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1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

**SUBJECT: COMMENTS OF THE CALIFORNIA ENERGY COMMISSION ON
PREVENTION OF SIGNIFICANT DETERIORATION (PSD) AND
TITLE V GREENHOUSE GAS TAILORING RULE**

To the Administrator:

The California Energy Commission (or Energy Commission) supports EPA's efforts to find regulatory mechanisms to "tailor" the major source applicability thresholds for GHG emissions for PSD¹ and Title V permitting. The Energy Commission has a critical role in the State of California's efforts to reduce greenhouse gas (GHG) emissions to 1990 levels by 2020 and 80 percent below 1990 levels by 2050.

We believe the proposed rule offers ample justification for setting the PSD/Title V "threshold" at a level higher than the 100/250 ton thresholds applicable to criteria pollutants in order to avoid regulatory gridlock and departure from the legislative intent of the Clean Air Act. However, we are gravely concerned that EPA's current proposal will likely create a huge administrative burden for the agencies that must implement expanded federal permit programs during a period of scarce agency resources, resulting in major delays for the very infrastructure investments that are necessary to reduce GHG emissions. For this reason, the Energy Commission recommends that EPA consider a more "staged" approach in its tailoring regulations to avoid these problems. These recommendations are detailed below.

¹ The tailoring rule applies to both PSD and Title V permitting. These comments are principally addressed to the proposed regulations in a PSD context, as PSD permits are currently required for new gas-fired power plants that trigger criteria pollutant PSD thresholds, and under the tailoring rule would be required for all gas-fired power plants. The federal PSD permit process, when it currently is applicable to power plants, is a separate process that normally results in permit issuance after the state permitting process concludes, and is an essential preconstruction requirement for such facilities. By contrast, the Title V permit is not a preconstruction requirement, and is therefore of less interest to state energy policy. Even so, many of these comments on PSD permit tailoring provisions have equal application to Title V permit tailoring.

I. BACKGROUND.

In 2006 the California Legislature enacted the Global Warming Solutions Act (better known as “AB 32”), a bill which requires the state to “cap” GHG emissions at the 1990 level by 2020. Meeting this target will require an approximate 15 percent reduction from current emission levels and an approximate 30 percent cut in projected 2020 emissions. The California Air Resources Board (ARB) is the agency charged with the implementation of AB 32 goals, and it has developed an overall strategy—the “Scoping Plan”—to achieve these goals. AB 32 directs ARB to consult with the Energy Commission and the California Public Utilities Commission on energy-related elements of its Scoping Plan, which relies heavily on significant reductions in GHG emissions from the electricity sector. The bulk of these reductions will come from greater efficiency in the use of energy and by converting much of the electric generation system to renewable generation through RPS requirements. A state cap and trade program currently under development will produce even further reductions.

The Energy Commission has an important role in meeting the state’s AB 32 requirements. In addition to consulting with ARB in the development and implementation of the Scoping Plan, the Energy Commission is responsible for adopting the state’s efficiency standards for buildings and appliances, and for licensing all new thermal electric generating plants of 50 megawatts or greater. Thus, the Energy Commission is the licensing agency for both gas-fired electric generation and the renewable thermal generation that will comprise an increasing part of the state’s generation and transmission system.

Because of the state’s efforts to implement AB 32, California is at the cusp of transforming its complex system for generating and serving electricity to consumers. This transformation will mean that an increasing amount of electricity generated in the state will come from renewable sources such as wind and solar generation. Such generation is “intermittent” by nature, meaning that it depends on sunlight and wind conditions, and thus must be supported by gas-fired generation that provides back-up reliability. Thus, a critical part of the transformation of the California system requires new, more flexible and efficient, gas-fired electric generation that will preserve system reliability when renewable power is less available.

Currently, PSD requirements apply only to large “base-load” power plants that emit more than 100 tons per year of criteria pollutants. Most of the new gas-fired peaking facilities that California needs to integrate renewable generation do not currently trigger PSD permit thresholds, and are thus not subject to this federal permit process. However, with the extension of PSD application to GHG emissions, particularly at the 25,000 ton level proposed by the tailoring rules, all gas-fired power plants in California, including even peakers that are too small to be within the jurisdiction of the Energy Commission, will require PSD permitting. In fact, even some solar thermal generators that use gas-fired backup to augment generation or prevent fluid from freezing will, under the current tailoring proposal, trigger PSD permit requirements.

II. EPA'S PROPOSED PSD TAILORING THRESHOLD JEOPARDIZES CALIFORNIA'S RENEWABLE ENERGY STRATEGY.

The Energy Commission is concerned that extending PSD requirements to relatively small peaker and some renewable power plants will jeopardize California's efforts to transform its system to one that is much more reliant on renewable sources. As discussed above, an essential piece of the state's renewable strategy is to construct new, very efficient, gas-fired power plants that will be essential to support a more renewable-based system. These gas-fired power plants will typically have fast-start capability, are highly efficient, and can quickly "ramp" up and down to support fluctuating generation from wind and solar facilities. This allows the electric system to avoid reliability problems that renewable generation can cause by their normal fluctuations, which will otherwise result in too little generation or too much generation without flexible gas-fired backup.

A tailoring rule of 25,000 tons will require PSD permitting for all of these flexible and efficient proposed natural gas peaking facilities (regardless of size), for all new biomass renewable facilities, and for some solar facilities with gas-fired augmentation. Such projects are currently (with some exceptions) below the PSD threshold. A 25,000 ton threshold will result in a several-fold increase in the number of PSD permits required in California.² Unfortunately, current agency resources are insufficient to process PSD permits without substantial delay, and there are no plans for new resources (either at Region 9 or at the air district level) to meet the significant new demand for PSD permits. Thus, it is likely the proposed rule, even at the 25,000 ton threshold, will cause gridlock of the air permit process.

This federal permit gridlock has the potential to substantially interfere with California's transformation of the electric generation system to greater reliance on renewable generation. In addition, by delaying new, more efficient, gas-fired peaking infrastructure, it will force continued reliance on a fleet of aging, inefficient gas-fired boiler units that were not designed to provide flexible peaking support. This consequence of expanded PSD permitting may thus retard, rather than facilitate, reductions in GHG emissions from the electricity sector—a cornerstone of California energy policy.

² EPA's estimate that a 25,000 ton threshold will result in only 400 additional PSD applications nationwide is almost certainly a grave underestimate. In California peaker power plant projects (and likely other project proposals) are often carefully designed to be below the 100 ton threshold, but all of these projects would become subject to PSD requirements. Of course, extending PSD to this new, much lower level because of GHG will subject these facilities to additional criteria pollutant analysis requirements, adding greatly to the administrative burden and delay for such projects.

III. THE TAILORING PROPOSAL FAILS TO CONSIDER DELAY FROM REVIEW BY THE ENVIRONMENTAL APPEALS BOARD (EAB).

In addition to delays in the PSD permitting process described above, the proposed rule would greatly increase the number of cases appealable to the Environmental Appeals Board (EAB), which will likely cause extraordinary delay in the development of new projects critical to California's GHG emissions goals. The Notice fails to consider this impact.

All PSD permits are subject to review before the EPA's EAB. In California, PSD requirements are typically met by an EPA-issued permit, issued either by EPA Region 9 or, for two air districts, by local air districts delegated that EPA duty. Thus, nearly all facilities that trigger the PSD threshold in California will be required to obtain a PSD permit, and this permit is subject to review at the EAB.³

While the EAB has been effective in resolving controversies between parties, the EAB process has also proven to be an effective tool for delaying the development of projects. Standing requirements under the EAB process are easily met, and because the PSD process is "preconstruction review," the filing of an appeal has the effect of enjoining a project until the appeal is fully resolved. As a consequence, even frivolous appeals often lead to lengthy delays in the construction of power plants in California.

Opponents of California power plant projects (and there are often opponents, for both renewable and gas-fired facilities) have learned how user friendly the EAB appeal process is and how easily it can be used to stop a project almost indefinitely. Rather than going to court to get an injunction, which would require a showing of likelihood of prevailing on the merits, and a balancing of harm, opponents can get the same effect (preconstruction injunction) without even hiring a lawyer by merely filing a comment letter and then re-filing it with the EAB.

Delay is further exacerbated by the fact that EAB is overburdened and not subject to time requirements for its decisions. Therefore, there is no way for a state licensing agency or project proponent to have any idea how long it will take to resolve PSD permit issues. Even under the current workload, appeals typically take more than a year (and often much more than a year) to resolve – adding at least an additional year to the permit process even if the appeal is denied.⁴ It is difficult to imagine how the EAB could

³ Only five smaller air districts (where there are few projects subject to PSD requirements) have their PSD function incorporated into their State Implementation Plan (SIP), which enables them to avoid EPA-issuance of PSD permits on a project-by-project basis.

⁴ In one recent and typical example, a defective PSD permit notice for a California power plant led to a 7-month EAB proceeding, followed by an opinion more than 40 pages in length, and finally required remand of the permit to the air district. It has taken the delegated air district more than 16 months to reissue a permit meeting all PSD requirements (in fact, as yet the permit is still not issued). The new permit is almost certain to be contested once again at the EAB when it is finally issued.

cope with the crush of appeals that would almost certainly result from the proposed decision.

The negative impact on power plant projects delayed by EAB review is almost inestimable. Financing for such projects (often on the order of hundreds of millions of dollars) is complex, reliant on contracts with utilities for the power to be provided, and subject to time-based milestone agreements. Open-ended delay at the EAB can prevent satisfaction of such milestones, making such contracts voidable. Thus, EAB review—even under its current, limited caseload—has the potential to kill projects even if the objections raised are specious or nonsubstantive.

By making a new universe of projects subject to the PSD permitting process, the proposed rule would exponentially increase the number of projects subject to EAB review. The Notice does not appear to consider this consequence, and the “streamlining” proposals mentioned do not address this source of open-ended delay. We believe that the proposed 25,000 ton threshold will greatly increase EAB’s caseload, and will bring power plant project development to a halt, unless substantial changes are made to the EAB process.

IV. THE TAILORING RATIONALE IS VALID.

EPA’s notice of the tailoring provisions includes a convincing rationale of the need for tailoring. The Clean Air Act provisions have legislative history indicating that PSD permitting was to be required for truly “major” new emission sources (or modifications). Setting the PSD threshold at 100/250 tons per year for GHG emissions would extend the permit program far beyond what Congress intended. As the Proposed Rule Notice states, congressional intent would be contravened:

“The legislative history of the PSD provisions makes clear that Congress intended the PSD program to apply only to larger sources, and not to smaller sources, in light of the larger sources relatively greater ability to bear the costs of PSD; and their greater responsibility for the pollution problems . . . [A] literal application of the threshold to GHG emitters, without streamlining, would sweep in large numbers of small sources and subject them to the high costs of determining and meeting individualized BACT requirements, while also overwhelming permit authorities’ capacity to process those applications.” (Proposed Rules, 74 Fed. Reg. 55305 (Oct. 27, 2009 [cited hereafter as “Notice”].)

Without a tailoring rule, the Notice envisions a “150-fold” increase in permit applications that would “far exceed administrative resources,” and that would lead to a 10 year lead time for processing PSD permits. (*Ibid.*) In addition, while recognizing the PSD statutory threshold, the Notice provides extensive and convincing elaboration regarding the legal doctrines of “absurd results” and “administrative necessity” that the federal courts have held to justify deviating from an unworkable statutory provision. The

statements of congressional intent that PSD requirements are to promote economic growth while protecting the environment would, as the Notice recognizes, be contrary to a process that increased the annual PSD preconstruction requirement for permitting authorities “from 300 to 41,000 permits,” which would “severely undermine this purpose of facilitating economic growth . . . until permitting authorities can develop streamlining methods and ramp up resources.” (Notice, p. 55308). Rather than promoting economic growth, a PSD rule based on too broad a focus will result in “many thousands of sources [facing] multi-year delays in receiving their permits, and . . . be forced to place on hold indefinitely their plans to construct or modify.” (*Ibid.*)

The Notice also emphasizes that PSD permit requirements are “individualized to the source,” in that they apply on a source-by-source basis for individual equipment BACT determinations, and apply separately to each criteria pollutant. Congress designed applicability requirements within 28 different source categories that emit at least 100 tons per year, and provided exemptions for smaller sources. “The legislative history shows that Congress’s limitation of PSD to larger sources was quite deliberate, and was based on its determination to limit the costs that PSD permitting to larger sources in certain industries”; this legislative intent has been recognized in federal appellate decisions. (Notice, p. 55308.) As one court aptly put it: “Though the costs of compliance with [the PSD] requirements are substantial, they can reasonably be borne by facilities that actually emit . . . the large tonnage thresholds specified in [the Clean Air Act].” (*Ibid.*, citing *Alabama Power Co. V. Costle* (D.C. Cir. 1979) 636 F.2d 323, 353.) The Notice quotes extensively from expressions of congressional intent that accompanied adoption of the Clean Air Act that PSD requirements be limited to only the largest projects that affect air quality, and that “there were a large number of sources below those cut-offs that Congress explicitly contemplated would not be included in PSD.”

In other words, EPA has offered a compelling rationale for tailoring PSD requirements for GHG emissions to make them consistent with congressional intent, and to avoid the “absurd result” of imposing such requirements on small projects. EPA recognizes that without such tailoring, huge new administrative resources will be required for PSD permitting, years will be required (at least initially) to achieve such permits, and that worthy projects will be delayed indefinitely even if their impact on air quality is relatively negligible.

Unfortunately, EPA’s proposed tailoring concept only lessens this absurd impact without avoiding it. Its proposal of 25,000 tons as the PSD threshold is incompatible with congressional intent that only projects with “major” emissions be subject to these requirements.

This is best illustrated by comparing the power plant projects currently subject to PSD for their criteria pollutant emissions to those that will be additionally covered under the proposed rule. PSD requirements currently apply to virtually all coal-fired power plants; as such plants have relatively large criteria emissions that exceed 100 tons of certain

criteria pollutants. PSD also may apply to large (e.g., 500+ MW) gas-fired power plants that are permitted for more than a certain number of hours of a year (so called “mid merit” peakers). PSD requirements may not apply to even large peakers (up to 500 MW or more) that will be utilized relatively few hours (e.g., 20 percent) of the year. And the current PSD threshold would never be reached for peaker facilities that are less than 300 MW. In other words, PSD provisions currently apply to “major” emission sources, because only large sources exceed 100 tons per year of any given criteria pollutant.

Using EPA’s proposed 25,000 ton per year threshold for PSD is disproportionately small in this context. All of the above projects, even small 30 MW peakers, may have the “potential to emit” in excess of 25,000 tons of GHGe. Even solar thermal plants with gas-fired augmentation may trigger such a low threshold. In other words, EPA’s tailoring proposal extends the PSD requirements to much smaller projects that Congress never intended to be subject to this kind of permitting.

Using this very low threshold will require far more PSD permitting, yet resources are lacking for the permitting that is currently undertaken. Neither Region 9 nor the air districts have the capacity to greatly expand the resources spent on PSD permitting. In California, much of the current permitting is by Region 9, as many air districts have resisted delegation agreements. If PSD permitting requires significantly more air district resources in the delegated districts, it is foreseeable that even the delegated districts might return their delegation, and let Region 9 undertake the entire responsibility. The predictable result is the regulatory gridlock that the tailoring rule is supposed to avoid. However, this unfortunate result can be avoided, and EPA can still comply with its responsibilities, by adopting the “staged” approach to extending its GHG authority as described below.

V. ADOPT A BETTER SOLUTION: SEQUENCING THE IMPLEMENTATION BY PROGRESSIVE STEPS.

As stated above, the tailoring proposal is well-justified, but is unfortunately inadequate to avoid the quagmire it describes. Even with EPA’s proposal, administrative agencies will be greatly overburdened, PSD permitting will be subject to indefinite delay, and all projects that eventually receive permits will be subject to the burdensome review of the EAB. EPA can and must provide a better solution.

That solution is the “staging” concept discussed but not effectively utilized by the EPA proposal. The EPA approach is simply far too modest. What is needed, and would be more likely to avoid the regulatory gridlock EPA has described, is to move by progressive “stages,” starting with a relatively high GHG threshold and lowering it in successive increments every two or three years, until the desired level is met. The staging concept is perhaps more important than the exact threshold number, but it is essential that the initial threshold be set far higher than the 25,000 ton proposal. The Energy Commission believes the following approach would be sensible and avoid most disastrous consequences outlined above.

We propose the “first stage” of the tailoring proposal require GHG PSD analysis for all sources over a threshold of one million tons GHG. This would expand GHG analysis to most of the projects currently subject to PSD permit requirements for their criteria pollutant emissions (a result roughly consistent with proposed federal “cap and trade” legislation). During this initial two year period EPA would have an opportunity to explore the viability of the streamlining measures that they propose to explore in the Notice. Equally important, state and local air permitting agencies would have an opportunity to decide whether they should adopt and place PSD requirements “in the SIP” to avoid a federal permit process and the interminable consequent review that can occur at the EAB.

The second stage, after a two year period, could cut in half the threshold to 500,000 tons per year—a considerable expansion of the number of projects subject to the threshold, but a far more gentle impact than what EPA currently proposes. For power plants, this would subject larger gas-fired peakers to PSD permit requirements, but smaller peakers that are currently exempt would remain unaffected.

The third stage, after another two years, could again cut in half the threshold number, to 250,000 tons (or lower). Again, this would be an incremental, if relatively substantial, increase in administrative burden, but because it is incremental and because there would have been four years to plan for it, it is more likely to be manageable. A fourth stage two years later could reduce the threshold still further, to whatever a desirable and practical long-term threshold is (whether 250,000, 100,000 or 25,000 tons), based on the experience gained during the prior six years. The Energy Commission notes that the permanent and final stage should be one commensurate with the “major” emission sources that Congress intended the PSD provisions to apply, which might reasonably be interpreted to be no less than 250,000 tons per year for GHG emissions.

The above proposal would truly “tailor” the new PSD requirements for GHG emissions, and should avoid the permit agency gridlock and economic dislocation that the current threshold proposal will almost certainly cause. States like California would find this more graduated approach to PSD permitting far less disruptive of efforts to replace aging generation infrastructure with renewable generation backed up by modern, efficient, and flexible gas-fired generation.

VI. PROJECTS IN THE PERMIT PROCESS BUT NOT CURRENTLY SUBJECT TO PSD SHOULD BE “GRANDFATHERED”.

Projects currently subject to PSD requirements often require more than a year to obtain their permits. Any new threshold imposed for PSD will add significantly to that time period. Many projects currently in state or local air permit processes will thus be subject to significant delay if they become subject to PSD requirements, as they will suddenly need to obtain both counsel and experts who can guide them through the application process, and then wait for beleaguered agency staff to finally issue a permit. This potential for catastrophic delay of current proposals that have not been subject to PSD

requirements, and the considerable economic consequences of such, can be avoided by a “grandfathering” provision that exempts projects that are currently in a state or local application process. The Energy Commission proposes that projects be exempt if they have filed applications with local air pollution control agencies that have been accepted as complete before the effective date of the new tailoring rule.

VII. CONCLUSION.

EPA has provided justification for a well-designed tailoring of new PSD requirements for GHG. Unfortunately the current tailoring proposal is far too modest, and will likely result in same gridlock in the federal PSD permit process that the proposed rule is intended to avoid. This gridlock has the potential to substantially interfere with California’s transformation of the electric generation system to greater reliance on renewable generation. In addition, by delaying new, more efficient, gas-fired peaking infrastructure, it will force continued reliance on a fleet of aging, inefficient gas-fired boiler units that were not designed to provide flexible peaking support. Thus, the proposed rule will likely retard, rather than facilitate, reductions in GHG emissions from the electricity sector—a cornerstone of California energy policy.

The Energy Commission asks the EPA to consider amending its tailoring rule, so that it is implemented in a graduated or “staged” manner proposed herein. We believe such an approach would avoid the disruptive effect of the current EPA proposal, which would in turn allow states like California to effectively pursue their GHG reduction policies and therefore cause a net decrease in GHG emissions from the electricity sector. Consequently, we are confident that our proposal is most consistent with the ultimate intent of Congress when it created the PSD permit process through the Clean Air Act.

[Original Signed by Melissa Jones]

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