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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, STAFF DIRECTOR
RUTH VAN MARK, MINORITY STAFF DIRECTOR

August 18, 2010

The Honorable Lisa P. Jackson
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Jackson:

As numerous public comments to the Agency from a wide array of businesses and public officials from both parties have noted, the greenhouse gas regulatory edifice EPA is constructing will harm jobs, economic growth, manufacturing competitiveness, and state operating budgets. Therefore it is important to release all relevant information to the public, including state and local officials, and businesses seeking to hire and expand, regarding EPA's proposed rules to address implementation issues surrounding its Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule).

In these new rules, EPA proposes to find that 13 states with EPA-approved state implementation plan (SIP) New Source Review PSD programs are substantially inadequate to begin regulating greenhouse gases in accordance with the Tailoring Rule. The August 12 proposed rules further indicate that EPA will be taking additional comments from other states on whether their PSD programs do or do not currently apply to GHG-emitting sources. EPA also proposed to issue a FIP that would give EPA authority to apply EPA's PSD program to GHG emitting sources in case such a state is unable to submit a corrective SIP revision by its deadline.

In the Tailoring Rule, EPA requested that state and local permitting authorities submit to the appropriate EPA Regional Administrator, no later than August 2, 2010, information regarding whether the permitting authority would be able to implement the Tailoring Rule by applying EPA's new definition of "subject to regulation" through interpretation, or by regulation or legislation. The August 12 proposed rules again asked for comments from other states on whether their PSD programs do or do not currently apply to GHG-emitting sources. By making an identical request in the August 12, 2010 proposed rule, I assume that not all states responded to your earlier request.

Given the significance of these and other issues related to EPA's incipient greenhouse gas regulatory program, I ask for complete responses to the following requests:

1. Please send all comments filed by the states or local authorities in reference to their ability or need to amend their laws or administer necessary changes to their PSD and Title V programs. This request includes any letters submitted to EPA in response to the request in the final PSD and Title V Greenhouse Gas Tailoring Rule or any other

comments, letters, or other documents provided by states to EPA regarding this topic. Please also ensure my staff is briefed regarding additional comments received by the Agency in response to the August 12 companion proposals. If any of these letters and comments is not in the docket, please explain the reason for their omission or the reasons for the delay in their inclusion in the regulatory docket.

2. In your "Finding of Substantial Inadequacy and SIP Call" proposal you indicated the potential for a "gap" in PSD permitting authority should the states not take certain actions. Please provide a detailed legal explanation of your interpretation of the Clean Air Act which supports this conclusion. Wouldn't a simple amendment to the federal PSD program (40 CFR 52.21) filling any "gap" be a far simpler solution? Also, on what basis is EPA placing responsibility for the "gap" on States alone? To what extent is EPA responsible for creating the "gap" it seeks to remedy?

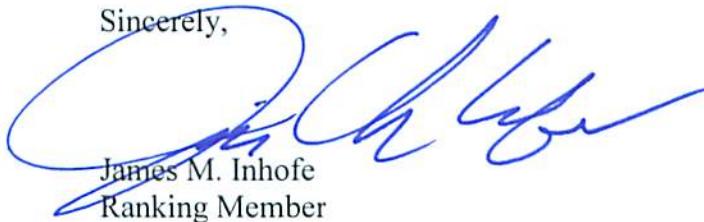
3. Your time compression of the 110(k)(5) and 110(c) processes seems unnecessary. The entire notice is designed to force States to act hastily in order to meet EPA's arbitrary January 2, 2011, deadline for implementing of the Tailoring Rule. For example, 110(c) provides that within two years of a finding of failure to submit, EPA may issue a FIP "unless the State corrects the deficiency" and EPA approves the plan. Without a complete understanding of individual state legal and regulatory requirements, EPA has arbitrarily cut this period to one year. Additionally, by creating the possibility of a permitting "gap," EPA is shirking its responsibility to regulated entities to provide "fair notice" and a reasonable regulatory process. Recognizing the unique role the Clean Air Act places between the states and the federal government, wouldn't it be more consistent with the Clean Air Act to allow the states to have their full participatory rights in the federal-state partnership?

4. For businesses to expand, they must have certainty about the impact of federal and state regulations on their businesses. EPA's proposed Tailoring Rule appears to fall far short of that goal, given the numerous comments from states questioning EPA's assertions of how the proposed rule will affect state law. EPA's decision to pursue federal implementation plans (FIPs) in states that cannot or do not modify their SIPs before the Tailoring Rule takes effect may also not solve the fundamental problem, since State laws may still apply. Businesses in those states would then be in the unfortunate position of having to comply with both state law and the FIP. It is this very uncertainty that will freeze investment and economic growth. Please provide a legal analysis to support EPA's apparent assumption that a less stringent FIP would automatically override more stringent State law.

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I would appreciate complete responses to these requests by September 3, 2010. If you have any questions about this letter, please contact either Tom Hassenboehler or George Sugiyama at 202-224-6176.

Sincerely,



James M. Inhofe
Ranking Member
Senate Committee on
Environment and Public Works

Cc: Regina McCarthy