



The State of New Hampshire  
*Department of Environmental Services*



Thomas S. Burack  
Commissioner

December 23, 2009

Lisa. P. Jackson, Administrator  
U.S. Environmental Protection Agency  
EPA Docket Center, EPA West (Air Docket)  
Mail Code: 2822 T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
*Attention: Docket ID No. EPA-HQ- OAR-2009-0517*

**Re: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule  
– Proposed Rule**

Dear Administrator Jackson:

The New Hampshire Department of Environmental Services (NHDES) appreciates the opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA's) Notice of Proposed Rulemaking, published on October 27, 2009 in the Federal Register, entitled *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* [74 FR 55292-55365].

NHDES supports EPA's efforts to initiate rulemaking that would fulfill EPA's obligations under the Clean Air Act's (CAA's) Prevention of Significant Deterioration (PSD) and Title V programs. We understand that EPA's proposed rulemaking seeks to incorporate greenhouse gas (GHG) considerations into PSD and Title V permitting programs while addressing administrative burdens for state permitting authorities in keeping with the intent of the CAA.

NHDES supports EPA's proposed "endangerment and cause or contribute findings" for GHGs [74 FR 18886-18910]. NHDES also supports the EPA and U.S. Department of Transportation joint proposed rulemaking to establish light-duty vehicle GHG emission standards and corporate average fuel economy standards [74 FR 49454-49789]. These two rules respond to the Supreme Court's ruling in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), which held that EPA was obliged under the law to issue an "endangerment" finding to determine whether GHGs "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" [CAA § 202(a)]. EPA's proposed rule on PSD/Title V GHG requirements is one of several approaches EPA may choose in moving forward in implementing federal rules controlling GHG emissions.

New Hampshire, along with many other states, has moved forward with the implementation of GHG control programs in the absence of prior federal programs. As an example, New Hampshire is one of ten states participating in the Regional Greenhouse Gas

Initiative (RGGI), which administers a mandatory cap and trade program to reduce carbon dioxide (CO<sub>2</sub>) from electric generating facilities. The RGGI states committed a great deal of time and effort to establish this GHG control program. Any final EPA rule should give due consideration to the environmental benefits provided by existing GHG programs so that a final rule does not reduce the effectiveness of these programs and does not “penalize” states that have taken earlier actions to reduce GHGs.

NHDES recognizes that the scope of the climate change problem is large and complex. We support EPA's efforts to begin the necessary steps to address the threat of climate change with the available tools at hand in the Clean Air Act. However, due to the substantial ambiguity that exists with respect to the regulatory trigger for GHG regulations, NHDES feels strongly that federal legislation clarifying the implementation of GHGs control regulations with respect to the Clean Air Act would appear to be the most feasible solution.

Below are our specific comments on elements of EPA's proposed tailoring rule.

**1. The proposal does not provide adequate time for SIP-approved states to make regulatory changes**

The proposed rule would raise the threshold for applicability of PSD and Title V programs to levels that EPA determines are administratively feasible and that do not produce absurd results. While NHDES understands this may be of substantial benefit in delegated states, New Hampshire manages SIP-approved programs where state laws or rules establish the 100/250-tpy threshold for PSD and Title V requirements. In SIP-approved states, until and unless state law and/or regulations are modified, these thresholds will remain at 100/250 tpy. This essentially means that the very problem that EPA is trying to address in this proposal will simply be passed on to states with SIP-approved programs. This obviously poses very serious implementation concerns for New Hampshire. Permitting authorities are constrained by state law and legislative session schedules, as well as required administrative procedures (including public notice and comment periods), and cannot raise the thresholds, even by way of a state version of the Tailoring Rule, in the 75 days that EPA proposes.

Comments by the National Association of Clean Air Agencies (NACAA) on the Johnson memorandum (EPA Docket EPA-HQ-OAR-2009-0597) recommended that EPA consider adopting an interpretation of “subject to regulation” under the CAA that, for Title II regulations, incorporates the Title II requirement for mandatory lead time. Under this recommendation, the GHG emissions are “subject to regulation” when the first vehicles are “subject to regulation.” Following the Title II lead time requirements, EPA has proposed that vehicles will not be subject to regulation of GHG emissions until Model Year (MY) 2012. If EPA were to employ MY 2012 as the date when GHG emissions are first “subject to regulation,” state and local authorities would likely<sup>1</sup> have a period of 15 months to adopt higher thresholds and other permit streamlining strategies.

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<sup>1</sup> The “Model Year” commences at the discretion of the manufacturer and can occur as early as January 2, 2011. Based on historical practice, it is anticipated that the first MY 2012 vehicles would be certified and produced in summer 2011.

Further, EPA's proposed legal rationales for the Tailoring Rule – administrative necessity and the avoidance of absurd results – require the agency to design an interpretation of the CAA that is feasible and that avoids the absurd results associated with the plain reading of the Act. This would seem to require an outcome that GHG emissions are not subject to regulation until SIP-approved states have had a reasonable opportunity to adopt regulations and/or laws that raise state and local thresholds for applicability of these programs.

Although not specifically addressed in the proposed tailoring rule, NHDES also points out that states will need adequate time to amend their Part 70 program requirements to incorporate GHGs into Title V permits. In the case of New Hampshire, we will likely need to establish new applicable requirements in a temporary (construction) permit before they can be incorporated into a facility's Title V permit. Given the limited environmental benefit associated with the Title V requirements in this circumstance, EPA should consider a longer schedule for implementation of that program than the PSD program.

In sum, EPA needs to provide a path forward that provides sufficient time for states that implement their PSD and/or Title V programs through SIP-approved state rules and regulations to modify those state programs to be consistent with EPA's final tailoring rule. If states are not provided adequate time to modify their regulations, then the lower thresholds of 100 or 250 tons per year (tpy) would apply in those programs and the "administrative impossibility and absurd results" that EPA seeks to avoid in its rule would occur in those states. EPA's suggestion that it could delay the effective date of the new programs an additional 75 days after "promulgation" of the regulation on the basis of the review period provided by the Congressional Review Act still does not provide sufficient time. NHDES estimates that approximately 12 months will be needed to make the necessary changes to state rules and properly implement the new GHG requirements.

## **2. Threshold for Major Sources and Significance Levels**

NHDES supports EPA's proposal to raise the major source threshold for GHG sources to address unreasonable administrative burdens. EPA's reasoned explanations for balancing the appropriate administrative burden with tangible environmental benefits in line with the intent of the Clean Air Act reflect NHDES' concerns and experiences in implementing effective permitting programs. However (and as noted above), unless EPA provides SIP-approved states such as New Hampshire with adequate time to make the necessary state statute and regulatory changes to address GHGs, this proposed threshold will not provide New Hampshire any relief from the unreasonable administrative burden that EPA is trying to address.

EPA has proposed a major source threshold of 25,000 tpy, on a "carbon dioxide equivalent" (CO<sub>2</sub>e) basis, and requests comment on whether a lower or higher threshold should be established. NHDES supports a minimum threshold of 25,000 tpy CO<sub>2</sub>e. However, based on discussions with EPA staff and other states (as part of an EPA briefing to the NACAA Permitting Committee and during the December 11, 2009 EPA webinar on the proposed rule), it appears that there is uncertainty as to the size of a source that will trigger this threshold. One air permitting agency noted that (based on their calculations) a single boiler as small as 20 million Btu per hour would exceed the proposed 25,000 tpy CO<sub>2</sub>e threshold. NHDES estimated that a

boiler in the range of 28 - 38 million Btu per hour (depending on fuel type) would exceed 25,000 tpy of CO<sub>2</sub> (not taking into consideration the other GHG pollutants). Due to this widely varying range of estimates, NHDES is concerned that more sources are likely to be subject to the proposed rule than EPA has estimated. For this reason, NHDES recommends that a higher threshold, such as 50,000 tpy CO<sub>2</sub>e, be initially established. At the five-year review period, EPA could evaluate whether its initial projections were accurate and whether a lowering of the major source threshold is warranted.

Based on the same reasoning to address administratively burdensome obstacles while running an environmentally effective GHG permitting program, NHDES supports EPA's reasoning for an increase in the significance level for a major modification to trigger PSD. NHDES suggests adoption of a 25,000-ton significance level due to the concerns expressed above about the uncertainty NHDES has over EPA's estimate of potentially affected sources. EPA could revisit this threshold at the five-year review period and establish a lower threshold if EPA's original estimates are found to be accurate.

With regard to the metric used in setting the threshold levels, NHDES supports using units of short tons rather than metric tons. Short tons are used to express emissions for all other pollutants in the permitting and PSD program, and NHDES is concerned that using a different metric in this case could lead to confusion and errors in permitting actions. However, facilities must be clear in reporting the units of emissions since some of the GHG programs (such as the EPA's GHG Mandatory Reporting Rule) use metric tons.

### **3. Guidance to States**

It is imperative that EPA provide timely and sufficient guidance to states to assist permitting authorities in implementing sufficiently comprehensive and robust PSD and Title V GHG permitting programs. Historically, EPA has not always been timely in developing guidance for state programs; for example, guidance for implementation of the PM<sub>2.5</sub> NAAQS has not yet been completed although states are being required to regulate PM<sub>2.5</sub> emissions. Permitting authorities are being tasked with the important challenge of incorporating a suite of new air pollutants (GHGs) within their permitting programs. Timely and clear guidance from EPA is a fundamental foundation on which states can construct solid GHG permitting programs.

NHDES does not recommend that EPA develop presumptive best available control technology (BACT) levels. If EPA believes that predefining the technology is the best approach, then NHDES recommends that EPA develop a New Source Performance Standard instead. Should the final rule resemble the proposed rule, such guidance must also include current cost per ton values for top-down BACT that can be used as a starting point for the full range of sources captured under the GHG permits, as well as feasible and appropriate GHG mitigation options at the facility.

As part of the necessary guidance, NHDES asks that EPA also update the RACT/BACT/LAER clearinghouse that is the basis for most (if not all) BACT determinations. While NH strongly supports and encourages energy-efficiency as a GHG emission mitigation

option, allowing such options offsite of the affected facility is not appropriate for BACT, but instead more appropriate for other types of emission reduction programs (such as cap and trade).

Without adequate guidance, all parties involved (e.g., states, facilities, public, etc.) are uncertain of the expectations for the program, especially in determining BACT for GHG. For regulated facilities, the uncertainty may jeopardize the financing of beneficial energy and efficiency projects. A lack of timely guidance will not only make it difficult for regulatory agencies such as NHDES to adequately justify permitting actions that regulate GHGs, but it will also make it difficult for citizens and environmental groups to effectively review and provide comments on these decisions. Having guidance in place will clarify what is expected of permitting agencies in their role of regulating GHGs (particularly in making BACT determinations for GHGs), make permitting decisions more defensible from a legal standpoint, provide more certainty to the affected sources, and allow citizens and interested parties to effectively review BACT determinations.

#### **4. Potential to Emit**

NHDES does not support EPA's proposed modifications to the current approach on calculating potential to emit (PTE) that is used in permitting decisions. Alterations to the current practice for calculating PTE will upset longstanding policies and procedures in NSR permitting guidance and would affect all of the regulated NSR pollutants. NHDES is especially concerned that this approach would ultimately undermine existing state and federal rules for triggering applicability thresholds for the existing NSR pollutants. NHDES recommends that the current PTE approach remain as is to avoid opening this area to challenge in NSR reviews.

#### **5. Additional Administrative Burden**

NHDES has concluded that the proposed Tailoring Rule may place a larger administrative burden on regulatory agencies than EPA has estimated. EPA's intent in raising the major source threshold for GHGs is to capture most of the existing major sources without significantly increasing the number of new major sources. Based on NHDES' analysis of sources in New Hampshire, we believe that the proposed rule would add a significant number of new major sources.

There are 39 currently operating Title V sources in New Hampshire. Of these, nine sources are subject to Title V due to VOC and/or HAP emissions and are not expected to be impacted by the proposed rule. Of the remaining 30 Title V sources, 26 are subject to Title V due to emissions from fuel burning, and the remaining four are municipal solid waste landfills. NHDES anticipates that these 30 sources would also be Title V sources for GHGs (at the proposed 25,000 tpy CO<sub>2</sub>e threshold) due to their carbon dioxide or methane emissions.

NHDES has determined that, depending on the fuel type, a combination of boilers or other fuel burning devices in the range of 28 - 38 million Btu per hour (MMBtu/hr) would emit more than 25,000 tpy of CO<sub>2</sub> (not taking into consideration the other GHG pollutants). Furthermore, NHDES has been informed (through discussions with other air quality agencies) that values as low as 20 MMBtu/hr could result in 25,000 tpy of CO<sub>2</sub>e. Assuming that sources

with fuel burning devices over 28 MMBtu/hr will exceed 25,000 tpy CO<sub>2</sub>e, NHDES estimates that the proposed rule will result in 38 new Title V sources, which would double the number of Title V sources in New Hampshire. Furthermore, there are numerous stationary sources that have one or more boilers that are collectively rated at 20-28 MMBtu/hr. This would increase the previous estimate of newly created Title V sources from 38 to 75. NHDES assumes that some of these sources will elect to accept federally-enforceable limits to restrict their potential CO<sub>2</sub>e emissions and become synthetic minor sources, but having to issue synthetic minor permits to these sources will obviously increase the administrative burden on NHDES.

As mentioned under Comment #1, the State of New Hampshire will likely need to establish new applicable requirements in a temporary (construction) permit before they can be incorporated into a facility's Title V permit. This additional step will further increase the administrative burden on NHDES.

EPA also noted that in developing projections of additional workload on permitting agencies, they did not include the number of sources that (for a modification) would already undergo PSD review for other regulated PSD pollutants. It appears that EPA's projection only includes sources that would trigger PSD for the first time due to GHG emissions, and EPA assumed that there would be minimal additional work to conduct a GHG BACT analysis for projects where a BACT analysis would already be required for other pollutants. BACT reviews are often a very time-consuming process, so even one additional BACT analysis would have a measurable impact on administrative resources. Complicating this further is the fact that there is currently limited information upon which to make GHG BACT determinations, which will likely increase the time needed to conduct a BACT analysis. This will certainly increase the administrative burden on the implementing agencies, and EPA should take this into consideration.

Lastly, NHDES emphasizes that the administrative burden is not limited to permitting staff. Staff will be required to propose changes to underlying state statutes and state rules. Permitting and inspection staff will need additional training, and compliance inspections will take longer to complete since inspectors will need to evaluate a stationary source's compliance with these new, additional requirements. New monitoring, recordkeeping, and reporting requirements will also add to the administrative burden for the inspectors that review this information.

## **6. Streamlining Techniques**

As stated previously, NHDES supports EPA's approach to set major source thresholds and significance levels in a manner that appropriately addresses unnecessary additional administrative burdens while capturing the environmental benefits intended by the Clean Air Act. We do have some concern at this point that many states do not have sufficient information on hand with regard to potential GHG emissions levels (and actual emissions) to gauge accurately the true universe of GHG sources that may be covered under the proposed tailoring rule. EPA has proposed several streamlining efforts which might alleviate some of the workload.

Among the workload reducing proposals EPA suggests are the use of e-permitting and “lean” techniques. While these are viable workload reduction and streamlining techniques when applied to well-established permitting procedures, NHDES doubts that these approaches will be helpful until states have gained some experience implementing the new requirements into their PSD and Title V permitting programs.

EPA suggests that presumptive BACT and model permits would also help to reduce the workload. With regard to presumptive BACT, NHDES believes such an approach is contrary to the longstanding policies and procedures applied to sources of the existing regulated NSR pollutants. We also believe that this approach has the potential to greatly diminish the technology-forcing benefits of case-by-case BACT reviews. As noted above, NHDES believes that NSPS is a more appropriate program for specific technology or emission standards.

EPA's overall approach to streamlining – presumptive BACT with model permit language for specific source categories, and applicability thresholds established through a modified PTE procedure, together with the recognition that permitting for many sources would not provide any environmental benefit – can lead to no different outcome than if EPA simply established performance standards for the larger GHG emitting source categories. NHDES recommends that EPA place on an expedited timeline the establishment of performance standards (in addition to the guidance discussed above) for the control of carbon dioxide and GHGs from the major source categories (including combustion sources of all sizes and landfills) that will be in place before states must incorporate BACT for GHGs into permits. With performance standards, the burden on states in making BACT determinations will be significantly eased by setting a starting point for control, thereby making the PSD permit process more meaningful for the control of GHG emissions.

## **7. Phase-in Period**

NHDES supports EPA's approach to provide a first phase of five years in the PSD/Title V tailoring rule with a sixth year to complete additional rulemaking. With the experience that permitting agencies will gain in administering GHG regulatory actions, the tailoring rule can be refined after the first phase to incorporate any changes needed to cover an appropriate scope of sources.

NHDES does not support the alternative option of a “step down” approach in which the threshold levels are reduced in regular predetermined step-down levels. Without the experience of administering the new GHG permitting requirements, predetermining the step-down increments is an uncertain and potentially arbitrary exercise. Again, this approach would be a modification to the existing framework of the NSR program, and is more appropriate with other regulatory programs (such as cap and trade.) Permitting agencies need the benefit of actual experience in implementing their GHG permitting programs over time to gain a better sense of appropriate and administrable permitting thresholds. In addition, because permitting thresholds often have to be embodied in state law or regulation, a series of stepped-down thresholds may place additional and unnecessary procedural burdens on state authorities who would be forced to engage in a lengthy cycle of regulatory revisions.

## 8. Permitting Fee Issues

EPA acknowledges that at the GHG emissions thresholds proposed in its Tailoring Rule, there will be an increase in permitting actions by state and local agencies. EPA further acknowledges that, under applicable law, it may only relax the statutory thresholds by the minimum amount needed to cure “impossibility.” Put another way, the statutory thresholds must be “nearly impossible”. Lastly, EPA acknowledges that, once it relies on the doctrine of administrative necessity, it must devise a solution that is feasible. However, raising the regulatory threshold to 25,000 tpy CO<sub>2</sub>e or a higher number will not abate the predicted permitting backlog if additional permitting personnel are not in place *at the time the additional workload occurs*. In its proposal, EPA would avoid responsibility for this issue, promising only to look at Title V permit fees some years down the road to see if they have been adequate to maintain appropriate levels of support. Both as a matter of equity and a matter of law, EPA has the responsibility of ensuring that state and local permitting authorities have adequate resources in place to address the additional permitting workload that flows from the threshold EPA adopts *before* the threshold becomes effective.

In order to properly resolve this issue and ensure that its Tailoring Rule is feasible, EPA must, by modification of Part 70 rules, adopt presumptive Title V fees that are also “tailored” to the GHG program. Such a rule would provide a basis for states to 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.

As noted above, the resources required for a new GHG program may go beyond the Title V program. NHDES anticipates that the number of synthetic minor permits will increase significantly. Also, additional resources are required to implement and maintain the GHG program. Consequently, NHDES will require additional funding.

Given the additional resources that will be required to integrate GHG sources into the PSD/Title V programs (and the temporary permit program in New Hampshire’s case as well), it is imperative that EPA develop mechanisms that will create revenue streams to support permitting agencies for these efforts. NHDES strongly recommends that EPA increase section 105 program funding and require the collection of Title V and other permitting related fees for GHGs. However, as with the traditional Title V program, the ton per year fee funding level may vary significantly from agency to agency. A variety of factors will influence the level of funding necessary to implement this program. These factors include, but are not limited to, the number of affected sources and mechanisms used to address affected sources. Therefore, NHDES recommends that EPA clearly detail permitting agencies’ authority to collect fees under any of the potentially affected air programs and provide them with general guidance and recommendations for fee structures.

## 9. Biomass Combustion Sources

The proposed tailoring rule provides insufficient information on how permitting authorities should consider biomass combustion sources for purposes of GHG PSD/Title V permitting. For example, are the CO<sub>2</sub> emissions from facilities burning biomass to be considered

“net zero” because they may be offset by sequestration and/or avoided methane emissions from decaying trees in the forests? This presumption of “net zero” would appear to be appropriate unless the biomass resource cannot demonstrate that its fuel was harvested in a sustainable manner. However, because the definition of sustainable harvesting is not settled, we recommend that EPA establish a national standard on sustainability to avoid a multitude of many different standards around the country that will lead to confusion and ongoing controversy about the use of biomass as a fuel.

## Summary

In summary, we commend EPA for its foresight in addressing GHG emissions under the PSD and Title V provisions of the Clean Air Act. We recognize and appreciate EPA's efforts to seek a workable balance between the additional administrative burdens and future environmental benefits resulting from this proposal, while remaining consistent with the intent of the Clean Air Act. We also appreciate the time that your staff has taken to discuss the proposed rule and answer questions from state permitting agencies. As demonstrated in the interplay of considerations taken in the proposed Tailoring Rule, this is clearly a state and federal partnership towards achieving our shared environmental goals under the Clean Air Act. While this is new territory for EPA and the state permitting authorities, it provides another step along the path to addressing climate change.

If you or your staff has any questions regarding the issues raised in this letter, please contact Gary Milbury, Air Permit Programs Manager, at 603-271-2630 or via email at [gary.milbury@des.nh.gov](mailto:gary.milbury@des.nh.gov).

Sincerely,



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