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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program
Docket ID No. EPA-HQ-OAR-2009-0507
74 Fed. Reg. 51535 (Oct. 7, 2009)

Comments of Peabody Energy Company

VIA ELECTRONIC MAIL TO: a-and-r-Docket@epa.gov

Dear Sirs:

I. Introduction

Peabody supports the interpretation of the regulatory phrase “subject to regulation” that the Environmental Protection Agency (EPA or the Agency) proposes to adopt in the above-referenced docket. Peabody supports the legal and policy rationales proffered by EPA and offers further justification below. Peabody also believes that greenhouse gases (GHGs) should be considered regulated pollutants not when the light duty motor vehicle rule¹ is promulgated or becomes effective under the Congressional Review Act, but when the rule becomes enforceable at the beginning of the 2012 model year.

Peabody is the world’s largest private-sector coal company. Our products fuel approximately 10 percent of America’s and 2 percent of the world’s electricity. Last year Peabody shipped 238 million tons of coal. The company has 340 electricity generating and industrial customers in nearly 40 states and 19 countries. In the United States, Peabody companies operate three large surface mines in the Powder River Basin of Wyoming that produce about 150 million tons per year; three surface mines in the Southwest that produce about 14 million tons per year; an underground mine in Colorado that produces about 8.6 million tons per year; and a number of surface and underground mines in the Illinois Basin that collectively produce about 32 million tons per year. Peabody’s 2007 domestic coal production of about 200 million tons per year equaled about 17.4 percent of total domestic production.²

¹ *Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 74 Fed. Reg. 49454 (Sept. 28, 2009).

² See Technical Support Document, *The Coal Sectors, Proposed Rule for Mandatory Reporting of Greenhouse Gases*, Office of Air and Radiation, U.S. Environmental Protection Agency, January 28, 2009, EPA-HQ-OAR-2008-0037, Ex. 10.

II. Additional Rationale for Defining “Subject to Regulation” as Subject to a Regulation that Actually Restricts Emissions

EPA’s legal rationale for its interpretation of the phrase ‘subject to regulation’ should focus more broadly on the meaning of that phrase within the Prevention of Significant Deterioration (PSD) statutory program and the Clean Air Act (CAA) as a whole. Perhaps the most basic maxim of statutory construction is that “[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to *its object and policy*.”³ As the Supreme Court has stated, “[i]nterpretation of a word or phrase depends upon reading the *whole* statutory text, *considering the purpose and context of the statute...*”⁴ According to the Court, “[i]n considering the statute at issue, ‘we consider not only the bare meaning’ of the critical word or phrase ‘but also its placement and purpose in the statutory scheme.’”⁵

Considered in the context of the PSD program and the CAA as a whole, the interpretation of the phrase “subject to regulation” that the Petition for Reconsideration⁶ advances is frankly absurd. The essence of the argument in the Petition is that various actions taken by EPA that were not preceded by a CO₂ endangerment finding and that did not require any source to actually reduce emissions should be interpreted as triggering CO₂ Best Available Control Technology (BACT) requirements for new and major CO₂ emitters. In other words, according to Petitioners, even before EPA determines that CO₂ endangers public health and welfare, and even before EPA decides to require that any emitter should be required to reduce emissions, EPA unwittingly took action that should now be interpreted as having triggered CO₂ control requirements for a potentially very large number of emitters.

Petitioners’ argument is mere interpretive cleverness and would stand the CAA – and indeed the theory of government regulation of any kind – on its head. The objective of the CAA is to “protect and enhance the quality of the Nation’s air resources so as to promote public health and welfare and the productive capacity of its population.”⁷ Petitioners seek regulation untethered from this basic purpose. Without the predicate endangerment finding, the regulation that Petitioners seek is no more than regulation for regulation’s sake.

In contrast, interpreting the phrase “subject to regulation” as “subject to regulation that restricts emissions” fits comfortably within the statute because EPA is only authorized to restrict emissions of air pollutants where the Agency has made an endangerment finding – or where Congress has implicitly done so by directing EPA to restrict emission of specified pollutants, for instance in the stratospheric ozone program under Title VI.

³ *Crandon v. U.S.*, 494 U.S. 152, 158 (1990), citing *K Mart Corp. v. Carrier, Inc.*, 486 U.S. 281, 291 (1988) (emphasis supplied).

⁴ *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006) (emphasis supplied).

⁵ *Holloway v. U.S.*, 526 U.S. 1, 6 (1999), quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995).

⁶ Petition for Reconsideration, In the Matter of: EPA Final Action Published at 73 FR 80300 (Dec. 31, 2008), entitled “Clean Air Act Prevention of Significant Deterioration Program; Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Program.”

⁷ CAA § 101(b)(1).

Defining the term “regulated NSR pollutant” at 40 C.F.R. § 52.21(b)(50) as a pollutant that is actually subject to emission controls makes perfect sense for the same reason. As EPA states, that regulation sets forth four categories of NSR air pollutants. The first three explicitly apply to pollutants for which an endangerment finding has been made and which are therefore subject to emission restrictions or for which Congress has itself directed emissions reductions. The fourth category applies to pollutants that are “otherwise subject to regulation.” Petitioners contest the use of *esjudem generis* to interpret that fourth category as applying only to pollutants otherwise subject to emission restrictions, but they miss the point. The use of *esjudem generis* in construing the meaning of that fourth category is appropriate because it advances the purposes of the statute as a whole. In other words, the fourth category must be interpreted as applying to regulations that restrict emissions because any other interpretation confounds the purpose of the statute to require emission reductions where there is endangerment.

*Massachusetts v. EPA*⁸ confirmed the basic structure of the CAA under which first there is an EPA endangerment finding and then there is regulation. *Massachusetts* explicitly held that EPA may not impose emission reduction requirements based on the status of GHGs as CAA “air pollutants.” According to the Court, GHGs are CAA “air pollutants” only because the CAA definition of that term is “sweeping” and “embraces all airborne compounds of whatever stripe.”⁹ The Court held that for EPA to impose GHG emission restrictions, it must first find a danger to public health or welfare.¹⁰ As the Court said, the statute “condition[s] the exercise of EPA’s authority on the formation of a ‘judgment,’ 42 U.S.C. § 7521(a)(1), [and] *that judgment must relate to whether an air pollutant ‘cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare....’*”¹¹

Indeed, the *Massachusetts v. EPA* petitioners, which included some of the Petitioners here, specifically disavowed the contention that defining GHGs as CAA “air pollutants” would trigger regulatory consequences. Petitioners told the Court on brief that:

At the first step in the process, section 202(a)(1) directs the EPA Administrator’s attention to the questions whether “any air pollutant” from new motor vehicles or new motor vehicle engines “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.” *If “in his judgment” (42 U.S.C. § 7521(a)(1)), this so-called “endangerment standard” is met, then the obligation to regulate is triggered.*¹²

Yet Petitioners now seek to convince EPA that, even without a CO₂ endangerment finding, EPA should engage in massive CO₂ regulation. Petitioners, however, had it right in their Court argument: under the CAA, first there is an endangerment finding, then there is regulation – not the other way around.

⁸ 127 S. Ct. 1438 (2007).

⁹ *Id.* at 1460.

¹⁰ *Id.* at 1459.

¹¹ *Id.* at 1462 (emphasis supplied).

¹² *Massachusetts v. EPA*, Petition for Writ of Certiorari at 5 (March 2, 2006) (emphasis supplied).

Finally, the necessity of interpreting the term ‘subject to regulation’ as “subject to regulations restricting emissions” is emphasized by the potentially huge consequences of interpreting that phrase as demanded by petitioners. As EPA states in the tailoring rule preamble,¹³ more than a million sources have the potential to emit more than the statutory 100/250 tons per year (tpy) threshold if CO₂ is a regulated pollutant. Thus, the interpretation urged by Petitioners here could mean that a very large number of relatively small emitting sources across the economy could be required to reduce emissions without any formal finding that their emissions pose a danger to the public health and welfare.

Although the tailoring rule attempts to redefine the major source threshold for a five-year period to 25,000 tpy CO₂e, there are serious questions as to the legality of the tailoring rule, as EPA is well aware and as Peabody will discuss in its tailoring rule comments. Moreover, the tailoring rule is not retroactive, and neither EPA nor Petitioners discuss what granting their Petition would mean for sources which, in the past, undertook activity that made them a new or modified major source of CO₂ emissions. Since Petitioners argue that CO₂ became a regulated pollutant with the passage of the Clean Air Act Amendments in 1990, would any new or modified source constructed after that time that is major for CO₂ be in violation of the CAA since they did not apply for a PSD permit? A potentially very large number of sources could be at risk – and this risk would accrue despite the fact that EPA had not formally determined through a public process that CO₂ emissions create public health or welfare danger.

In sum, the only construction of the phrase “subject to regulation” that fits within the statutory scheme of protecting health and welfare is the one EPA proposes to make in this docket. Peabody urges the Agency to finalize its proposal.

III. Timing of Effectiveness of Control Requirements

Peabody agrees with EPA that the Agency’s proposed light-duty motor vehicle regulation, when it is final and effective, will be the type of restriction on emissions that will trigger PSD for GHGs. Peabody does not agree, however, with EPA’s statement that the motor vehicle regulation will be final and effective for PSD purposes at the time that such regulation is deemed effective for purposes of the Congressional Review Act, that is, sixty days after the regulation is promulgated. Peabody believes that, for PSD purposes, the motor vehicle regulation should be deemed final and effective when it creates an enforceable requirement, which is at the beginning of the 2012 model year.

The interpretation Peabody offers harmonizes the requirements that will be triggered by the motor vehicle rule with the requirements that will be triggered under the PSD program. Under EPA’s proposed interpretation, new and modified major sources of GHGs will be prohibited on pain of penalty from undertaking construction unless they have a PSD permit with BACT for GHGs commencing sixty days after the motor vehicle rule is promulgated, which we understand is currently expected in March 2010. In contrast, automobile manufacturers are not subject to enforcement or penalties under the motor vehicle rule until the beginning of model year 2012 in the Fall of 2011. Thus, EPA’s interpretation of when the motor vehicle rule is final

¹³ *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55292 (Oct. 27, 2009).

and effective will create the anomalous result that stationary sources will begin reducing GHG emissions as much as a year-and-a-half in advance of the time when motor vehicles begin reducing emissions, even though it is the regulation of motor vehicles that triggers the requirements for stationary sources. This makes no sense in the context of the statute as a whole, since it is the obligation of the automakers to actually reduce emissions which triggers the concurrent obligation of stationary sources to do the same.

The interpretation offered by Peabody makes even more sense given that, as stated in Peabody's comments on the light duty motor vehicle rule.¹⁴ EPA has not done any of the analyses required by various statutes and Executive Orders of the costs and benefits of GHG regulation of major stationary sources under the PSD program. Thus, if EPA's interpretation of when GHGs should be considered regulated prevails, EPA will have mandated immediately effective requirements for major stationary sources without analyzing the cost and benefits of that action. At the same time, emission reductions from motor vehicles will not take place until the beginning of model year 2012, even though EPA did perform cost-benefit analyses of those regulations. Again, this outcome makes no sense in the context of the statute, and should be rejected by EPA.

IV. Conclusion

EPA should adopt the interpretation "subject to regulation" as it proposes, but with an expanded rationale as set forth above. EPA should also determine that GHGs will become "subject to regulation" at the time that its light-duty motor vehicle GHG rule becomes enforceable at the beginning of model year 2012. Peabody appreciates the opportunity to submit these comments.

Sincerely,



Mary Frontczak

¹⁴ See EPA-HQ-OAR-2009-0472-7223.1. Peabody incorporates those comments by reference here.