December 28, 2009

Via Electronic Filing

Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mail Code: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (Docket: EPA-HQ-OAR-2009-0517)

Dear Sir or Madam:

American Municipal Power, Inc. (AMP) respectfully submits these comments concerning the Environmental Protection Agency's (EPA) Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas (GHG) Tailoring Rule (74 Fed. Reg. 55292, Oct. 27, 2009) (GHG Tailoring Rule). AMP is a not-for-profit corporation founded in 1971 and is headquartered in Columbus, Ohio. AMP is owned and governed by its 129 member communities in six states (Ohio, Michigan, Pennsylvania, Virginia, West Virginia and Kentucky), and supplies wholesale electric power and services to its members. AMP's principal mission and purpose is to provide cost-effective, reliable power supply to its member communities.

Introduction

AMP and its member communities are regional leaders in the deployment of renewable generation assets. AMP built the 42 megawatt (MW) Belleville Hydroelectric Plant, which began generating power in 1999, and currently operates the plant on behalf of a joint venture of AMP member communities, which owns the facility. AMP also built and operates Ohio's only utility-scale wind farm, the 7.2 MW American Municipal Power Wind Farm in Wood County, Ohio, which is also owned by a joint venture of AMP member communities.

AMP currently is embarking on the largest deployment of new run-of-the-river hydroelectric generation in the United States. Five projects are being developed at existing dams on the Ohio River, which together will total more than 350 MW of clean, renewable generation. AMP also has additional wind, solar and landfill gas projects under development. AMP has recently received from the U.S. Treasury bonding authority under the new Clean Renewable Energy Bond (CREB) program totaling $143.7 million in the most recent round of awards, which will support hydroelectric, wind, biomass, and solar projects in five of AMP's footprint states.

In the area of energy efficiency, AMP is working with the Vermont Energy Investment Corporation to increase AMP's current efficiency efforts by developing and making the *Efficiency $mart* program available to member communities.

AMP is a member of the Chicago Climate Exchange, which is North America's only voluntary, legally binding rules-based GHG emissions reduction and trading system. In addition, AMP is a member of the Midwest Regional Carbon Sequestration Partnership, contributing to research on the effectiveness and viability of carbon sequestration.

In short, AMP is seeking to reduce GHG emissions associated with serving its members' electric energy requirements by developing renewable generation and helping its members and their customers use energy more efficiently. AMP believes that these actions are good for the environment and good for its member communities and their customers.

AMP believes that while equitable, cost-effective actions should be taken to improve efficiency and reduce emissions, it is unwise and will be an enormous economic and regulatory burden to attempt to use the Clean Air Act (CAA or the Act) as a vehicle to regulate stationary source GHG emissions. EPA itself has recognized that the Act is ill-suited to this purpose and would lead to, in EPA's own words, "absurd results." EPA's recently proposed GHG Tailoring Rule does not effectively address these consequences; rather, it has a questionable legal foundation and creates, rather than eliminates, regulatory uncertainty.

AMP appreciates EPA's recognition of the difficulties presented by regulating GHGs under the CAA, but the agency's attempt to "tailor" the regulatory scope of the Act is misguided. EPA's current interpretation of the CAA, and its current regulatory push to use the Act to control GHG emissions, will impose substantial costs, regulatory burdens, and uncertainty at a time when our economy can least afford additional turmoil. AMP urges EPA to reconsider its current regulatory path and return to what Administrator Jackson has said is her preferred course – pressing Congress to address climate change through the legislative process. In support of using the legislative process as a means to address climate change, AMP has been working with congressional offices in its six-state footprint to advocate for balanced, reasoned legislation that recognizes the economic impacts on coal-dependent regions of the country and provides appropriate incentives for clean energy.

I. EPA Has Not Fully Calculated or Considered, in This or Any Other Rulemaking Proceeding, the Burdens and Costs of Using the Clean Air Act to Regulate Stationary Source Emissions of GHGs.

EPA has recognized that the CAA is not well-suited to regulating GHG emissions from stationary sources, and that GHG-related permitting requirements will impose significant regulatory burden on millions of stationary sources. EPA has stated:

> [T]he administrative burdens would be immense, and they would immediately and completely overwhelm the permitting authorities. Permitting authorities would receive approximately 40,000 PSD permit applications each year – currently, they receive approximately 300 – and they would be required to issue title V permits for approximately some six million sources – currently, their title V inventory is some 15,000 sources. These increases are measured in orders of magnitude.

GHG Tailoring Rule, 74 Fed. Reg. at 55295.

Despite the negative and far-reaching impacts of using the CAA to regulate stationary source GHG emissions – impacts that the EPA itself has labeled as "absurd", the agency has not calculated or considered those costs and burdens in its regulatory impact analysis (RIA) in this rulemaking proceeding or any other current or recently completed GHG-related rulemaking. Yet those costs likely will be in the billions of dollars and potentially affect millions of stationary sources.

EPA has stated that the GHG Tailoring Rule was proposed primarily with the intent to relieve regulatory burdens on smaller sources in the face of potential CAA regulation, but AMP believes that EPA has acted hastily and without full consideration of whether the Tailoring Rule is an effective means of addressing the enormous costs and burdens of using the CAA to regulate stationary source GHG emissions, whether from small or large sources. The permitting requirements that EPA has readily acknowledged create burdens and costs for smaller sources cannot be underestimated or ignored for larger sources too, some of which will be subject to PSD permitting for the first time. For example, the Tailoring Rule does nothing to relieve the costs and burdens of imposing GHG-related

permitting requirements on larger emitters that will, for the first time, be subject to best available control technology (BACT) controls for GHGs, and PSD or Title V permitting requirements due to a source's GHG emissions, should EPA finalize GHG emissions controls for motor vehicles. EPA has repeatedly acknowledged that imposing BACT controls for GHGs presents special problems, yet it has not calculated or fully considered those costs in any rulemaking proceeding, nor has it offered any reasoned justification for seeking to exempt from regulatory requirements sources below the arbitrary 25,000 ton per year (TPY) carbon dioxide equivalent cutoff while not only leaving them in place but doing nothing to explain, clarify, quantify or justify those burdens, costs and uncertainties for larger sources.

Rulemaking action that is taken without considering the effects and consequences of that action is arbitrary and capricious. *See American Mining Congress v. EPA*, 907 F.2d 1179, 1190-91 (D.C. Cir. 1990). Because the consequences of EPA's proposed actions leading to regulation of stationary source emissions will affect a wide variety of sources and EPA has not fully calculated or considered the regulatory consequences of its actions, particularly on larger sources, EPA's GHG Tailoring Rule and its other GHG-related rulemaking actions will be arbitrary and capricious and will violate provisions of the Administrative Procedure Act, the Regulatory Flexibility Act, the Unfunded Mandates Act, and the Paperwork Reduction Act.

II. The GHG Tailoring Rule Would Not Effectively or Comprehensively Address the Legal and Practical Uncertainties Imposed on Stationary Sources.

In the proposed GHG Tailoring Rule, EPA effectively tries to change the Clean Air Act's statutory triggering thresholds for the Act's major source permitting programs – PSD and Title V. Specifically, EPA has proposed limiting permitting requirements to only sources emitting over 25,000 TPY of carbon dioxide equivalent. Thus, the GHG Tailoring Rule proposes to fundamentally increase the triggering thresholds of both the PSD and Title V permitting programs, but without Congressional action, and only for GHGs but not for other pollutants.

While relieving regulatory burdens is an arguably laudable goal if done fairly and on a reasoned basis, EPA's attempt at regulatory relief in the GHG Tailoring Rule is ultimately inequitable, legally questionable, and ineffective. The CAA itself states that the PSD program includes "any. . . source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." 42 U.S.C. § 7479(1). It is difficult to understand how EPA has the regulatory authority to change this statutory threshold, and why an act of Congress is not required to do so. Further, the issue of whether EPA has the authority to make this change in the absence of Congressional action will not be resolved until the inevitable litigation over the rule is concluded, which will take years. In the meantime, sources will be subject to considerable regulatory uncertainty, administrative burdens, and increased costs.

Moreover, even if finalized and ultimately upheld, the GHG Tailoring Rule would provide only incomplete and uncertain relief, even for smaller sources. The current threshold EPA has proposed would not be permanent – EPA would be allowed to immediately begin considering lowering the threshold of GHG emissions, at its discretion, further expanding the agency's power to regulate a variety of sources, including smaller units and facilities, office buildings, apartment buildings, etc. As a result, AMP's members and their customers that arguably could receive some regulatory relief if the GHG Tailoring Rule were finalized would have no assurance of the soundness or permanence of that relief – and in fact would be on notice that the relief is, in all likelihood, temporary and illusory.

The GHG Tailoring Rule also would not mitigate the broader burden of CAA permitting requirements on sources in states that administer their own PSD programs. Thus, in states such as Ohio, the rule would not mitigate the impact of GHG-related regulatory burdens. As EPA notes, "the lower thresholds remain on the books under state law, and sources therefore remain subject to them as a matter of state law." GHG Tailoring Rule, 74 Fed. Reg. at 55343.

III. There are Alternative Interpretations of the Clean Air Act that Would Allow EPA to Regulate GHG Emissions from Motor Vehicles Without Triggering the Unmanageable and As Yet Unconsidered Consequences of Regulating GHG Emissions from Stationary Sources.

If EPA believes that it must press forward with regulating GHG emissions from motor vehicles using CAA regulatory authority, EPA should interpret its regulations and the CAA in a manner that will prevent the severe consequences that this regulation of motor vehicles could impose on stationary sources. Specifically, EPA should consider and adopt alternative interpretations of the CAA that would avoid, for both small and large emitters, the substantial adverse consequences that EPA has tried but failed to effectively address in the GHG Tailoring Rule. Two such alternative CAA interpretations are set forth below.

The Clean Air Act's PSD program prescribes emissions limitations for areas that are "designated pursuant to section 7407 of this title as attainment or unclassifiable." 42 U.S.C. § 7471. The Act designates an area as "attainment" if it "meets the national primary or secondary ambient air quality standard for the pollutant," and designates an area "unclassifiable" if it "cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard [NAAQS] for the pollutant." 42 U.S.C. 7407(d)(1)(A). Thus, the CAA's plain language indicates that the PSD pre-construction permit program is only triggered by pollutants for which there is a NAAQS. Once a source is required to obtain a PSD permit, of course, PSD requires the source to adopt BACT for any pollutant subject to CAA regulation. 42 U.S.C. §§ 7475(4), 7479(3). But the trigger for whether a source must obtain a PSD permit in the first place is whether the source emits more than the threshold amount of a pollutant for which EPA has established a NAAQS. Because no NAAQS has been established for GHGs, a source's emission of GHGs cannot trigger PSD permitting requirements.

Alternatively, EPA should conclude that PSD and Title V permitting requirements do not apply to pollutants like GHGs that do not have local air quality impacts, and the control of which will not bring about local air quality improvement. GHGs differ from traditional pollutants in that controlling them in a particular area will not meaningfully improve air quality in that area. CAA section 165 focuses on air quality monitoring and air quality impacts, and requires analysis of "the ambient air quality at the proposed site and in areas which may be affected by emissions from [the proposed] facility for each pollutant subject to regulation under [the CAA] which will be emitted from such facility." 42 U.S.C. § 7475(e)(1). Thus, Section 165 is concerned with how pollutants affect particular locales. Congress's intent to limit permitting requirements to traditional pollutants with local impacts is also evident in the selection of the 100 and 250 ton-per-year thresholds for triggering permitting requirements. As applied to GHGs, those thresholds have an impossibly broad and burdensome reach, and therefore these provisions should not be used to regulate GHG emissions.

Conclusion

Thank you for the opportunity to comment on this proposal. If you have any questions related to AMP's comments, please contact Jolene M. Thompson, AMP Senior Vice President, Member Services and External Affairs, and Executive Director of the Ohio Municipal Electric Association, at 614-540-1111 or jthompson@amppartners.org.