

U.S. ENVIRONMENTAL PROTECTION AGENCY

**PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE
GAS TAILORING RULE
DOCKET NO. EPA-HQ-OAR-2009-0517**

COMMENTS OF PEABODY ENERGY COMPANY

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I. Introduction

Peabody appreciates the opportunity to comment on EPA's tailoring rule proposal.¹ The proposal would limit greenhouse gas (GHG) regulation of stationary sources under the Prevention of Significant Deterioration (PSD) and Title V permit programs to sources emitting 25,000 tons per year (tpy) or more of CO₂e. The proposal would also define the "significance" level for CO₂e in the PSD program as 10,000-25,000 tpy for purposes of determining whether a modification is major.

EPA states that the rule is necessary to avoid the "absurd" result of implementing the explicit statutory PSD and Title V thresholds. According to EPA, PSD and Title V regulation of GHGs under the statutory thresholds would subject potentially millions of small sources to GHG regulation under the PSD and Title V programs, a result that EPA says could indefinitely gridlock those programs for both large and small sources while achieving very little gain in reducing GHG emissions.

Although Peabody appreciates EPA's attempt to mitigate the effects of regulating GHGs under the CAA, Peabody does not believe that the tailoring rule will accomplish its intended result. Peabody is greatly concerned that, the tailoring rule notwithstanding, EPA's currently proposed decision to proceed with GHG regulation under the Clean Air Act (CAA) next spring will indeed result in overwhelmed PSD and Title V permit systems, thereby preventing a very large number and variety of both large and small GHG-emitting sources from obtaining permits. Since PSD and Title V permits are legally-required for these sources to construct, renovate and operate their facilities, the consequences to the American economy of this looming regulatory gridlock could be extremely severe.

Peabody's concern in this regard stems from two factors. First, EPA's legal justification for the tailoring rule is, at best, highly uncertain. Second, as stated in the tailoring rule preamble, even with the tailoring rule, the 100/250 tpy PSD thresholds and the 100 tpy Title V threshold will remain "on the books" and therefore enforceable *as a matter of state law* in "most" states.² Although EPA says that these states might want to consider changing their thresholds,³ it does not provide them with any time to do so before GHG regulation becomes effective. Thus, even

¹ *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55292 (Oct. 27, 2009).

² *Id.* at 55342/1.

³ *Id.* at 55343/2.

if the tailoring rule is legally valid, which we question, it will not prevent a very large number of sources from becoming subject to the PSD and Title V programs in “most” states.

Peabody believes that the problem GHG regulation creates for both large and small sources, and with which EPA is struggling in the tailoring rule, stems generally from the inherent unsuitability of the CAA to GHG regulation. But it also stems in large measure from EPA’s evident intention to commence GHG regulation next spring before it has developed an effective mechanism ensuring that the small-source problem is truly solved. This is a problem of EPA’s own making. Although the Supreme Court in *Massachusetts v. EPA* commanded EPA to regulate GHGs if it made an endangerment finding, it did not require EPA to make such a finding, and it explicitly told EPA that the Agency has great discretion as to the timing of actual regulations.⁴ Thus, no legal impediment prevents EPA from taking time to ensure that its regulatory program in fact will not create more problems than it solves.

Nor does any policy reason compel EPA to commence GHG regulation next spring, as is currently planned. EPA’s proposed decision to begin GHG regulation at that time is driven by its desire to finalize its motor vehicle GHG regulations at the same time as the Department of Transportation (DOT) finalizes its CAFE standards. Peabody understands that DOT intends to finalize those standards in March in accordance with legal requirements not applicable to EPA. As discussed more fully below, the GHG reductions that will be achieved by EPA’s motor vehicle regulations largely duplicate the reductions that will be achieved by DOT’s CAFE standards. Thus, little, if any, GHG-reduction benefit is lost if DOT’s standards are issued in March as legally required, while EPA defers its motor vehicle regulations as necessary to ensure that the PSD and Title V problems are truly solved.

EPA’s rush to finalize the motor vehicle regulations in March has also resulted in the Agency committing itself and the country to an ambitious GHG regulatory program without the Agency first having undertaken any study of the economic consequences of such regulation. As discussed in Peabody’s comments on EPA’s light-duty motor vehicle GHG rule, which we incorporate by reference here, a number of statutes and Executive Orders require agencies to produce regulatory impact studies as a part of the rulemaking process to ensure adoption of the most effective regulation at the lowest possible cost.⁵

But EPA, at every step in its GHG regulatory proceedings so far – the endangerment finding, the motor vehicle rule, the Johnson Memorandum reconsideration, and now the tailoring rule – has failed to produce any study of the economic consequences of GHG regulation of stationary sources. By failing to inform itself and the public of these consequences, EPA has

⁴ *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (“EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies”). EPA reemphasized this point in the preamble to its final endangerment finding: “We also note that the language many commenters quoted from the Supreme Court decision about EPA discretion regarding the manner, timing and content of Agency actions, and the ability to consider policy concerns, relate to the motor vehicle standards required in the event that EPA makes a positive endangerment finding, and not the finding itself. *EPA has long taken the position that it does have significant discretion in the standard-setting step under CAA section 202(a).*” See *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act; Final Rule*, 74 Fed. Reg. 66496, 66501/2 (Dec. 15, 2009) (emphasis supplied).

⁵ See EPA-HQ-OAR-2009-0472-7223.1. Peabody incorporates by reference here both these comments and our comments in EPA’s reconsideration of the so-called Johnson Memorandum, EPA-HQ-OAR-2009-0597-0080.1.

left itself without the means of properly determining that the GHG regulations it proposes to adopt, including the tailoring rule, are in fact the least-cost way of achieving EPA's objectives.

Peabody therefore urges EPA to proceed with GHG regulation on a more reasonable time line. Specifically, EPA should defer GHG regulation for PSD and Title V purposes until:

- States have had an opportunity to change their PSD and Title V thresholds and EPA assesses the consequences that will ensue if some states do not elect to conform those thresholds to the tailoring rule levels.
- States have studied and put into effect whatever permit "streamlining" mechanisms EPA believes may be legal.⁶ Peabody does not believe that EPA needs six years to study and implement the streamlining mechanisms discussed in the tailoring rule preamble. Putting these "streamlining" mechanisms into place is necessary as a backstop in the event the tailoring rule thresholds are determined to be legally invalid.
- EPA has developed appropriate GHG BACT Guidance after measured consideration and notice and comment. The current process EPA is following is extremely rushed and, as a result, may not yield well-considered provisions.
- EPA has produced comprehensive economic analyses of the costs and benefits of GHG regulation.

After describing Peabody, we make the following specific points below: (a) regulating small sources under the PSD and Title V programs would be disastrous; (b) the tailoring rule does not solve the PSD and Title V problem; (c) the legal rationales for the tailoring rule are, at best, highly uncertain; (d) no necessity exists for EPA to promulgate light-duty motor vehicle regulations by March 2010; (e) EPA failed to examine the economic impacts of PSD and Title V regulation; and (f) EPA should defer finalizing the tailoring rule as to coal mines until it has issued final fugitive emissions regulations and taken other action to resolve uncertainties as to how the tailoring rule will apply to coal mines.

II. Peabody

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

⁶ 74 Fed. Reg. at 55320-55326.

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.⁷

III. Regulating Small Sources under the PSD and Title V Programs Would Be Disastrous

The preamble to the tailoring rule comprehensively sets forth the regulatory nightmare that would ensue if small sources become subject to GHG regulation next spring. At the time those regulations are finalized (or alternatively, as EPA proposes in the Johnson Memorandum reconsideration, at the time those regulations become effective for purposes of the Congressional Review Act sixty days thereafter), GHGs will be considered to be regulated pollutants under the CAA. As a result, PSD permit requirements will be triggered for new and modified sources with the potential to emit at least 100 tpy of GHGs if the source is within 28 specified categories or 250 tpy if the source is within any other category. At the same time, sources emitting at least 100 tpy of GHGs would become subject to operating permit requirements under the Title V program.

According to the tailoring rule preamble, the effect of subjecting these small sources to PSD and Title V permits would be to so expand these permitting programs as to make them wholly unworkable. As to the PSD program, the preamble states that "the number of permit applications would increase by 150-fold, an unprecedented increase that would far exceed administrative resources."⁸ The preamble goes on to say that "[p]ermitting authorities have estimated that it would take 10 years to process a PSD application, on average, and the resulting backlog would affect the permit applications for all sources, not just GHG emitters. This backlog would grow by tens of thousands each year following the triggering of PSD applicability."⁹

According to the preamble, the effect on the Title V program would be even worse. EPA states that it expects "some 6.1 million" Title V permit applications, a number that is "almost 100 times greater than what Congress expected" with resulting "multi-year delays in permit issuance."¹⁰ Moreover, the chaos that would ensue in the Title V program would yield minor GHG emission reductions as "the great majority of the 6.1 million additional permittees would not be subject to any CAA requirements and, as a result, would be issued permits that do not include any applicable requirements."¹¹

EPA, of course, agrees that this is an absurd result, and the tailoring rule is in part based on EPA's legal argument that small source regulation can be delayed for a period of years in order to avoid these absurd results.¹² Critically, however, the catastrophic consequences of subjecting small sources to the PSD and Title V permit program is not merely a problem of

⁷ 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.

⁸ 74 Fed. Reg. at 55304/1.

⁹ *Id.*

¹⁰ *Id.* at 55304/2.

¹¹ *Id.* at 55304/3.

¹² *Id.* at 55303/2-55311/3.

overwhelmed permit agencies. The real problem is that small sources will be required to obtain permits to construct or operate but will be unable to obtain the needed permits because of the overloaded system. As a result, new construction and modification activity will cease, and operations will (at a minimum) be thrown in doubt. This result will not be confined to just small sources because large sources will also not be able to obtain needed permits. This is a recipe for economic disaster across the economy.

IV. The Tailoring Rule Does not Solve the PSD and Title V Problem

Given the dire consequences that will result from making small sources subject to GHG regulation, it is extremely concerning that the tailoring rule will necessarily fall short of its intended purpose. Much attention has been focused on possible legal problems with EPA's reliance on the absurd results and administrative necessity doctrines as justification for essentially changing the 100 and 250 tpy statutory thresholds to 25,000 tpy. We discuss this issue more below. But even assuming for the sake of argument that EPA's legal rationale works, the tailoring rule still falls short, as EPA itself admits, albeit not until the discussion beginning on page 264 of the preamble, in a section misleadingly named "What implementation issues are related to this proposal?"¹³

As EPA explains in this section, the PSD program is largely administered by state permitting agencies acting pursuant to state laws and regulations. Most states operate their own PSD programs that are approved by EPA as a part of the State Implementation Plan (SIP) process. EPA says that "virtually all of [these state permit programs] establish the PSD permitting threshold at the 100/250-tpy level" and that "a few states have adopted lower permitting threshold levels."¹⁴ Additionally, according to EPA, "virtually all EPA-approved SIPs establish the significance level for any new pollutant that it covers – including GHG emissions, if covered – at zero."¹⁵

EPA goes on to explain that the tailoring rule only has the effect of withdrawing federal approval of (a) state permitting thresholds insofar as they are less than 25,000 tpy CO₂e and (b) state significance levels insofar as they are less than 10,000-25,000 tpy CO₂e (whichever level is chosen in the final tailoring rule). But, as EPA acknowledges, this withdrawal of federal approval does not affect the legal validity *under state law* of the 100/250 tpy state thresholds and the zero state significance levels for a new pollutant such as CO₂. In other words, as EPA states, the 100/250 tpy state thresholds and the zero state significance levels will remain legally effective under state law, even though they are no longer federally enforceable.¹⁶

As a result, as EPA concedes, the tailoring rule will not eliminate the legal requirement for small sources to obtain PSD permits when GHGs become regulated pollutants in most states. According to EPA's own analysis, these state law requirements will apply in "virtually all" of the 43 states that administer their own PSD programs.¹⁷ The same result will obtain under the Title

¹³ *Id.* at 55340/3.

¹⁴ *Id.* at 55342/1.

¹⁵ *Id.*

¹⁶ *Id.* at 55343/2.

¹⁷ *Id.* at 55342/1.

V program.¹⁸ Thus, the administrative nightmare that EPA predicts absent the tailoring rule will occur even with the tailoring rule.

Of course, states could change their PSD and Title V regulations to conform to the tailoring rule, and EPA suggests that “states may wish to consider revising those state law provisions.”¹⁹ On the other hand, EPA points out that states are legally free to maintain their current PSD100/250 tpy thresholds and zero significance levels and 100 tpy Title V thresholds.²⁰ Indeed, EPA specifically says that it does not intend either to issue a SIP Call requiring states to adopt the tailoring rule thresholds and significance levels or to adopt a Federal Implementation Plan imposing those thresholds and significance levels.²¹ Thus, without further action taken by states of their own volition, the tailoring rule will fail utterly to achieve its purpose.

Moreover, EPA does not discuss the process that states would need to undertake to change their own laws and regulations. Many states could take a year or more to change their regulations, and many may require either legislative approval or legislative review of some kind. In the meantime, the regulatory gridlock that EPA predicts will be a reality.

EPA cannot escape responsibility for this outcome by implying that this result is somehow the responsibility of state governments. EPA created the problem by its rush to regulate GHGs before, rather than after, the states had changed their laws and regulations. Thus, EPA can and must prevent the disastrous consequences that it predicts by deferring GHG regulation until the states have an adequate opportunity to act.

V. The Legal Rationales for the Tailoring Rule Are, at Best, Highly Uncertain

A. Legal Uncertainty Created by EPA’s Approach to PSD and Title V Regulation Is Highly Detrimental to Large and Small Sources Across the Economy

The legal validity of EPA’s reliance on the absurd results and administrative necessity doctrines is, at best, uncertain. EPA admits that the absurd results doctrine applies only in “rare” circumstances.²² Moreover, in all of the cases that EPA cites on administrative necessity, including the *Alabama Power* case on which EPA principally relies, the courts overruled the applicable agency’s attempt to rely on the doctrine.²³ Given the extremely negative consequences that EPA predicts absent the tailoring rule, its reliance on legal doctrines that either may be invoked only in “rare” circumstances or which have not succeeded in any cases is a very dangerous course indeed.

EPA must bear in mind that the PSD and Title V thresholds do not apply to EPA – *they apply to sources*. Sources with the potential to emit above the statutory thresholds are directly obligated by the CAA to obtain a PSD permit before undertaking new construction or a major modification, and sources with the potential to emit above the Title V threshold must have a Title

¹⁸ *Id.* at 55344/2-55346/2.

¹⁹ *Id.* at 55343/2.

²⁰ *Id.*

²¹ *Id.* at 55342/2, 55343/3

²² *Id.* at 55306/2.

²³ *Id.* at 55311/3-55314/2.

V permit in order to operate. Severe sanctions apply if sources violate these requirements. It is, therefore, uncertain whether sources can even rely on EPA or state regulations that purport to change the applicable statutory requirements, particularly where the underlying legal rationale is so tenuous.

EPA may assume that perhaps no one will challenge the tailoring rule, and so the rule can be relied on by business. Any such assumption is wrong for at least two reasons.

First, at least one environmental group in their comments on the GHG Advance Notice of Proposed Rulemaking (ANPR)²⁴ disputed the legal rationales that EPA is now using in the tailoring rule.²⁵ Hence, they and perhaps others may challenge the rule in a direct appeal to the U.S. Court of Appeals for the D.C. Circuit. If the rule is challenged and overturned, GHGs will be subject to regulation with no rule in place to prevent millions of sources from becoming immediately subject to the PSD and Title V programs. Even worse, if the rule is vacated, any entity that, absent the tailoring rule, was required to have a permit at the 100/250 tpy thresholds or the zero significance level may be deemed to be in violation of the CAA. For any business seeking to engage in new construction or to expand operations in a way that produces GHG emissions, these risks are intolerable.

Second, even if no such direct appeal is filed, any entity wishing to construct or modify a source that is major under the statutory thresholds could face a NIMBY lawsuit where the legal rationales for the tailoring rule are subject to collateral attack in a state or federal court. If a court in such a lawsuit were to strike down the tailoring rule, the source could be subject to penalties for having failed to follow the statute. At a minimum, the source could face the need to cease construction – or to cease operation if it is already constructed – while it applies for and obtains the necessary permits, which could require it to comply with unknown and unplanned for BACT requirements.

In sum, the tailoring rule creates a cloud of uncertainty for business, a cloud that may not dissipate for some time even if the rule is not challenged in court. Given the current state of the economy, EPA is ill-advised to create new roadblocks to business investment.

B. The Absurd Results Doctrine May Be Unconvincing to a Court

EPA is correct that the absurd results doctrine, although rarely applied, has been relied on in some instances as a tool of statutory construction. But EPA does not identify a single case where the doctrine was used, in essence, to read out of the statute a mandatory, numerical trigger for regulation in favor of a different numerical trigger that an agency found to be preferable.

The typical “absurd results” case, as is shown in most of the cases EPA cites in the preamble, is one where a broad statutory term may be interpreted more narrowly and in context

²⁴ *Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule*, 73 Fed. Reg. 44354 (Jul. 30, 2008).

²⁵ Comments of the Center for Biological Diversity, Docket No. EPA-HQ-OAR-2008-0318 at 23 (Nov. 28, 2008). These comments by the Center for Biological Diversity (CBD) also told EPA that it must promulgate a NAAQS for GHGs. The fact that the CBD has now petitioned the EPA to promulgate such a NAAQS, in which it reasserts EPA’s legal obligation to do so, should convince EPA of the seriousness of the CBD’s resolve to challenge the tailoring rule.

in order to avoid a result that Congress could not have intended. For instance, in *Green v. Bock Laundry Machine Co.*,²⁶ the Court determined that the term “defendant” in Rule 606(a)(1) of the Federal Rules of Evidence must refer to only criminal defendants because the rule would not make sense when applied to civil defendants. Similarly, in *United States v. Am. Trucking Assns, Inc.*,²⁷ the Court determined that the term motor carrier “employee” in the Motor Carrier Act referred only to employees whose duties affect safety of operation, since a construction referring to all motor carrier employees would give the Interstate Commerce Commission general labor and employment authority far beyond the more limited scope of the Act. And, in *Train v. Colorado Public Interest Research Group, Inc.*,²⁸ the Court determined that the Federal Water Pollution Control Act (FWPCA) does not apply to certain “radioactive materials,” including source, byproduct, and special nuclear materials, that are regulated under the Atomic Energy Act, even though such materials fit within the FWPCA’s definition of “pollutant,” because a contrary interpretation would have resulted in duplicative regulation that Congress did not intend.

These and other similar cases²⁹ are unlikely to justify the tailoring rule because there is no narrower, contextual meaning of the numerical terms “100” and “250” that can accommodate EPA’s desired statutory construction. Although the terms “defendant,” “employees,” and “radioactive materials” may, respectively, be read in context as referring to only some defendants, employees, and radioactive materials, the terms “100” and “250” cannot by any stretch be read as “25,000.”

In some cases, courts have even been willing to broaden the meaning of statutory language in order to capture congressional intent. For instance, in *In re Franklyn C. Nofziger*,³⁰ the Court construed a provision of the Independent Counsel Act which permits an award of attorney’s fees when “no indictment is brought.” The Court concluded that this language applied to situations both where no indictment was brought and where an invalid indictment was brought. The Court reasoned that, given the aim of the statute, Congress must have intended the phrase “no indictment is brought” to mean “no valid indictment is brought.”

But even this type of case does not help EPA here. The underlying rationale of *Nofziger*, as it is in all the absurd results cases, is that “[i]n statutory interpretation it is a given that statutes must be construed reasonably so as to avoid absurdities—*manifest intent prevails over the letter.*”³¹ Thus, it is not enough that an agency thinks the language Congress used produces an absurd result – the language must in some way be susceptible to a “reasonable” reading in accordance with a “manifest” or “unambiguously expressed” congressional intent. As the United States Court of Appeals for the D.C. Circuit stated in a case relied on in the preamble, “[t]he rule

²⁶ 490 U.S. 504 (1989).

²⁷ 310 U.S. 534 (1940).

²⁸ 426 U.S. 1, 23-24 (1976).

²⁹ See, e.g., *United States v. Ron Pair Enterprises*, 489 U.S. 235 (1989), where the Court refused to narrow a statutory term based on the absurd results doctrine, and *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132-33 (2004), where the Court determined that “any entity” in context meant “any private entity.”

³⁰ 925 F.2d 428, 434 (D.C. Cir. 1991).

³¹ *Id.* at 434 (citing *Holy Trinity Church*, 143 U.S. 457, 459-60 (1893)) (emphasis supplied).

that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect “*unambiguously expressed intent of Congress....*”³²

Here, Congress could not have manifested its intent more clearly and unambiguously as to the amount of emissions of a pollutant that triggers PSD and Title V. Unlike the absurd results cases on which it relies, EPA is not providing a “reasonable” construction of a statutory term in context; it is simply changing a number that it does not think is workable. No case supports the authority of an agency to take such an action.

C. The Administrative Necessity Doctrine May Be Equally Unavailing

EPA’s reliance on the administrative necessity doctrine will also be difficult for the Agency to sustain if challenged in court. EPA cites six cases to support its position on administrative necessity, but every single one of them rejected an agency’s use of the doctrine to disregard a clear statutory command.³³ Four of these cases involved EPA. Thus, EPA has tried repeatedly to use this doctrine before, but it has never been successful.

EPA’s particular reliance on *Alabama Power* is odd, since the facts of that case are similar to the facts here. In *Alabama Power*, EPA attempted to create an exemption from PSD permitting for sources actually emitting less than 50 tpy because permitting entities would be unable to process the large number of permits that would otherwise result. EPA justified its selection of the 50 tpy amount as the proper regulatory threshold by utilizing the same rationale as it does here. It claimed that the “relatively insignificant” emissions reductions achievable from regulating the small emitters was not justified by the significant burden – on both industry and the agency – of processing large numbers of permits.

The Court, however, rejected EPA’s position. As the tailoring rule preamble states, the Court ruled that justifying administrative necessity is “a heavy burden,” one that is “especially heavy,” where, as in the tailoring rule and in *Alabama Power*, the agency had not yet actually attempted to implement the statutory requirements.³⁴

In sum, having had no success before with the administrative necessity doctrine, *Alabama Power* and its progeny is a very thin reed on which to base EPA’s rewriting of the statutory PSD and Title V thresholds.

D. A Court Is Particularly Likely to Question EPA’s Reliance on the Absurd Results and Administrative Necessity Doctrines Given the Potential Availability of

³² *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (emphasis supplied).

³³ See *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006); *Public Citizen v. FTC*, 869 F.2d 1541 (D.C. Cir. 1989); *N. Colorado Water Conservancy Dist. v. FERC*, 730 F.2d 1509 (D.C. Cir. 1984); *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983); *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1980); *EDF v. EPA*, 636 F.2d 1267 (D.C. Cir. 1980); *NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1974).

³⁴ *Alabama Power*, 636 F.2d at 359.

Alternative Regulatory Mechanism that Would Allow EPA to Implement the Statutory Thresholds

Perhaps the most difficult impediment to EPA succeeding in its reliance on the absurd results and administrative necessity doctrines is EPA's failure to attempt alternative means of implementing PSD and Title V regulation without rewriting the statutory thresholds. The tailoring rule preamble discusses some of these possible alternative mechanisms in the section on "streamlining" procedures that EPA could use to lessen the burden on small sources and permitting agencies of complying with the statutory thresholds.³⁵

Without expressing an opinion on the legal validity of these mechanisms, Peabody notes that they at least appear to be the types of regulation that might find approval in court. For instance, in *Permian Basin Area Rate Cases*,³⁶ cited in the tailoring rule preamble, the Supreme Court approved a plan by the Federal Power Commission to use area rate regulation "as the practical means to regulate thousands of natural gas producers." Based on this precedent, the potential availability of streamlining measures would seem to undermine EPA's theory that application of the statutory PSD and Title V thresholds *inevitably* produces absurd results and administrative impossibilities when applied to small sources.

Improbably, EPA states that it needs six years to "vigorously develop[]" and implement streamlining procedures, even though it began exploring the streamlining procedures at least as far back as the climate change ANPR.³⁷ Peabody respectfully suggests that a court is highly unlikely to agree that such a time period is necessary. Indeed, a court may view the claimed necessity of a six-year study period as a transparent effort to avoid the statutory thresholds completely.

In sum, the underlying problem with EPA's legal rationales for the tailoring rule is, again, EPA's desire to begin GHG regulation next spring before the Agency and the states are prepared for the consequences. And this problem is particularly acute given that, as discussed in the next section below, EPA will produce very little, if any, GHG reductions by beginning regulation on the current time schedule.

VI. No Necessity Exists for EPA to Promulgate Light-Duty Motor Vehicle Regulations by March 2010

Peabody understands that EPA wishes to have its motor vehicle GHG regulation in place for model year 2012 and for that reason wishes to promulgate that regulation by the end of March 2010 at the same time as DOT promulgates its CAFE standards. But the benefits that will actually be obtained from EPA's portion of these joint regulations are extremely small or non-existent and do not justify the large risks for both large and small stationary sources that EPA's regulatory action creates.

The EPA and DOT joint motor vehicle regulations were deliberately designed to be largely overlapping so as not to create inconsistent regulatory requirements. As the preamble to

³⁵ 74 Fed. Reg. at 55320-55326.

³⁶ 390 U.S. 747 (1968).

³⁷ *Id.* at 55303/3.

the joint rule says, EPA and DOT were able to create a joint “National Program” because “the relationship between improving fuel economy and reducing CO₂ tailpipe emissions is a very direct and close one...there is a single pool of technologies for addressing these twin problems, i.e., those that reduce fuel consumption and thereby reduce CO₂ emissions as well.”³⁸ As the joint proposal says, the overwhelming majority of CO₂ emissions achieved by EPA’s portion of the joint standard are made possible by improving fuel economy per the CAFE standards.³⁹

In fact, as Peabody understands it, the principal difference in the EPA and DOT standards – and the principal way that the EPA standards produce more GHG emission reductions than the DOT CAFE standards standing alone – is through EPA’s air conditioning requirements. EPA states that with the air conditioning GHG reductions, EPA standards would equate to a fuel economy standard of 35.5 mpg for model year 2016, whereas the DOT CAFE standard is 34.1 mpg for that model year.⁴⁰ Presumably, that difference would be less in the earlier model years, which are the model years of concern if there is a delay in implementing EPA’s standard.

Peabody does not believe that this additional approximately one mph increment of GHG reductions would be jeopardized if EPA delays promulgating its portion of the regulations while it more adequately addresses the stationary source issue under PSD and Title V. One possibility would be for EPA to promulgate its motor vehicle regulation but delay its effectiveness for the necessary period of time. The automakers, who are apparently in agreement with the joint EPA/DOT proposal, could voluntarily agree to be bound by the EPA portion of the rule, even if there is a delay in making that portion effective while the PSD/Title V problem is solved. Alternatively, EPA could regulate motor vehicle air conditioners through Title VI of the CAA.⁴¹

In any event, whatever mechanism EPA might use to delay its motor vehicle regulation, the fact that such regulation is largely redundant of DOT’s CAFE standards undermines both the policy and legal rationales for the tailoring rule. As a matter of policy, EPA does not need to proceed immediately with regulation of GHG emissions from motor vehicles and has time to design a better plan for addressing the very large risks that such regulation creates for both large and small sources under the PSD and Title V programs. As a matter of law, the lack of immediate impetus to regulate motor vehicle GHG emissions *under the CAA* increases the difficulty EPA will have in justifying its failure to examine and implement effective streamlining measures that could preempt the need to ignore the statutory thresholds.⁴²

³⁸ *Id.* at 49458/3

³⁹ *Id.* at 49468/2.

⁴⁰ *Id.*

⁴¹ Moreover, EPA has an option to implement its motor vehicle GHG regulations without immediately triggering PSD and Title V. As discussed in Peabody’s comments and the comments of other parties in the Johnson Memorandum reconsideration proceedings, EPA can finalize its motor vehicle GHG regulations and make them effective sixty days later for purposes of the Congressional Review Act, while at the same time declaring that GHGs will not be considered to be regulated pollutants under these programs until the beginning of model year 2012 when the regulation creates enforceable obligations.

⁴² Any argument that EPA needs to promulgate its *motor vehicle* regulation by March because it needs to begin regulating *stationary source* GHG emissions at the time those regulations become effective would make little sense. EPA’s desire to promulgate its motor vehicle GHG regulation by March is the factor driving the current regulatory schedule, not a desire to regulate stationary source emissions by that time. If the purpose of the motor vehicle regulations were really to regulate stationary sources, EPA would have clearly stated that purpose in the motor

VII. EPA Failed to Examine the Economic Impacts of PSD and Title V Regulation

As explained in more detail in Peabody's comments on EPA's motor vehicle GHG regulation, EPA has failed to perform any studies of the economic impact of GHG regulation on stationary sources.⁴³ This failure began in the endangerment finding proceeding and has continued through all of the GHG proceedings that EPA has initiated to date.

In the endangerment finding proceeding, EPA justified its failure to conduct any economic analyses by maintaining that the finding does not constitute actual regulation.⁴⁴ In the motor vehicle rule proceeding, which will create regulation of both motor vehicles under section 202(a) and stationary sources under the PSD and Title V programs, EPA conducted an economic analysis of regulating motor vehicles but did not analyze the economic consequences for stationary sources.⁴⁵ EPA said those consequences would be examined in the tailoring rule proceeding, at least for small sources.⁴⁶

But the Draft Regulatory Impact Analysis (RIA) in the tailoring rule proceeding was limited to an analysis of the benefits to small sources of deferring regulation under the PSD and Title V programs.⁴⁷ It did not assess the economic impacts of regulating GHG emissions from the large stationary sources that would unquestionably be regulated under those programs. According to EPA, there are approximately 13,600 such sources representing almost the entirety of the nation's fossil-fueled industrial production and a majority of the GHG emissions of all stationary sources.⁴⁸ Thus, even though EPA's motor vehicle GHG regulation automatically triggers GHG regulation of stationary sources under the PSD and Title V programs, EPA has failed to produce any study of the consequences of this action – or indeed even to explain why it did not produce such studies.

With the tailoring rule, it is no longer possible for EPA to avoid preparing the necessary studies. Although the tailoring rule is facially designed to limit the effects in the PSD and Title V programs of EPA's action in regulating motor vehicle GHGs, EPA itself characterizes the rule as an independent determination by EPA to regulate GHG emissions of large industrial sources. EPA's fact sheet for the tailoring rule describes the rule as "a proposal that is focused on large facilities emitting over 25,000 tons of greenhouse gases a year. *These facilities would be*

vehicle regulatory preamble and would have produced, as a part of that rulemaking, the studies required by various statutes and Executive Orders of the impact of such regulations. In fact, EPA is backing into stationary source GHG regulation as an unavoidable result of its desire to regulate motor vehicle GHG emissions, and it is scrambling in its tailoring rule to avoid the consequence of that action. More logical and direct ways of regulating stationary source GHG emissions are available to EPA, including section 111 new source performance standards, where EPA can carefully consider the proper scope of regulations in a proceeding specifically targeted at stationary sources.

⁴³ See EPA-HQ-OAR-2009-0472-7223.1.

⁴⁴ *Endangerment Finding*, 74 Fed. Reg. at 66545-46.

⁴⁵ *Draft Regulatory Impact Analysis*, Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards (September 2009), Docket No. EPA-HQ-OAR-2009-0472-11272.3.

⁴⁶ *Proposed Motor Vehicle Rule*, 74 Fed. Reg. at 49629/3.

⁴⁷ *Proposed Tailoring Rule*, 74 Fed. Reg. at 55337-40.

⁴⁸ See *Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation* (Jul. 7, 2009) at 7, Table 2 and generally; 74 Fed. Reg. at 55311/2.

required to obtain permits that would demonstrate they are using the best practices and technologies to minimize GHG emissions.”⁴⁹

Similarly, EPA’s press release announcing the tailoring rule was entitled, “New EPA Rule *Will Require* Use of Best Technologies to Reduce Greenhouse Gases from Large Facilities/Small businesses and farms exempt.”⁵⁰ The press release opened by saying that:

U.S. EPA Administrator Lisa P. Jackson announced today in a keynote address at the California Governor’s Global Climate Summit that the Agency has taken a significant step to address greenhouse gas (GHG) emissions under the Clean Air Act. The Administrator announced a proposal *requiring* large industrial facilities that emit at least 25,000 tons of GHGs a year to obtain construction and operating permits covering these emissions. These permits *must demonstrate* the use of best available control technologies and energy efficiency measures to minimize GHG emissions when facilities are constructed or significantly modified.⁵¹

Since it is EPA’s view that the tailoring rule “require[s] large industrial facilities” to obtain PSD permits setting forth BACT requirements, EPA is obligated by the statutes and Executive Orders cited in Peabody’s motor vehicle comments to examine the effects of such requirement. As set forth in Peabody’s comments, those studies should have been prepared and released for public comment at the time the motor vehicle regulation was proposed. Alternatively, they at least should have been prepared and released for comment at the time the tailoring rule was proposed. EPA’s failure to do so is legal error that can be corrected only by preparing the studies and providing for another round of comment on both the studies and the regulations.

EPA also violates the applicable statutes and Executive Orders by failing to examine the economic cost of regulating small sources under the PSD and Title V programs. Although the tailoring rule, if it passes legal muster, defers small-source regulation, it does not exempt small sources from regulation. Since EPA has now legally committed itself to small-source regulation under PSD and Title V, it is obligated to examine the effects on small sources now, not at some point in the future. The fact that EPA does not know the precise character of small-source regulation at this point is no defense. EPA could conduct an evaluation of various alternative regulatory scenarios.

Finally, EPA has failed to examine the economic impacts of all of the other CAA regulation that its endangerment finding will lead to, including regulation under the section 111 New Source Performance Standards (NSPS) program, regulation of various mobile sources

⁴⁹ See *Fact Sheet – Proposed Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, <http://www.epa.gov/NSR/fs20090930action.html> (emphasis supplied).

⁵⁰ EPA Press Release, September 30, 2009, <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/21acdba8fd5126a88525764100798aad!OpenDocument> (emphasis supplied).

⁵¹ *Id.* (emphasis supplied).

under Title II, and even regulation under the National Ambient Air Quality Standards (NAAQS) program, which two environmental groups are now demanding.⁵²

In sum, EPA is about to embark on a momentous regulatory path without providing the public with a clear understanding of what the cost will be. Such a course is wrong as a matter of both policy and law.

VIII. EPA Should Defer Finalizing the Tailoring Rule as to Coal Mines Until It Has Issued Final Fugitive Emissions Regulations and Taken Other Action to Resolve Uncertainties as to How the Tailoring Rule Will Apply to Coal Mines

The tailoring rule seeks comment on the proper CO₂e threshold for major source status and for what constitutes a “significant” emissions increase for PSD purposes. At this point, however, because of uncertainties in whether fugitive emissions must be included in calculations of significance levels for coal mines, in what constitutes fugitive methane emissions from coal mines, and in how fugitive methane emissions will be calculated, it is essentially impossible to make specific recommendations as to the proper levels for coal mines.

The difficulty in formulating a recommendation is best demonstrated in relation to underground coal mines. A Technical Support Document (TSD) for the tailoring rule states that 103 underground coal mines emit 25,000 tpy of CO₂e or more and would therefore be major sources under the PSD program.⁵³ According to EPA, the large majority of CO₂e emitted by underground coal mines is methane.⁵⁴

So far as Peabody is aware, no underground coal mines are currently major PSD sources. As a result, GHG regulation represents a significant expansion of the applicability of the New Source Review program to the coal-mining industry.

The TSD states that EPA expects no new underground coal mines to be installed,⁵⁵ implying that PSD regulation of underground coal mine will be limited. Peabody does not agree that no new underground coal mines will be built. As importantly, many of the existing 103 underground coal mines (by EPA’s count) may undergo major modifications requiring, for the first time, PSD permits with BACT conditions.

EPA provides no information about the number of major modifications that might be expected at the 103 underground coal mines. Peabody is unaware of any definitive policy by EPA of what represents a modification of a coal mine. Potentially, a modification could include a deviation from a mine plan, as where a mine expands into contiguous reserves that were not included within its pre-existing mine plan. Since mine plans at many mines are periodically subject to change, potentially there could be a large number of modifications at the 103 underground coal mines that will be considered major sources under the tailoring rule.

⁵² Center for Biological Diversity and 350.org, *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act* (Dec. 2, 2009).

⁵³ *Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation*, at 57, Table 60.

⁵⁴ *Id.* at 54.

⁵⁵ *Id.* at 55.

This presents a very significant problem for underground mines because of current uncertainty as to EPA's requirements for counting fugitive emissions in determining whether a modification "significantly" increases emissions. EPA's TSD states that it did not count fugitive emissions from post-mining operations in determining the number of underground mines that will be "major" sources of CO₂e emissions at the 25,000 level because coal mines are not on the list of 28 source categories set forth in section 302(j) of the CAA.⁵⁶ Peabody agrees that, under section 302(j), EPA may not count fugitive emissions in determining major source status for unlisted source categories like coal mines.

However, EPA is currently considering a rule in which fugitive emissions *would* be counted in determining a significant emissions increase for major sources within categories that are not on the section 302(j) list.⁵⁷ If EPA does determine that fugitive emissions must be counted in determining a significant emissions increase for major sources in unlisted categories, then the 103 underground coal mines that are major sources for CO₂e would have to count fugitive methane emissions in determining whether a modification is a major modification. This would create an unworkable problem for underground coal mines in general and particularly those with surface post-mining operations. As EPA itself recognized in its GHG reporting rule, fugitive methane emissions from post-mining operations cannot accurately be measured.⁵⁸ For similar reasons, fugitive methane emissions would be very difficult to control.

Moreover, there is uncertainty as to exactly what types of coal mine methane emissions constitute fugitive emissions, particularly emissions originating underground. EPA's prospective finalization of its GHG reporting rules may potentially shed further light on this issue. Similarly, there is uncertainty as to exactly what calculation methodology EPA would use to estimate both underground and surface fugitive methane emissions given the difficulty of direct measurement. All of these issues together make it extremely difficult to determine how any particular numerical CO₂e major source threshold or significance level will affect underground coal mines.

The same problems may potentially exist for surface coal mines. EPA does not provide estimates of how many surface mines, if any, might be considered to be major sources under the tailoring rule's proposed numerical thresholds. Moreover, for the reasons discussed above, it is difficult for surface coal mines to determine for themselves what CO₂e thresholds and significance levels might trigger PSD regulatory requirements for its surface mines.

These uncertainties are significant enough for EPA to defer regulation of coal mine methane emissions under the PSD program until these issues are resolved. The basic premise of the tailoring rule is that the PSD thresholds and significance levels for CO₂e should be set at levels that capture only large emitters and that therefore avoid a creating significant regulatory burden for only insignificant emissions reductions. Toward that end, the thresholds and significance levels proposed in the tailoring rule are based on analyses of the number of new sources that would become subject to the PSD permitting program and the number of applications for PSD permits that can be expected from new and modified sources. Except for

⁵⁶ *Id.* at 54.

⁵⁷ *Prevention of Significant Deterioration (PSD) and New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions*, 74 Fed. Reg. 50115 (Sept. 30, 2009).

⁵⁸ *Mandatory Reporting of Greenhouse Gases; Proposed Rule*, 74 Fed. Reg. 16448, 16553/3 (Apr. 10, 2009).

EPA's estimate of the number of existing underground coal mines, however, that type of information is largely missing for coal mines.

In sum, this as an additional reason for deferring GHG regulation at this time. EPA should at least defer finalizing the tailoring rule for coal mines until the fugitive emissions rule is reconsidered and until the other questions discussed above can be addressed.

IX. Conclusion

For the foregoing reason, Peabody respectfully requests that EPA defer GHG regulation until the four conditions set forth in the Introduction have been met. Peabody appreciates the opportunity to submit these comments.

Dated: December 28, 2009

Respectfully submitted,

PEABODY ENERGY COMPANY