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December 28, 2009

EPA Docket Center
EPA West (Air Docket)
Attention: Docket Number EPA-HQ-OAR-2009-0517
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: Notice of Proposed Rule Making: Prevention of Significant Deterioration and
Title V Greenhouse Gas Tailoring Rule

To the Docket:

The State of California, acting by and through Attorney General Edmund G. Brown Jr., submits these comments on EPA's proposed Tailoring Rule. These comments are offered only on behalf of the State of California and Attorney General Brown, and not on behalf of any other California agency or official.¹

The State of California has been and continues to be a leader in the control of greenhouse gas emissions. We are pleased to see with this, and other actions, that the U.S. EPA is also taking critically important concrete steps to control greenhouse gases, and to make programs under the Clean Air Act practical and workable. In general, we support EPA's proposal. Attorney General Brown offers the attached comments with the hope that they will help EPA make the proposal more effective, and make it effective sooner. We appreciate the opportunity to comment. If you have questions, or would like to discuss the attached comments further,

¹The Attorney General provides these comments pursuant to his independent power and duty to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. (*See* Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974)).

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please do not hesitate to contact the undersigned.

Sincerely,

/s/

SUSAN DURBIN
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

Enc.

COMMENTS BY THE STATE OF CALIFORNIA, BY AND THROUGH

ATTORNEY GENERAL EDMUND G. BROWN JR.

1. In general, California supports EPA in making this proposal, and we commend EPA for its careful and responsible approach to enforcing the Clean Air Act (CAA) to control greenhouse gas (GHG) emissions, and also to protecting the functionality of the system of state, local and tribal air pollution control agencies. Our comments are intended to suggest ways in which this task might be done more effectively within the overall framework put forward by EPA.
2. We believe that the Technical Support documents show that EPA has ensured that permits will be required of the largest sources of GHG emissions. Because there is currently no NAAQS for GHGs and no increments for Prevention of Significant Deterioration (PSD) areas against which to measure the effects of new GHG emissions, the setting of thresholds becomes more a matter of judgement. While we might have ourselves set a somewhat different cut-off, it was a reasonable decision on EPA's part to set the thresholds at levels that capture 93% of new GHG emissions, while postponing or completely eliminating formal permitting for 95 % of the total number of potential new and existing sources. (RIA at 19.) We are attaching a white paper prepared by the California Air Pollution Control Officers' Association (CAPCOA) for submission into the docket. In this paper, CAPCOA did a detailed analysis of possible threshold levels for review under the California Environmental Quality Act (CEQA) of projects causing new GHG emissions. It discusses the relative benefits of different methods of setting thresholds, and recommends as one viable approach the setting of thresholds at levels that either capture a specified percentage of expected projects or a specified percentage of emissions (at pp. 42-47), thereby supporting the approach EPA has taken here. CAPCOA also urges that any threshold that is set now be re-examined as we have more information and a better understanding of how climate change is forced by GHG emissions, and as permitting agencies gain knowledge and experience of the permitting process for GHGs. We expect that EPA will perform such re-examinations.
3. We agree with EPA that the administrative necessity doctrine provides support for EPA's approach. We note that EPA is not proposing to permanently exempt new sources smaller than 25,000 tons per year or modified sources emitting less than 10,000-25,000 tons per year from the PSD program, or source emitting less than 25,000 tons per year from the Title V program. Instead, it proposes a phased plan to bring the myriad sources potentially covered by these programs into the programs over a definite and reasonable time. As the District of Columbia Circuit court has recognized, "technological or administrative infeasibility [is] a reason for adjusting court mandates to the minimum extent necessary to realize the general objectives of the Act." *NRDC v. Costle*, 568 F.2d 1369, 1379 (D.C. Cir. 1977); *see, also, League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002). We believe this is such a case.

The *NRDC v. Costle* case is good authority here, since it concerned the Clean Water Act, a statute traditionally viewed as similar to the Clean Air Act. *See, e.g., NRDC v. Train*, 510 F.2d 692, 701-02 (D.C. Cir. 1975); *Stauffer Chemical Co. V. EPA*, 647 F.2d 1075, 1078-79 (10th Cir. 1981). In the *Costle* case, EPA was allowed to phase-in compliance with a

statutory requirement that would have created a workload of literally thousands of permit applications for nonpoint water pollution sources that would have been administratively impossible to process. The court made clear that phasing of the permitting program could be accepted by the courts where outright exemptions from the statute of source categories could not be accepted. Here, EPA has acted on that principle and states that it is proposing a two-phase approach, with the first phase being a clear and unequivocal commitment to covering larger GHG sources now, with BACT determinations done on a case-by-case basis. However, EPA has emphasized that it is equally committed to a second phase, where it will develop and adopt definitions of BACT, and will find administratively feasible ways to deal with both the smaller sources and, potentially, whole categories of the larger sources. 74 FR 55320-326.

Under the administrative necessity doctrine, EPA may adjust the order in which it complies with a plainly unmanageable statutory mandate when it makes a clear case, as it has done here, that strict and unphased compliance with the literal terms of the statute is not only administratively impossible, but would conflict with the spirit and intent of the statute. As is shown in the RIA and its attachments, the numbers of potentially covered sources are simply overwhelming. Should EPA attempt to enforce the thresholds set out in the statute for the PSD and Title V permits as to GHGs across the board immediately, EPA and the rest of the nation's permitting agencies would face the task of finding the resources to process thousands of PSD permits and literally millions of Title V permits. This permit application tsunami would cripple agencies' resources to do air pollution control work, including processing those very PSD and Title V permits. Indeed, EPA, state, local, and tribal agencies could be virtually paralyzed at a time when their efforts to secure clean and healthy air for the nation are more important than they have ever been. So long as EPA maintains and acts on the principle that it is only delaying action on the smaller GHG sources and not impermissibly exempting them, we believe that its actions are necessary and will be accepted by the courts.

4. Given that the phasing of the PSD and Title V permit programs is both necessary and permissible, we urge EPA to rethink *how* it proposes to phase them. In particular, we question why the PSD and Title V programs are being treated equally and phased in simultaneously. While the transparency of the Title V permitting process is essential to public confidence and participation in the permitting process, EPA should focus more of its resources on the PSD program, which produces actual emissions *reductions*. As the proposal points out, the overwhelming majority of new title V permits that would be required under the statutory thresholds when the program is triggered for GHG emissions would be "hollow," permits that would have no federal requirements in them, since substantive control requirements would only be applied to new or modified sources emitting more than the much higher PSD cut-off thresholds. 74 FR 55302. Such permits would not confer the public information benefits expected from a Title V permit.

The RIA shows that new and modified Title V sources emitting 25,000 tons per year or more of GHGs are expected to be a small universe of permits. The vast majority of sources newly subject to Title V will have no substantive permit requirements to list or with which to certify compliance under EPA's proposal; in EPA's term, they will have "hollow" permits. Given that these "hollow" permits for all existing and unmodified sources place a burden on

permitting agencies and the regulated sources but confer little or no public information benefit on the public, EPA should consider either setting a higher threshold level for the Title V program, or administratively extending the deadline for submitting a Title V permit application for such sources during the first phase of this proposal. Such actions would allow EPA and the state, local, and tribal permitting agencies to concentrate on the PSD program, which reduces emissions.

It is usually the case that the most cost-effective opportunity to impose air pollution controls on a source is at the time of construction. Devoting the bulk of their energy to new or modified sources subject to PSD and its BACT requirements would allow EPA and the other permitting agencies to focus on developing the most efficient and cost-effective BACT determinations for new and modified sources. Given that EPA has made the case that administrative constraints demand some modification of the statutory scheme for PSD and Title V as to GHGs, we urge EPA to make that modification one that has the potential to get the maximum emissions control for the dollar.

5. California strongly suggests that EPA prioritize its own efforts during the six year period covered by its proposal. While the proposal states that EPA will spend the first five years developing BACT and regulatory streamlining approaches, and the sixth year doing rule making to adopt what it has developed, it sets no priorities for EPA's actions. During this time, EPA commits to developing BACT definitions for various source categories, and to working on ways to streamline the PSD and Title V programs for GHGs, whether through permits-by-rule, some other form of standardized permits, presumptive BACT, or other mechanisms. While this is a vital use of EPA's resources, perhaps the agency can do more during that time. We already know what the largest sources of GHG emissions are, and EPA has set out detailed tables as to how many new or modified sources are expected in the near future. We urge EPA to use that information to set priorities for its determination of BACT, focusing on ensuring the greatest emissions reductions in the shortest time frame consistent with good rule making. We believe that EPA should develop and make public at least a tentative set of priorities for its research and rule making, and commit to adopting at least some regulations before a full six years pass. Time is running short for effective action to control GHG emissions. EPA should commit itself to definite action before a full six years pass.
6. We also urge EPA to set interim milestones and deadlines for states, localities, and tribes during the six-year during which their air pollution permitting agencies are required to process permits solely for larger sources and solely on a case-by-case basis. We are concerned that without interim milestones and deadlines, the six years may pass, and state, local, and tribal agencies may find themselves still unprepared to cope with whatever the volume of PSD and Title V permits will then be. Milestones and deadlines will assist states, localities and tribes in developing their own procedures, hiring and training staff, and otherwise allocating resources and developing the capacity to process those permit applications.
7. We strongly support EPA's technical decision to calculate emissions using a CO₂-equivalent metric, since that best addresses the purpose of controlling GHGs: reducing the global warming potential (GWP) of the emissions. There is a history of using one specific pollutant

to represent a group of pollutants that are closely related on a chemical basis. For example, for several years, what is now the ozone NAAQS was a standard regulating multiple photochemical oxidants, but measured as ozone. 44 Fed.Reg. 8202 (Feb. 9, 1979). Handling multiple related chemicals in this way eases the burden of monitoring and modeling, but keeps the various pollutants all within the regulatory scheme. EPA's proposal presents convincing evidence that certain sources that emit pollutants with extremely high global warming potential (GWP) might completely escape regulation as GHGs if the literal statutory threshold were applied. An example is the electronics industry and its emissions of sulfur hexafluoride, which will only be brought within the PSD and Title V regulatory schemes if the threshold for regulating it is based on the GWP potential of its emissions, rather than the literal weight of those emissions. (Tech. Support Doc., Att. B., at 28.) We agree with the proposal that CO₂ equivalency is the most efficient and useful measurement metric.