGs, the significance level would be an increase of any amount. With the significance level for PSD major modifications being “zero”, it will be nearly impossible to issue any permits in a timely manner. This will result in a permit back log, delayed construction, and immediate impact to the state’s economy. We are constrained by our administrative process which requires adequate time for public notice and comment, and we cannot raise the thresholds even by way of a state version of the Tailoring Rule within 75 days (specified by the Congressional Review Act) after promulgation of the rule that EPA has proposed. Until North Carolina amends its state rules to increase the major source thresholds for PSD and Title V programs to be consistent with the Federal rule, if finalized as proposed, the current statutory thresholds will apply and the administrative burden that EPA has

taken action to avoid will be realized. As discussed later, NC DAQ has plans to address this shortfall through a policy memorandum and temporary rule making. However, this will require time and careful execution of key administrative hurdles.

In summary, if the GHG Tailoring Rule is not finalized in time, is stayed or vacated by the courts, or sufficient time is not allowed for states to change their rules, our workload will increase exponentially at a time when state government is experiencing severe budget challenges. The effect on the overwhelming universe of stationary sources subject to GHG permitting requirements could be dramatic, particularly for small businesses and previously unregulated sources. EPA should be prepared for this possibility and develop strategies to avoid significant impacts to permitting agencies, small sources, and businesses in general.

EPA has underestimated the number of permits (particularly new permits) that would need to be processed.

Title V: In 2008, NC DAQ managed operating permits for 314 major sources, 647 synthetic minor sources, and 1801 small sources. We believe nearly all of the currently permitted sources would trigger the 100/250 TPY threshold for the potential to emit (PTE) GHGs, which would make them all major sources.

The statutory threshold will also bring in a large number of currently un-permitted sources. For example, we expect that hundreds of landfills, some currently closed, could possibly be affected; including sites with municipal waste, industrial waste, and hazardous waste. Since EPA has not specified the methodology for determining applicability, very old landfills could be subject to regulation. Issuing new Title V permits to these sites would prove to be difficult because many of these sites are abandoned, have no clear owner/operator, and waste characterization information is not available. The 100/250 TPY threshold would also bring in a large number of multi-unit residential/commercial buildings, small businesses, government operations, etc. Our analysis of office buildings occupied by our department indicates that 11 out of 200 buildings with combustion systems (6%) have the PTE greater than 250 TPY of GHGs.

At the 25,000 TPY CO₂ threshold, we estimate that 90% (283) of currently permitted Title V sources would need modifications. We estimate that 552 of the 2,448 synthetic minor and small sources that are currently **not** Title V sources would trigger the major source threshold for GHGs. Of these 552, we estimate that based on actual emissions, 48 would require Title V permits and the remainder would require synthetic minor limits to keep them below major source status. Although this 15% increase in new Title V permits is consistent with EPA's estimate in the Preamble, we are concerned that EPA may have underestimated currently un-permitted sources that would be affected by this rule.

For landfills alone, our preliminary estimates suggest that 75-115 currently active landfills possibly have the potential to emit greater than 25,000 TPY. In addition, our consultation with a landfill industry representative indicates that several hundred inactive landfills may have the potential to emit greater than the threshold. One reason is that it is not clear what kind of

operating limits a closed landfill that isn't even accepting waste would take. It is also uncertain how NC DAQ would issue permits without clear ownership and operator information. For other unpermitted sources such as commercial office buildings, warehouses, small industries, and wastewater treatment facilities, we do not have the necessary information to determine impacts of the Tailoring Rule. Since EPA has not specified if source categories other than the 25 identified in the Mandatory Reporting Rule are used to determine emission potentials, we suspect many sites will be affected by the rule when emissions from insignificant sources (space heaters, emergency generators) and fugitive losses (refrigerant leaks) are accounted for. Of the 200 buildings occupied by DENR with on-site combustion systems, we estimate 6 buildings (3%) have the potential to emit greater than 25,000 TPY. All of these buildings have the flexibility to take operating limits.

PSD: In 2008, NC DAQ issued 6 PSD permits. If the threshold were to remain at 100/250 TPY, any facility with a PTE greater than this amount would trigger NSR if they made a modification that led to an increase greater than the significance level (zero). This increase would result from the addition or modification of any combustion equipment at all major, synthetic minor, and small sources. We estimate 184 NSR actions would be required for currently permitted sources. This number is significantly higher than the number of NSR actions without GHGs (6 in the same year) as regulated pollutants.

For unpermitted sources, the number of NSR actions required could reach thousands. We recognize that the actions required by this absurdly large number of affected sources would be minimized by the proposed increase in the significance level between 10,000 and 25,000 TPY. This would result in small sources being excluded from PSD evaluations, although they may have a PTE greater than 100/250 TPY. This approach still creates significant initial burden on agencies to develop and implement administrative procedures for affected sources.

At the 25,000 TPY significance level, we estimate 28 new NSR actions for Title V sources and 96 additional permit actions for synthetic minor and small sources. When operating limits are taken by synthetic minor and small sources, ten NSR actions are estimated. We are unable to quantify the number of NSR actions for currently unpermitted sources. Based on the earlier discussion related to landfills, it is reasonable to assume that all 75-115 landfills which need new Title V permits may also require NSR actions as these sites make major modifications to accommodate new waste volumes.

EPA must weigh the environmental benefits against the administrative burden.

EPA must thoroughly consider the environmental benefits achieved through additional NSR actions at the proposed and statutory thresholds, and assess actual emission reductions achievable through these actions. We do agree that at a minimum, NSR actions can achieve some stabilization in GHG emissions from new sources, but EPA needs to quantify the benefits to warrant major changes to the permitting program. In the document titled *The Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule*, EPA conducted a qualitative assessment of regulatory relief from avoided permitting requirements, social costs from foregone

emission reductions, and avoided costs. EPA stated that “...it is not possible at this time to quantify the social costs of avoided BACT..., to quantify GHG emission reductions foregone due to the uncertainties involved in this estimation..., and provide a monetized estimate of the foregone benefits or social costs of this rule.” EPA also stated that “emissions difference due to BACT controls are expected to be relatively small due to the lack of control technologies for GHG.” With such uncertainties in environmental and economic benefits, EPA must avoid regulating sources without achieving meaningful emission reductions.

EPA should reduce/eliminate Title V permitting requirements as proposed in the Tailoring Rule.

As discussed earlier, the combined effect of administering Title V permits for existing sources for which GHG major source status would need to be added, the number of new Title V permits and synthetic minor permits to be issued that are currently not major for any pollutants, and the number of new permits to be developed for currently unpermitted sources are significant. The administrative burden to permitted and unpermitted sources and our agency is large given that there are no control technology requirements and no requirement to report annual GHG emissions (per EPA’s Mandatory Reporting Rule (MRR)). In addition, we are unable to quantify any additional environmental benefit that would be achieved from the proposed Title V permitting program for GHGs. EPA has and should use its authority to reduce the burden by eliminating the need for a Title V permit program for which “hollow permits” would be issued.

A possible approach would be that used by the EPA in 1992 when dealing with the requirement to prepare a risk management plan (RMP) under 112(r). The EPA acknowledged that 112(r) pollutants (including methane) were regulated pollutants under Part 70. However, the EPA “recognize[d]...that an RMP is not in any sense a “permit” to release substances addressed therein, and that section 112(r) was not intended to be primarily implemented or enforced through title V (112(r)(7)(F)).” At least initially, the situation is identical for GHGs.

Once there are applicable requirements for Title V, EPA can develop a schedule to allow the permitting of sources over five years after applicable requirements are promulgated.

EPA should develop New Source Performance Standards (NSPS).

In the Advanced Notice of Public rulemaking, EPA provided use of the New Source Performance Standard (NSPS) authorities of section 111 as a regulatory pathway for regulating stationary sources of GHG under the Clean Air Act. This would have been a much more desirable approach as the initial step for regulating stationary sources as opposed to the current situation of the use of, in our situation, state-operated permitting programs. Under the EPA’s proposal, we will have the burden of making case-by-case regulatory determinations. We understand that EPA is currently working to provide guidance on BACT determinations; however, we feel it is most appropriate to have NSPS for a basis for BACT determinations. An NSPS would serve as a “floor” and would have the effect of minimizing challenges to state and local BACT determinations for a covered source category. It would also provide a measure of

national consistency in the regulation of GHG emissions from large sources, especially in the first few years of the program when BACT and NSPS technologies would be similar.

While we recognize that such standards will take years to develop, EPA should make this a top priority. As part of a sector-based approach, EPA should include NSPS along with all other sector-based regulatory actions which may minimize the resources and time required to develop NSPS.

EPA should consider workability and consistency when setting the metric for the threshold.

We support the utilization of a consistent set of metrics for the tailoring rule as are used in other EPA programs and other legislative efforts for GHGs. However, we also recognize that for permitting processes, our agency and our sources need certainty and stability. The most certainty and stability would result from the use of a metric that includes a single pollutant and is directly measurable. One problem we see with the CO₂e metric is that it relies on use of the global warming potential (GWP) that could change with periodic updates to the scientific literature. In addition, it is not clear to us why SF₆ and PFCs, which are not addressed in the Light-duty Vehicle Rule, would be triggered as regulated pollutants. Thus, we propose a metric that treats four pollutants individually, without GWP.

If, however, the EPA chooses the CO₂e metric, then we think for reasons of consistency that the threshold should be changed to 25,000 metric tons. The use of short tons in one program to measure CO₂e and metric tons in another (mandatory reporting rule - MRR) has the potential to create great confusion regarding which sources are affected as well as introducing significant errors in emission calculations and reporting. EPA acknowledges in its proposal the benefits of consistency with the MRR, and makes this argument with regards to the proposal to use the CO₂e metric. EPA indicates that "...a cumulative CO₂e metric would be consistent with the proposed mandatory reporting rule thresholds (thereby creating a "common currency" for recordkeeping for both industry and permitting authorities)". That same argument should be made to align the reporting values in the tailoring rule with those in the reporting rule.

NC DAQ believes that 25,000 metric tons is a reasonable threshold when administrative burden is taken into consideration, if EPA reduces/eliminates the Title V burden and provides timely guidance on addressing NSR requirements.

EPA should make the PSD significance level the same as the major source level.

NSR significance levels are defined through implementing rules, not through the CAA. This gives EPA the flexibility to select a significance level that minimizes the impacts discussed earlier. We prefer the significance level to be identical to the major source threshold for the first phase of Tailoring. We feel this would be the most straightforward way to implement and would give the necessary data for revisiting after the 5-year study period. Thus, if the major source level is changed to 25,000 metric tons CO₂e, then the significance level should be 25,000 metric tons CO₂e. Similarly, if the four pollutants controlled in the Light-Duty Vehicle Rule are

selected as the GHG metric (as we recommend), then the significance level should be the same as the applicability threshold for each pollutant.

EPA should provide additional time to implement the proposed rule.

Like many states across the country, we have a SIP-approved permitting program for which state laws regulations establish the 100/250 thresholds for PSD and Title V requirements. Until and unless state regulations are modified, these thresholds will remain at 100/250 TPY. The North Carolina administrative rulemaking process (including public notice and comment periods) is much longer than the time allowed by EPA's proposal. We estimate that permanent rulemaking would take between 11 and 18 months to complete. In addition, time is needed to educate and train staff and affected businesses. EPA should also develop compliance assistance tools to assist states in their outreach efforts. This too will require additional time. Given EPA's proposed legal rationales for the Tailoring Rule – administrative necessity and the avoidance of absurd results – the EPA should design a regulatory approach that is feasible and provides SIP-approved states like North Carolina a reasonable opportunity to amend regulations to address the finalized tailoring provisions.

In the proposed rule *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program*, EPA laid out two options on the timing when PSD requirements apply to a pollutant “subject to regulation.” These are: (1) upon promulgation date of a control standard, or (2) upon the effective date of a control standard. EPA also stated that “the CAA requires PSD controls ‘for each pollutant subject to regulation’ and “does not mention promulgation.” Consequently, the promulgation date and the trigger for application of PSD requirements are not bound, and EPA has the needed flexibility to interpret “subject to regulation” as the effective date, not the promulgation date. We believe EPA has additional discretion to interpret the timing of the PSD requirements to pollutants subject to regulation as the full implementation date or the date when controls must be in place (i.e., Model Year 2010 - when the first vehicles are subject to regulation). If EPA exercises this option, the PSD applicability date would be extended 15-19 months from the promulgation of the Light-Duty Vehicle Rule. This additional time would allow states such as North Carolina to make the needed adjustments to permitting and compliance programs, while allowing facilities time to meet new regulatory requirements.

EPA should specify a presumptive fee.

As indicated above, we recommend that EPA remove the requirements for GHGs to be included in Title V at least until there are applicable requirements to include in the permit. Once Title V is implemented, there would need to be an increase in revenue to cover the increase in level of activity.

State and local permitting agencies are currently facing tremendous funding challenges. We recommend that EPA ensure that state and local permitting agencies have adequate resources in place to address the additional permitting workload that flows from the threshold EPA adopts

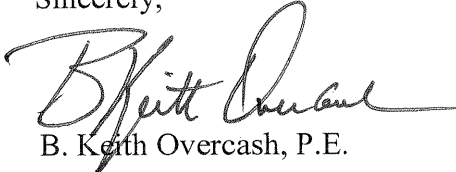
before the threshold becomes effective. One way to accomplish this is for EPA to modify its Part 70 rules to adopt presumptive Title V fees that are also “tailored” to the GHG program. Such a rule would help states as they analyze and develop revised Title V fees as necessary, but would not require a state to modify fees if it could show that it did not need an increase.

Additional technical comments

1. We request that EPA clarify whether biogenic CO₂ is a GHG, provide a clear definition of biogenic CO₂, and indicate how, if at all, it is counted in the CO₂e determinations. While there is no mention of biogenic CO₂ in the proposed rule, the regulatory impact analysis excluded sources that emitted biogenic CO₂. However, in webinars and teleconferences hosted by EPA related to this rule, it appeared that EPA was unclear on this issue. Our analysis of affected facilities assumes biogenic CO₂ is counted in the CO₂e determination.
2. EPA should clarify which GHG emission sources are covered in a facility’s PTE for GHG with regards to stack-level emissions versus fugitives and in terms of source categories and in terms of size (“insignificant sources”). For example, are leaks from refrigeration systems in building refrigerators or chiller systems used for buildings or process chilling operations included? Are fugitive emissions from natural gas production, processing or distribution included? One approach to address this issue for insignificant sources is to establish a presumptive threshold below which the permitting regulation would not apply.
3. EPA should provide guidance for computing GHG emissions for any sources that are not in the EPA’s Mandatory Reporting Rule but that are covered in the PTE calculation. For example, what methods would be used for Publicly Owned Treatment Works (POTWs), semiconductor manufacturing or blowing agents? Would the methods in the proposed reporting rule be used for wastewater treatment?

In conclusion, we encourage EPA to work closely with states and local air agencies to collaboratively develop and implement GHG regulations that transition well into existing programs. We thank you for the opportunity to comment on this important rulemaking.

Sincerely,



B. Keith Overcash, P.E.