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[EPA–HQ–OAR–2009–0517; FRL–8966–7]

RIN 2060–AP86

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to tailor the major source applicability thresholds for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Clean Air Act (CAA or Act) and to set a PSD significance level for GHG emissions. This proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions and, as a result, trigger PSD and title V applicability requirements for GHG emissions. If PSD and title V requirements apply at the applicability levels provided under the CAA, State permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate. On the basis of the legal doctrines of ''absurd results'' and ''administrative necessity,'' this proposed rule would phase in the applicability thresholds for both the PSD and title V programs for sources of GHG emissions. The first phase, which would last 6 years, would establish a temporary level for the PSD and title V applicability thresholds at 25,000 tons per year (tpy), on a ''carbon dioxide equivalent'' (CO_2e) basis, and a temporary PSD significance level for GHG emissions of between 10,000 and 25,000 tpy CO_2e. EPA would also take other streamlining actions during this time. Within 5 years of the final version of this rule, EPA would conduct a study to assess the administrability issues. Then, EPA would conduct another rulemaking, to be completed by the end of the sixth year, that would promulgate, as the second phase, revised applicability and significance level thresholds and other streamlining techniques, as appropriate.

DATES: *Comments.* Comments must be received on or before December 28, 2009. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before November 27, 2009.

Public Hearing: If anyone contacts us requesting to speak at a public hearing on or before November 16, 2009, we will hold a public hearing approximately 30 days after date of publication in the **Federal Register.**

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2009–0517 by one of the following methods:

- *http://www.regulations.gov.* Follow the online instructions for submitting comments. Attention Docket ID No. EPA–HQ–OAR–2009–0517.
- *E-mail: a-and-r-docket@epa.gov.* Attention Docket ID No. EPA–HQ–OAR–2009–0517.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2009–0517.
- *Mail:* EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2009–0517, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of 2 copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue, Northwest, Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2009–0517. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2009–0517. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Mangino, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–9778; fax number: (919) 541–5509; e-mail address: *mangino.joseph@epa.gov.*

To request a public hearing, please contact Pam Long, Air Quality Planning Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–0641; fax number: (919) 541–5509 no later than November 16, 2009 to request a hearing.

SUPPLEMENTARY INFORMATION:

I. Preamble Glossary of Terms and Abbreviations

The following are abbreviations of terms used in the preamble.

APA Administrative Procedure Act
ANPR Advance Notice of Proposed Rulemaking
APA Administrative Procedure Act
AQRV Air Quality Related Value
BACT Best Available Control Technology
CAA Clean Air Act
CAM Compliance Assurance Monitoring
CBI Confidential Business Information
CFR Code of Federal Regulations
CH_4 Methane
CO_2 Carbon Dioxide
CO_2e Carbon Dioxide Equivalent
CO Carbon Monoxide
EG Emission Guidelines
EPA U.S. Environmental Protection Agency
FERC Federal Energy Regulatory Commission
FIP Federal Implementation Plan
FLM Federal Land Manager
FTC Federal Trade Commission
FTE Full-Time Equivalent
GHG Greenhouse Gas
GWP Global Warming Potential
HAP Hazardous Air Pollutant
HFC Hydrofluorocarbon
HFE Hydrofluorinated Ether
ICR Information Collection Request
IPCC Intergovernmental Panel on Climate Change
MWCs Municipal Waste Combustion Facilities
NAAQS National Ambient Air Quality Standard
NESHAP National Emission Standards for Hazardous Air Pollutants
NOD Notice of Deficiency
NO_X Nitrogen Oxides
NSPS New Source Performance Standard
NSR New Source Review
OMB Office of Management and Budget
OTAQ Office of Transportation and Air Quality
PFC Perfluorocarbon
ppm Parts Per Million
PSD Prevention of Significant Deterioration
PTE Potential to Emit
RIA Regulatory Impact Analysis
SBA Small Business Administration
SO_2 Sulfur Dioxide
SF_6 Sulfur Hexafluoride
SIP State Implementation Plan
Tg Teragrams
TIP Tribal Implementation Plan
tpy Tons Per Year
UNFCCC United Nations Framework Convention on Climate Change

II. General Information

A. Does this action apply to me?

Entities affected by this proposed action include sources in all sectors of the economy, including commercial and residential sources. Entities potentially affected by this proposed action also include States, local permitting authorities, and tribal authorities. The majority of categories and entities potentially affected by this action are expected to be in the following groups:

Industry Group	NAICS[a]
Agriculture, fishing, and hunting	11.
Mining	21.
Utilities (electric, natural gas, other systems)	2211, 2212, 2213.
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316.
Wood product, paper manufacturing	321, 322.
Petroleum and coal products manufacturing	32411, 32412, 32419.
Chemical manufacturing	3251, 3252, 3253, 3254, 3255, 3256, 3259.
Rubber product manufacturing	3261, 3262.
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551.
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279.
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329.
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339.
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446.
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359.
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3369.
Furniture and related product manufacturing	3371, 3372, 3379.
Miscellaneous manufacturing	3391, 3399.
Waste management and remediation	5622, 5629.
Hospitals/Nursing and residential care facilities	6221, 6231, 6232, 6233, 6239.
Personal and laundry services	8122, 8123.
Residential/private households	8141.
Non-Residential (Commercial)	Not available. Codes only exist for private households, construction and leasing/sales industries.

[a] North American Industry Classification System.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this action will be posted on the EPA's New Source Review (NSR) Web site, under Regulations & Standards, at *http://www.epa.gov/nsr*.

C. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2009–0517.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a

Code of Federal Regulations (CFR) part or section number.

- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

D. How can I find information about a possible public hearing?

People interested in presenting oral testimony or inquiring if a hearing is to be held should contact Ms. Pamela S. Long, New Source Review Group, Air Quality Policy Division (C504–03), U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541–0641. If a hearing is to be held, persons interested in presenting oral testimony should notify Ms. Long at least 2 days in advance of the public hearing. Persons interested in attending the public hearing should also contact Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning these proposed rules.

E. How is the preamble organized?

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III. Overview of Proposed Rule

EPA is proposing to tailor the major source applicability thresholds for GHG emissions under the PSD and title V programs of the CAA by setting first-phase levels under both programs, setting a first-phase PSD significance level [1] for GHG emissions, undertaking efforts to streamline administrability of the programs, and committing to an assessment of administrability within 5 years and a second-phase rulemaking within 6 years.

This proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions from light-duty motor vehicles and, as a result, trigger PSD and title V applicability requirements for GHG emissions. When the light-duty vehicle rule is finalized, the GHGs subject to regulation under that rule would become immediately subject to regulation under the PSD program, meaning that from that point forward, prior to constructing any new major source or major modifications that would increase GHGs, a source owner would need to apply for, and a permitting authority would need to issue, a permit under the PSD program that addresses these increases. Similarly, for title V it would mean that any new or existing source exceeding the major source applicability level for those regulated GHGs, if it did not have a title V permit already, would have 1 year to submit a title V permit application.

If PSD and title V requirements apply at the applicability levels provided under the CAA, many small sources would be burdened by the costs of individualized PSD control technology requirements and permit applications. In addition, State permitting authorities would be paralyzed by enormous numbers of these permit applications; the numbers are orders of magnitude greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities. Based on the long-established judicial doctrines of

[1] ''Significant levels'' for regulated NSR pollutants are commonly called ''significance levels'' or ''significance thresholds,'' and these terms are used interchangeably for purposes of this proposed action.

''absurd results'' and ''administrative necessity,'' this proposed rule would phase in PSD and title V applicability. As the first phase, this rule would establish applicability thresholds for both the PSD and title V programs at the level of 25,000 tpy CO_2e, and would establish a PSD significance level of between 10,000 and 25,000 tpy CO_2e. This rule also marks the beginning of a concerted effort by EPA to streamline administration of the PSD and title V programs as much as possible and as quickly as possible. In addition, EPA commits that, within 5 years of promulgating the first phase, EPA will conduct a study of the permitting authorities' ability to administer the programs going forward, and then, within a year, conduct rulemaking for the second phase of the program. This second phase will either confirm the first-phase permitting levels or establish revised ones or other streamlining techniques. EPA also proposes to identify as the pollutant subject to PSD and title V for applicability purposes the group of up to six GHG emissions, each one weighted for its global warming potential, that are included in regulations for their control under the CAA. EPA also proposes to conform its action on PSD State implementation plans (SIPs) and title V programs to match the proposed Federal applicability requirements.

More specifically, following this overview, section IV of this preamble provides background information as to the nature of GHG emissions and the general requirements of the PSD and title V programs. Currently, PSD applies to sources that emit at least 100 or 250 (depending on the source category) tpy of pollutants subject to regulation under the CAA, and title V generally applies to sources that emit at least 100 tpy of pollutants subject to regulation under the CAA. Currently, PSD and title V requirements apply on the basis of emissions applicability thresholds that are pollutant-specific mass emissions rates expressed in tpy. Under PSD, construction of a stationary source that has the potential to emit (PTE) a regulated NSR pollutant in an amount exceeding 100 or 250 tpy (depending on the source category) (the ''major stationary source'' threshold, in the terminology of EPA regulations) triggers PSD permitting requirements. PSD permitting requirements are also triggered if a major stationary source undertakes a modification that is projected to increase emissions of a regulated NSR pollutant above an emissions threshold (the ''significance level''). For any particular pollutant, this level is zero unless and until EPA establishes one on the basis of *de minimis* emissions or administrative necessity. Under title V, a source with emissions exceeding a ''major source'' emissions threshold—generally 100 tpy on a PTE basis—triggers title V permitting requirements.

It should be noted that, as further explained in the background section, there are no geographic areas currently designated ''nonattainment'' for GHG pollutants; as a result, this action affects only the PSD program, and we are not proposing to amend the ''nonattainment NSR'' provisions of our major NSR program at this time, nor are we proposing to amend any provisions that affect minor NSR permitting.

Section IV of this preamble further describes the current and expected future treatment of GHG emissions for applicability purposes under those PSD and title V programs. In particular, section IV describes the light-duty motor vehicle rule, which EPA recently proposed and expects to promulgate by the end of March 2010, and which will control GHG emissions from certain mobile sources. Under EPA's current interpretation of PSD and title V applicability requirements, promulgation of this motor vehicle rule will trigger the applicability of PSD and title V requirements for stationary sources that emit GHGs.

In section V of this preamble, EPA describes the administrative burdens on permitting authorities if the requirements of PSD and title V programs are triggered without having this tailoring rule in place. In short, without this tailoring rule, the administrative burdens would be immense, and they would immediately and completely overwhelm the permitting authorities. Without this tailoring rule, 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. We estimate the additional resource burdens in full-time equivalents (FTEs) and time delays in processing permits, but the sheer numbers of additional permits by themselves paint the picture of the overwhelming administrative burdens.

In section VI of this preamble, we describe the legal rationale for this tailoring rule. The judicial doctrine of ''absurd results'' authorizes departure from a literal application of statutory provisions if it would produce a result that is inconsistent with other statutory provisions or congressional intent, and particularly one that would undermine congressional purposes. The judicial doctrine of ''administrative necessity'' authorizes an agency to depart from statutory requirements if the agency can demonstrate that the statutory requirements, as written, are impossible to administer. However, the agency must first attempt to mitigate administrative problems through techniques consistent with the statutory requirements, and, if variance from the statutory requirements nevertheless is necessary to allow administrability, the variance must be limited as much as possible.

As discussed in section VI of this preamble, to apply the statutory PSD and title V applicability thresholds to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. This extraordinary increase in the scope of the permitting programs, coupled with the resulting burdens on the small sources and on the permitting authorities, were not contemplated by Congress in enacting the PSD and title V programs. Moreover, the administrative strains would lead to multi-year backlogs in the issuance of PSD and title V permits, which would undermine the purposes of those programs. Sources of all types—whether they emit GHGs or not—would face long delays in receiving PSD permits, which Congress intended to allow construction or expansion. Similarly, sources would face long delays in receiving title V permits, which Congress intended to promote enforceability. For these reasons, the absurd results doctrine applies to avoid a literal application of the thresholds.

By the same token, the impossibility of administering the permit programs brings into play the administrative necessity doctrine. This doctrine also justifies EPA to avoid a literal application of the threshold provisions.

Instead, these doctrines authorize EPA to apply the PSD and title V applicability provisions through a phased program. The first phase would establish the applicability thresholds at the 25,000-tpy levels and vigorously develop streamlining measures that would facilitate applying PSD and title V on a broader scale with overburdening sources and administrators. In this manner, the phased approach reconciles the language of the statutory provisions with the results of their application and with congressional intent.

In section VII of this preamble, we describe the streamlining techniques—short of limiting the applicability of PSD and title V to higher-emitting sources—that may be available to improve administrability. These techniques range from defining ''potential to emit''—which is the basis for calculating the statutory thresholds—to be closer to actual emissions, to general permits and presumptive best available control technology (BACT), which is the principal control requirement under the PSD program. Although these techniques offer promise over the long term to improve administrability, they cannot be in place by March 2010, when we expect PSD and title V requirements to be triggered for GHG emitters, or within a several-year period thereafter. Accordingly, this tailoring rule is necessary at this time.

In section VIII of this preamble, we describe in detail our proposed tailoring rule. For the PSD program, we are proposing to establish, as the first phase, the GHG ''major stationary source'' emissions applicability threshold level at 25,000 tpy on a CO_2e basis. That is, sources that emit at this level or higher would be considered ''major stationary sources'' and therefore would become subject to PSD requirements when they construct or modify. We are also proposing to establish in this first phase a PSD ''significance level'' emissions rate for GHGs and are proposing a range for that value of 10,000 to 25,000 tpy CO_2e for comment. The ''significance'' level is important for determining whether existing sources that make physical or operational changes become subject to PSD and for determining whether sources that are subject to PSD for other pollutants are also subject to PSD for their GHG emissions.

As further described in section VIII of this preamble, for the title V operating permits program, we are also proposing to establish the GHG emissions applicability threshold level at 25,000 tpy CO_2e for this first phase. That is, sources that emit at this level or higher would be considered ''major sources'' and therefore would become subject to title V requirements.

As further described in section VIII of this preamble, as an integral part of the tailoring rule, EPA proposes to commit to complete, within 5 years of a final rule, a study to evaluate the actual administrative burden resulting from the proposed GHG permitting thresholds and possible other thresholds, and the progress of developing streamlining techniques and augmentation of permitting authorities' resources. In addition, EPA commits to propose and promulgate a rulemaking—informed by the study—within 6 years from the effective date of a final version of this rulemaking (*i.e.,* 1 year from the completion of the study) that would establish the second phase, which would either reaffirm the GHG permitting thresholds, promulgate alternative thresholds, adopt other streamlining techniques, and/or take other action consistent with the goal of expeditiously meeting CAA requirements in light of the administrative burden that remains at that time.

During this first phase of the tailoring program, EPA proposes to make a concerted effort to assess and implement streamlining options, tools, and guidance—some of which we describe in section VII of this preamble—to reduce the administrative burden on permitting authorities when implementing PSD and title V for GHGs. EPA proposes to undertake as many of these streamlining actions as possible and to do so as quickly as possible. In addition, for larger sources that would be subject to PSD and title V requirements during the first phase, EPA intends to work closely with the stakeholders to develop efficient methods for implementing those requirements. For smaller sources for which PSD and title V requirements would not apply during the first phase due to the increase in the major source applicability threshold, EPA intends to identify cost-effective opportunities available as soon as possible to achieve GHG reductions through means other than PSD and title V (*e.g.,* energy efficiency and other appropriate measures).

Section VIII of this preamble further describes our proposal to define the relevant pollutants as the group of up to six GHG emissions that have been regulated for control, calculated on the basis of global warming potential (GWP).[2]

Section IX of this preamble describes the burden and economic impacts of the proposed rule.

Section X of this preamble discusses implementation issues related to this proposal. These include conforming EPA approval of the PSD programs in SIPs and EPA approval of the State title V programs to be consistent with the proposed applicability threshold levels. By way of background, as soon as EPA promulgates a rule regulating for control of GHG emissions—which we expect to occur with the proposed light-duty motor vehicle rule, scheduled for promulgation at the end of March 2010—stationary sources will become subject to PSD and title V requirements. The major source thresholds for PSD and title V, significance level for PSD, and identification of GHGs subject to PSD and title V as proposed in this tailoring rule would each take effect immediately in the Federal PSD program (codified at 40 CFR 52.21) and in the Federal operating permits program (codified at 40 CFR 71), as applicable. To conform EPA action on PSD SIPs and State title V programs, EPA intends to limit its previous approval of those SIPs and title V programs to cover only the permitting of sources of GHG emissions at or above the proposed threshold levels. EPA will take no action on—that is, EPA will not disapprove—the PSD SIPs and title V programs to the extent they require permitting of GHG emitters at levels below the proposed thresholds. EPA proposes to take this action by virtue of its authority to reconsider its previous regulatory actions. Section X of this preamble also explains how we propose to address the treatment of GHGs in the fee programs under title V.

IV. Background

A. What are greenhouse gases and their sources?

Gases that trap heat in the atmosphere are often called GHGs. Some GHGs such as carbon dioxide (CO_2) are emitted to the atmosphere through natural processes as well as human activities. Other gases, such as fluorinated gases, are created and emitted solely through human activities. The primary GHGs of concern directly emitted by human activities include CO_2, methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). These six primary GHGs will, for the purposes of this proposal, be referred to collectively as ''the six primary GHGs.'' These six gases, once emitted, remain in the atmosphere for decades to centuries. Thus, they become well-mixed globally in the atmosphere and their concentrations accumulate when emissions exceed the rate at which natural processes remove them from the atmosphere. The heating effect caused by the human-induced buildup of GHGs

[2] The Intergovernmental Panel on Climate Change (IPCC) describes GWP as an index, based upon radiative properties of well-mixed GHGs, measuring the radiative forcing of a unit mass of a given well-mixed greenhouse gas in the present-day atmosphere integrated over a chosen time horizon, relative to that of CO_2. The GWP represents the combined effect of the differing times these gases remain in the atmosphere and their relative effectiveness in absorbing outgoing thermal infrared radiation. (Intergovernmental Panel on Climate Change (IPCC), Glossary of Terms used in the IPCC Fourth Assessment Report, WG1). *http://www.ipcc.ch/*

in the atmosphere is very likely the cause of most of the observed global warming over the last 50 years. A detailed explanation of climate change and its impact on health, society, and the environment is included in EPA's technical support document for the endangerment finding proposal (Docket ID No. EPA–HQ–OAR–2009–0171–0137).[3]

In the U.S., the combustion of fossil fuels (*e.g.,* coal, oil, gas) is the largest source of CO_2 emissions and accounts for 80 percent of total GHG emissions. More than half the energy-related emissions come from large stationary sources such as power plants, while about a third come from transportation. Of the six primary GHGs, four (CO_2, CH_4, N_2O, and HFCs) are emitted by motor vehicles. Industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management are also important sources of GHG emissions in the U.S. These emissions are inventoried at a national level by EPA in the Inventory of U.S. Greenhouse Gas Emissions and Sinks.[4]

Different GHGs have different heat-trapping capacities. It is useful to compare them to each other through the use of the CO_2e metric. This metric incorporates both the heat-trapping ability and atmospheric lifetime of each GHG and can be used to adjust the quantities, in tpy, of all GHGs relative to the GWP of CO_2. When quantities of the different GHGs are multiplied by their GWPs, the different GHGs can be summed and compared on a CO_2e basis. Depending on which GWP values are used, the calculated GHG emissions on a CO_2e basis will vary. Throughout this preamble, we are applying the GWP values established by the Intergovernmental Panel on Climate Change (IPCC) in its Second Assessment Report (SAR) (IPCC 1996).[5] For example, CH_4 has a GWP of 21, meaning each ton of CH_4 emissions would have 21 times as much impact on global warming over a 100-year time horizon as 1 ton of CO_2 emissions. Thus, on the basis of heat-trapping capability, 1 ton of CH_4 would equal 21 tons of CO_2e. The GWPs of the six primary GHGs range from 21 (for CH_4) up to 23,900 (for SF_6). Aggregating all GHGs on a CO_2e basis at the source level allows a facility to evaluate its total GHG emissions contribution based on a single metric. For a complete list of the applicable GWP values for each GHG, please refer to EPA's Inventory of U.S. Greenhouse Gas Emissions and Sinks.

B. What are the general requirements of the PSD program?

1. Overview of the PSD Program

The PSD program is a preconstruction review and permitting program applicable to ''new major stationary sources'' and ''major modifications'' at existing major stationary sources, in the terminology of EPA's implementing regulations. The PSD program applies in areas meeting the health-based National Ambient Air Quality Standards (NAAQS) or for which there is insufficient information to determine whether they meet the NAAQS (''unclassifiable'' areas). The PSD program is contained in part C of title I of the CAA. The ''nonattainment NSR'' program applies in areas not meeting the NAAQS and in the Ozone Transport Region, and is implemented under the requirements of part D of title I of the CAA. Collectively, we also commonly refer to these two programs as the major NSR program. The governing EPA rules are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendices S and W. There is no NAAQS for CO_2 or any of the other primary GHGs, nor does EPA plan to promulgate one; therefore, we do not anticipate that the ''nonattainment'' major NSR program will apply to GHGs.

The applicability of the PSD program to a particular source must be determined in advance of construction or modification and is pollutant-specific. The primary criterion in determining PSD applicability is whether the proposed project is sufficiently large (in terms of its emissions) to be a major stationary source or major modification, both of which are described below.

a. Major Stationary Sources

Under PSD, a ''major stationary source'' is any source type belonging to a specified list of 28 source categories which emits or has a PTE of 100 tpy or more of any pollutant subject to regulation under the CAA, or any other source type which emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tpy. *See, e.g.,* 40 CFR 52.21(b)(1). We may refer to these levels as the 100/250-tpy thresholds. A new source with a PTE at or above the applicable ''major stationary source threshold'' amount is subject to major NSR. These limits originate from section 169 of the CAA, which applies PSD to any ''major emitting facility''[6] and defines the term to include any source with a PTE of 100 or 250 tpy, depending on source category.

b. Major Modifications

PSD applies to not only new construction but also to existing sources that undertake a ''major modification,'' which is defined in terms of the following three criteria:

(1) A physical change in, or change in the method of operation of, a ''major stationary source'' must occur;

(2) The change must result in an increase in emissions that is ''significant,'' that is, equal to or above the significance level defined for the pollutant in question, *e.g.,* in 40 CFR 52.21(b)(23)); and

(3) The increase in emissions resulting from the change must be a significant net emissions increase. In other words, when the increase from the project is added to other contemporaneous increases or decreases in actual emissions at the source, the net emissions increase must be significant (equal to or above the significance level defined, *e.g.,* in 40 CFR 52.21(b)(23)).

Generally, significance levels for PSD are pollutant-specific emissions rates. For example, the significance level for emissions of nitrogen oxides (NO_X) is 40 tpy. *See, e.g.,* 40 CFR 52.21(b)(23)(i). However, for a regulated NSR pollutant for which no specific significance level is listed, PSD applies to ''any increase.'' *See, e.g.,* 40 CFR 52.21(b)(23)(ii). Thus, if GHGs were to become subject to regulation and PSD review, and no significance levels for GHGs had been established, the default value would be ''zero.''

EPA has promulgated significance levels for criteria pollutants and certain other pollutants, which EPA generally based on levels that represent a *de minimis* contribution to air quality problems. For example, for certain pollutants regulated under the new source performance standards (NSPS), EPA generally based significance levels at 20 percent of the NSPS. These concentrations were compared to available health and welfare data to assure that significant adverse effects

[3] ''Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,'' Climate Change Division, Office of Atmospheric Programs, U.S. Environmental Protection Agency, Washington, DC. April 17, 2009.

[4] For additional information about the Inventory of U.S. Greenhouse Gas Emissions and Sinks, and for more information about GHGs, climate change, climate science, *etc., see* EPA's climate change Web site at *http://www.epa.gov/climatechange/.*

[5] ''Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2007,'' U.S. Environmental Protection Agency, EPA 430–R–09–004, April 15, 2009. Table 1–2, p. 1–6. *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.*

[6] EPA's regulations employ the term ''major stationary source'' in lieu of ''major emitting facility.'' *e.g.,* 40 CFR 52.21(a)(2)(i), (b)(1)(i).

were avoided.[7] To this point, EPA has not established a significance level for GHGs, and we currently do not have an adequate supporting record to establish a similar health and welfare-based *de minimis* level for significance for GHGs.

2. General Requirements for PSD

Under the PSD program, one of the principal requirements is that a new major source or major modification must apply BACT, which is determined on a case-by-case basis taking into account, among other factors, the cost and effectiveness of the control. EPA has developed a ''top-down'' approach for BACT review which involves a decision process that includes identification of all available control technologies, elimination of technically infeasible options, ranking of remaining options by control and cost effectiveness, and then selection of BACT. Under PSD, once a source is determined to be major for any regulated pollutant, a BACT review is performed for each attainment pollutant whose emissions exceed its PSD significance level as part of new construction or modification projects at the source.

In addition to performing a BACT review, the source must analyze the impact of the project on ambient air quality to assure that no violation of any NAAQS or PSD increments will result, and must analyze impacts on soil, vegetation, and visibility. Sources or modifications that would impact Class I areas (*e.g.,* national parks) may be subject to additional requirements to protect air quality related values (AQRVs) that have been identified for such areas. Under PSD, if a source proposes to locate within 100 kilometers of a Class I area, the Federal Land Manager (FLM) is notified and is responsible for evaluating a source's projected impact on the AQRVs and recommending either approval or disapproval of the source's permit application based on anticipated impacts. There are currently no NAAQS or PSD increments established for GHGs, and therefore these PSD requirements would not apply to GHG emissions sources, even when PSD is triggered for GHG emissions sources. However, as noted previously, if PSD is triggered for a GHG emissions source, all regulated NSR pollutants which the new source emits in significant amounts would be subject to PSD requirements. Therefore, if a facility triggers review for regulated NSR pollutants that are non-GHG pollutants for which there are established NAAQS or increments, the air quality, additional impacts, and Class I requirements would apply to those pollutants.

When the reviewing authority reaches a preliminary decision to authorize construction of a proposed new major source or major modification, it must provide notice of the preliminary decision and an opportunity for comment by the general public, industry, and other interested persons. After considering and responding to the comments, the reviewing authority may issue a final determination on the construction permit in accordance with the PSD regulations.

Usually NSR permits are issued by State or local air pollution control agencies. In these cases, State and local air pollution control agencies may have their own permit programs that are approved by EPA in the SIP or they may be delegated the authority to issue permits on behalf of EPA. In some areas, the EPA issues the permits.

3. Minor NSR Program

The permitting program for minor stationary sources is addressed by section 110(a)(2)(C) of the CAA. We commonly refer to this program as the minor NSR program. A minor stationary source means a source whose PTE is lower than the major source applicability threshold for a particular pollutant as defined in the applicable nonattainment major NSR program or PSD program. As with nonattainment NSR requirements, the CAA does not require that minor source programs apply to GHGs because there are no NAAQS for GHGs.

C. What are the general requirements of the title V operating permits program?

1. Overview of Title V

The title V operating permits program was added to the CAA by Congress in 1990. The operating permits program requirements under title V are intended to improve sources' compliance with the requirements of the CAA. In summary, the title V program requires major sources (generally defined as sources that actually emit or have the potential to emit 100 tpy) and certain other sources to obtain operating permits that: Consolidate all CAA requirements into a single document; provide for review of these documents by EPA, States, and the public; and require permit holders to track, report, and annually certify their compliance status with respect to their permit requirements.

Title V will be triggered for GHG emissions when EPA regulates them for control under another provision of the CAA. Section 502(a) of the Act sets forth the sources required to obtain operating permits under title V. These sources include: (1) Any affected source subject to acid rain rules under title IV of the Act; (2) any major source; (3) any source required to have a permit under part C or D (PSD/NSR) of title I of the Act; (4) ''any source subject to section 111 [NSPS] or section 112 [NESHAP];'' and (5) any other source designated by rule. *See* also 40 CFR 70.3(a) and 71.3(a). The requirements of section 502(a) are primarily implemented through the operating permit program rules at 40 CFR part 70, which sets out the minimum requirements for title V operating permit programs administered by State, local, and tribal permitting authorities (57 FR 32261; July 21, 1992); and part 71, the Federal operating permit program requirements that apply where EPA or a delegate agency authorized by EPA to carry out a Federal permit program is the title V permitting authority (61 FR 34228, July 1, 1996).

Title V generally does not add new substantive requirements for pollution control, but it does require that each permit contain all of a facility's ''applicable requirements'' under the CAA, and that certain procedural requirements be followed, especially with respect to compliance with these requirements. ''Applicable requirements'' for title V purposes include all stationary source requirements, but do not include mobile source requirements.

2. Title V Permit Requirements

When a source becomes subject to title V, it must apply for a permit within 1 year of the date it became subject. The application must include identifying information, a description of emissions and other information necessary to determine applicability of CAA requirements, identification and certification of the source's compliance status with these requirements (including a schedule to come into compliance for any requirements for which the source is currently out of compliance), a statement of the methods for determining compliance, and other information. The permitting authority then uses this information to issue the source a permit to operate, as appropriate. A title V source may not operate without a permit, except that if it has submitted a complete application, the submission acts as a ''shield'' that

[7] EPA established significance levels for hazardous air pollutants on a similar basis, but subsequently, in the 1990 Clean Air Act Amendments, Congress mooted them by exempting hazardous air pollutants from PSD, under CAA section 112(b)(6).

authorizes it to operate while awaiting issuance of its permit.

Title V permits must contain the following main elements: (1) Emissions standards to assure compliance with all applicable requirements; (2) a duration of no more than 5 years, after which the permit must be renewed; (3) monitoring, recordkeeping, and reporting requirements necessary to assure compliance, including a semiannual report of all required monitoring and a prompt report of each deviation from a permit term; (4) provisions for payment of permit fees as established by the permitting authority such that total fees collected are adequate to cover the costs of developing and implementing the program; and (5) a requirement for an annual compliance certification by a responsible official at the source. An additional specific monitoring requirement, compliance assurance monitoring (CAM), also applies to some emissions units operating at major sources with title V permits. The CAM rule requires source owners to design and conduct monitoring of the operation of add-on control devices used to control emissions from moderately large emissions units. Source owners use the monitoring data to evaluate, verify, and certify the compliance status for applicable emissions limits. The CAM rule is implemented in conjunction with the schedule of the operating permits program. While these are the main elements relevant to a discussion of GHGs, there are numerous other permit content requirements and optional elements, as set forth in the title V regulations at 40 CFR 70.6.

In addition to the permit content requirements, there are procedural requirements that permitting authorities (typically States) must follow in issuing title V permits, including (1) determining and notifying the applicant that its application is complete; (2) providing public notice and a 30-day public comment period on the draft permit, as well as the opportunity for a public hearing; (3) giving notice to EPA and affected States; and (4) preparing and providing to any requester a statement of the legal and factual basis of the draft permit. The permitting authority must take final action on permit applications within 18 months of receipt. EPA also has 45 days from receipt of a proposed permit to object to its issuance, and citizens have 60 days to petition EPA to object. Permits may also need to be revised or reopened if new requirements come into effect or if the source makes changes that conflict with, or necessitate changes to, the current permit. Permit revisions and reopenings follow procedural requirements which vary depending on the nature of the necessary changes to the permits.

D. What is the current treatment of GHG emissions under the title V and PSD programs and what future actions may change that treatment?

This section of the preamble describes the current treatment of GHG emissions under the PSD and title V programs—under which GHG emissions are not included for purposes of determining applicability—including recent regulatory and legal developments related to this action, and then describes what future action may change that treatment.

1. Regulation of GHGs Under the CAA

a. The *Massachusetts* U.S. Supreme Court Decision

On April 2, 2007, in *Massachusetts* v. *EPA,* 549 U.S. 497 (2007), the U.S. Supreme Court held that GHGs are air pollutants covered by the CAA. Therefore, the Court further held that GHG emissions are subject to CAA section 202(a) under which the Administrator must determine whether or not emissions of GHGs from new motor vehicles or motor vehicle engines cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. This decision resulted from a petition for rulemaking under section 202(a) filed by more than a dozen environmental, renewable energy, and other advocacy organizations. As a result of this decision, EPA decided to issue an advance notice of proposed rulemaking (ANPR), discussed later in this preamble, soliciting comment on how GHG emissions should be regulated under the CAA.

b. The EPA ANPR

On July 30, 2008, EPA published an ANPR in the **Federal Register** entitled, ''Regulating Greenhouse Gas Emissions under the CAA.'' 73 FR 44354, July 30, 2008. This ANPR presented information relevant to, and solicited public comment on how to respond to, the U.S. Supreme Court's decision in *Massachusetts* v. *EPA,* holding that GHGs are air pollutants subject to the CAA. The notice reviewed the various CAA provisions (including the PSD and title V requirements) that may be applicable to sources of GHGs, examined the issues that regulating GHGs under those provisions may raise, provided information regarding potential regulatory approaches and technologies for reducing GHG emissions, and raised issues relevant to possible legislation and the potential for overlap between legislation and CAA regulation.

In addition, the notice described and solicited comment on petitions the EPA had received to regulate GHG emissions from ships, aircraft, and nonroad vehicles such as farm and construction equipment. Finally, the notice discussed several other actions concerning stationary sources for which EPA has received comment regarding the regulation of GHG emissions, including promulgation of performance standards or guidelines under CAA section 111 for new and existing sources in various source categories. The EPA included options for phasing in the PSD program and title V programs to mitigate burdens that would occur if GHGs were to be regulated under the CAA and solicited comments on those actions. Section V.C of this preamble summarizes some of the substantive comments received on the ANPR. In issuing the ANPR, EPA made clear that it believed that the best way to address the problems posed by GHG emissions would be through legislation directly addressing GHG emissions, rather than through use of the tools in the CAA.

2. Current Applicability of the PSD Program to Sources of GHG Emissions

As explained earlier in this preamble, EPA treats sources as subject to PSD requirements only if they emit ''regulated NSR pollutants'' at specified threshold levels. Currently, EPA does not consider GHG emissions to be ''regulated NSR pollutants'' under the PSD program because GHG emissions have not, thus far, been subject to regulation requiring control under the CAA. As discussed later in this preamble, EPA is in the process of reviewing its approach to PSD applicability and is in the process of developing a rulemaking—the light-duty motor vehicle rule—that will trigger PSD applicability for GHG emissions.

a. PSD Interpretive Memorandum

EPA is currently reconsidering the PSD Interpretive Memorandum (previously referred to as the ''Johnson Memorandum''), which describes the circumstances under which EPA considers a pollutant subject to PSD requirements. *See* memorandum (in docket for this rulemaking) from Administrator Stephen L. Johnson to Regional Administrators, ''EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program,'' December 18, 2008. The PSD

Interpretive Memorandum followed a decision by the Environmental Appeals Board (EAB) in *In re Deseret Power Electric Cooperative,* on November 13, 2008. PSD Appeal No. 07–03 (EAB 2008) (*In re Deseret*). There, the Board remanded a PSD permit that EPA Region VIII issued on August 30, 2007, to Deseret Power Electric Cooperative, authorizing the latter to construct a new waste-coal-fired electric generating unit near its existing Bonanza Power Plant, in Bonanza, Utah. The primary issue before the Board was whether the permit had to include BACT limits for CO_2, which depended on whether CO_2 meets the definition of ''regulated NSR pollutant'' under 40 CFR 52.21(b)(50), which in turn interprets the provisions in CAA sections 165 and 169 that apply the BACT requirement to ''each pollutant subject to regulation'' under the CAA. The Board rejected arguments by the petitioner, the Sierra Club, that the CAA compelled a broad interpretation of the phrase ''subject to regulation,'' which, according to the petitioner, required EPA to apply BACT to pollutants as long as they are subject to monitoring and reporting requirements. Currently, and since 1993, sources covered by the Acid Rain program have been required to monitor and report CO_2 emissions pursuant to the CAA. The Board also rejected the view advanced by the EPA offices involved in the case—Region VIII and the Office of Air and Radiation—that EPA had already established an interpretation of ''subject to regulation,'' which was that this term authorized BACT only for pollutants subject to actual regulatory controls. Thus, the Board remanded the permit to the Region to ''reconsider whether or not to impose a CO_2 BACT limit in light of the 'subject to regulation' definition under the CAA.'' *In re Deseret,* slip op. at 63.

On December 18, 2008, EPA's then-Administrator Stephen Johnson issued a memorandum establishing an interpretation clarifying the scope of the PSD program under the CAA (the PSD Interpretive Memorandum). This memorandum interprets the definition of ''regulated NSR pollutant'' to include each pollutant subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant, and to exclude pollutants for which EPA regulations only require monitoring or reporting.

On February 17, 2009, EPA Administrator Lisa Jackson responded to an amended petition for reconsideration dated January 6, 2009, filed on behalf of the Sierra Club and other parties (petitioners), seeking reconsideration of the PSD Interpretive Memorandum. In Administrator Jackson's response, she granted the petition for reconsideration in order to allow for public comment on issues raised in the memorandum and stated that EPA will also seek public comment on any issues raised by the opinion of the EAB with regard to the *In re Deseret* decision (as discussed in the PSD Interpretive Memorandum), to the extent they are not coextensive with the issues raised in the memorandum. However, Administrator Jackson made clear that the current interpretations in the PSD Interpretive Memorandum remain in effect during the reconsideration process.

Because the PSD Interpretive Memorandum concerns PSD applicability, its reconsideration will identify the circumstances under which GHG emissions are treated as ''subject to regulation under the CAA'' and, therefore, are ''regulated NSR pollutants.'' Once GHG emissions are considered ''regulated NSR pollutants,'' PSD program requirements for existing thresholds (100/250 tpy) are triggered. The PSD Interpretive Memorandum reconsideration is being addressed in a proposed rule published in the **Federal Register** *on October 7, 2009 (74 FR 51535).* Although several possible triggering events may be considered in that action, the latest of these events would be the one that applies under EPA's current interpretation: A nationwide rule controlling or limiting GHG emissions. Presently, the EPA expects that the first such rule will be the light-duty motor vehicle rule.

b. Light-Duty Vehicle Rule

EPA is currently developing a rule to regulate GHGs from mobile sources under title II of the CAA (74 FR 24007; May 22, 2009). EPA expects to promulgate this rule by the end of March 2010. As described in the PSD Interpretive Memorandum, it is EPA's position that new pollutants become subject to PSD and title V when a rule controlling those pollutants is promulgated (and even before that rule takes effect). Accordingly, as soon as GHGs become regulated under the light-duty motor vehicle rule, GHG emissions will be considered pollutants ''subject to regulation'' under the CAA and will become subject to PSD and title V requirements.

3. Current Applicability of Title V Program to GHGs

CAA section 502(a) and related definitions under sections 302 and 501, require that specified types of sources have operating permits. These include any source that emits or has a potential to emit 100 tpy of a pollutant subject to regulation (consistent with EPA's policy interpretation) [8], any source with a NSR or PSD permit, any major source of a hazardous air pollutant (HAP), any source subject to acid rain requirements, and certain minor sources subject to section 111 or section 112 standards. As with the PSD program, currently GHGs are not considered to be subject to regulation and have not been considered to trigger title V applicability.

V. What would be the administrative burdens of implementing PSD and title V at the current permitting thresholds?

This section of the preamble describes the additional administrative burdens for the PSD and title V programs in terms of staffing needs, time for processing permits, and costs that permitting authorities would incur if sources of GHG emissions were to trigger PSD and title V at the statutory thresholds, which we shorthand as the 100/250-tpy thresholds. Evidence we have collected to this point makes it clear that if PSD and title V applicability requirements are triggered at those threshold levels, an enormous influx of permits would occur—tens of thousands of PSD permits and millions of title V permits—which would create enormous administrative burdens for permitting authorities that would far exceed their current capacity to administer the PSD and title V programs. It is also worth noting here that, under a scenario where

[8] EPA included this policy interpretation that title V addresses 100-tpy sources of ''pollutants subject to regulation'' in a memorandum from Lydia Wegman. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, ''Definition of Regulated Air Pollutant for Purposes of Title V'' (Apr. 26, 1993). EPA continues to maintain this interpretation. The interpretation in this memorandum was based on: (1) EPA's reading of the definitional chain for major source under title V, including the definition of ''air pollutant'' under section 302(g) and the definition of ''major source'' under 302(j); (2) the view that Congress did not intend to require a variety of sources to obtain title V permits if they are not otherwise regulated under the Act, (*see also* CAA section 504(a), providing that title V permits are to include and assure compliance with applicable requirements under the Act); and (3) promoting consistency with the approach under the PSD program. While the specific narrow interpretation in the Wegman Memorandum of the definition of ''air pollutant'' in CAA section 302(g) is in question in light of the *Massachusetts* v. *EPA* decision (finding this definition to be ''sweeping''), EPA believes the core rationale for its interpretation of the applicability of title V remains sound. EPA continues to maintain its interpretation, consistent with CAA sections 302(j), 501, 502 and 504(a), that title V applies to 100 tpy sources of pollutants subject to regulation. This interpretation is based primarily on the purpose of title V to include all regulatory requirements applicable to the source in one document to assure compliance, *see, e.g.,* CAA section 504(a), and to promote consistency with the approach under the PSD program.

State or local permitting authorities do not have the resources to implement the title V or PSD programs for GHG sources at current CAA permitting applicability thresholds, EPA may withdraw its approval, in which case, EPA would become the permitting authority and the enormous resource requirements would shift to EPA to implement these programs.

A. PSD Implications

We evaluated the additional administrative burden and cost of including GHG emitters in the PSD program at the current 250-tpy major source permitting threshold (but not at 100 tpy [9]). To calculate the administrative burdens and cost, we first estimated the number of new sources and modifications that would be subject to PSD if GHGs were included at the 250-tpy threshold level. We developed these estimates of number of new sources and modifications as part of our GHG threshold data analyses. For more information on these analyses, *see* the technical support documents entitled ''Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation'' and ''Methodology for Estimating Modified Sources That Would Be Subject to PSD Permitting for GHGs;'' Prepared by EPA Staff; August 2009 in the docket for this rulemaking.

After estimating the number of affected facilities and sources, we then evaluated the additional administrative burden and cost of including these numbers of new and modified GHG emitters in the PSD program. Our burden estimates are based on labor and cost information from the existing Information Collection Requests (ICRs) for PSD programs.[10]

Based on our GHG threshold data analysis, we estimate that almost 41,000 new and modified facilities per year would be subject to PSD review, based on the current rate of modifications at major sources, if a GHG major source threshold of 250 tpy CO_2e were applied. Compared to the 280 PSD permits currently issued per year, this would be an increase in permits of more than 140-fold.

We estimated the number of workload hours and cost a permitting authority would expend on each new source and each modification. We based these estimates on the workload hours and cost for processing permits for new sources of non-GHG emissions, which we derived from labor and cost information from the existing ICRs for PSD programs. The ICRs show that permitting authorities expend 301 hours to permit a new or modified industrial source. For more detail on information used from the PSD ICR for this evaluation, please refer to the docket for this rulemaking.

We then made assumptions for number of workload hours and costs for new sources of GHG emissions. We assumed that permitting new industrial GHG sources that emit in excess of the 250-tpy threshold would be of comparable complexity to permitting non-GHG emitting industrial sources that are subject to PSD. Thus, for these sources, we assumed that permitting authorities would expend the same number of workload hours and costs, on a per-permit basis, as they do for non-GHG emitting industrial sources. On the other hand, for commercial and residential GHG sources that emit GHGs above the 250-tpy threshold (and as a result would be subject to the requirements of the PSD permitting program at this threshold level), we assumed that the workload hours and cost for permitting these sources would be significantly less than—only 20 percent of—the hours and cost necessary to prepare and issue initial PSD permits or permit modifications for industrial GHG sources. This 20-percent estimate amounts to 60 hours of permitting authority time per residential or commercial permit.

Based on these assumptions, the additional annual permitting burden for permitting authorities, on a national basis, is estimated to be 3.3 million hours at a cost of $257 million to include all GHG emitters above the 250-tpy threshold.

In addition to conducting our burden analysis, we also reviewed summary information from State and local air permitting agencies regarding additional resources and burden considerations if GHG sources that emit above the 100/250-tpy thresholds were subjected to the PSD and title V programs. This information covered 43 State and local permitting agencies, representing programs from different regions of the country and various permitting program sizes (in terms of geographic and source population coverage). A summary of this information can be found in the docket for this rulemaking.[11] This information showed significant burdens projected by permitting agencies with adding sources of GHG emissions in terms of staffing, budget, and other associated resource needs. Importantly, the agencies based their analysis on the assumption that, for purposes of determining whether a source is major, its emissions would be calculated on an actual emissions (''actuals'') basis, and not on a PTE basis. On an actuals basis, the agencies estimated a 10-fold increase in the number of permits.

Specifically, the agencies estimated that:

- Assuming, again, that number of permits was to increase by 10-fold (based on actual emissions), the resulting workload would require an average of 12 more FTEs per permitting authority at an estimated cost of $1 million/year;
- Without the additional FTEs, the average processing time for a permit would increase to 3 years, which is three times the current average processing time;
- Permitting authorities would need 2 years on average to add the necessary staff;
- Permitting authorities would also need, on average, eight additional enforcement and judicial FTEs;
- Ninety percent of the permitting agencies indicated that their staff would need training in all aspects of permitting for sources of GHG emissions; and
- A quarter of the permitting agencies reported that they were currently under a hiring freeze.

It is important to reiterate that the State and local permitting information on burden was based on the number of additional facilities subject to PSD because their emissions of GHGs exceed the 100/250-tpy thresholds at actual emissions rates, not PTE-based emissions rates. However, the PSD applicability requirements are based on PTE. By adjusting the increase in number of permits to account for GHG sources that exceed the 100/250-tpy applicability thresholds based on their PTE emissions, EPA estimated a 140-fold increase in numbers of PSD permits, much more than the 10-fold increase estimated by the States based on actual emissions.

The GHG threshold analyses used to identify the number of facilities that would be affected at current PSD permitting thresholds, and which is also used later in Section VIII for evaluating

[9] In light of time and resource constraints, we did not calculate the additional administrative burden and cost of including in the PSD program sources that emit between 100 tpy and 250 tpy and that are among the 28 source categories identified in CAA section 169(l). Including these sources in the calculation would increase the administrative burdens and costs of implementing PSD at the statutory thresholds.

[10] ''Summary of ICR-based Data Used to Estimate Avoided Burden and Evaluate Resource Requirements at Alternative GHG Permitting Thresholds;'' Prepared by EPA Staff; August 2009.

[11] ''NACAA Summary on Permitting GHGs Under the Clean Air Act''; Memorandum from Mary Stewart Douglas, National Association of Clean Air Agencies to Juan Santiago, EPA/OAQPS, September 3, 2009.

alternative thresholds, are based on the PTE of GHG sources. PTE is defined as the maximum capacity of a stationary source to emit a pollutant under its physical and operational design, including certain legal limitations, for example, on emissions or hours of operation. PSD and title V programs both use PTE for defining major sources. Our threshold analyses begin with actual emissions estimates, but we then adjust the numbers upward to account for potential-to-emit. PTE adjustments for industrial sources are generally based on industry-specific capacity utilization factors, while those used for commercial and residential sources are based on general sector-based information on heating equipment and appliance usage in these sectors. While these PTE adjustments are important for estimating affected facilities in all sectors, they are a particularly relevant concern for determining the number of facilities in the commercial and residential sector that may be affected, where CO_2 emissions are primarily due to space heating/appliance usage and combustion units are likely to be used at levels well below constant operation at maximum capacity. For example, our PTE adjustment for commercial and residential sources resulted in an upwards adjustment ranging from 85 to 90 percent in emissions from their actual emission values. The basis for our PTE adjustments is described in the ''Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation'' found in the docket for this proposal. We ask for specific comment on the reasonableness of these PTE adjustments as they apply to the different sectors and source categories, in particular, the commercial and residential sectors where there is limited information available on equipment capacity utilization.

There are multiple sources of uncertainty in our approaches for estimating emissions, and thus for estimating numbers of sources. For example, the PTE adjustment factors just described may overstate or understate the maximum emissions from sources particularly for the commercial and residential sectors. In addition, there are inherent uncertainties in developing source counts from nationally aggregated statistics, as was done for the estimates for commercial and residential sources which rely on the allocation of national level statistics for energy consumption. The allocation factors we used, based on U.S. Energy Information Administration statistical sampling procedures, are likely the best available to estimate the population of residential and commercial sources exceeding different GHG thresholds. Again, these uncertainties may result in either overestimates or underestimates. The uncertainty is less for industrial categories, where we generally utilized facility-based methodologies, but because it was necessary to use varying methodologies for different source types, as described in the Technical Support Document, the uncertainties will not be uniform across all categories. We request comment on all aspects of our threshold analysis, possible sources of error, suggestions for reducing uncertainties, and alternate approaches to estimating emissions from commercial and residential sources.

B. Title V Implications

The triggering of title V requirements for GHG would result in administrative burdens that stem from sources' obligation to apply for permits. These obligations apply differently depending on whether the source already has a title V permit. Most significant are the more than six million sources of GHGs that would become newly subject to title V requirements because they exceed the 100-tpy threshold for GHG but did not for previously regulated pollutants. Although there are generally not applicable requirements for GHGs that apply to such sources, these six million sources would be required to submit a title V permit application within 1 year. Permitting authorities would need to issue these permits within 18 months of receipt of a complete application, and these permits would need to include any requirements for non-GHGs that may apply to the source, such as provisions of an applicable SIP. For any such requirements, permitting authorities would also need to develop terms addressing the various compliance assurance requirements of title V, including monitoring, deviation reporting, six-month monitoring reports, and annual compliance certifications.

Adding to the burden described above would be the burden to add GHG terms to the 14,700 existing title V permits. While, in general, existing title V permits would not immediately need to be revised or reopened to incorporate GHG (because as noted above, there are generally not applicable requirements for GHGs that apply to such sources), permitting authorities may face burdens to update existing title V permits for GHG under two possible scenarios: (1) EPA promulgates or approves any applicable requirements for GHGs that would apply to such a source, which would generally require a permit reopening or renewal application, or (2) the source makes a change that would result in an applicable requirement for GHGs to newly apply to the source, such as PSD review, which would generally require an application for a permit revision. Permitting authorities will also need to process permit renewal applications, generally on a 5-year cycle, and such renewals would need to assure that the permit properly addresses GHG. Finally they would have to process title V applications for new sources (including all the PSD sources previously discussed).

Obviously, this massive influx of permit applications would overwhelm permitting authorities' administrative resources. Indeed, permitting authorities report that they currently are having difficulty keeping up with their existing permit workloads. The Title V Operating Permits System database, which tracks permit issuance, confirms that issuance of many permits is already delayed. By increasing the volume of permits by over 400 times, the administrative burden would be unmanageable.

As with PSD, we have quantified the extent of the administrative problem that would result in workload hours and cost on the basis of information concerning hours and costs for processing existing title V permits that is indicated on ICRs. However, we recognize that more than 97 percent of these new sources would be commercial and residential sources. We estimate that for permitting authorities, the average new commercial or residential permit would require 43 hours to process, which is 10 percent of the time needed for the average new industrial permit. For an average existing permit, which permitting authorities would need to process through procedures for significant revisions and permit renewals, adding GHG emissions to the permit would result in, we estimate, 9 additional hours of processing time, which is 10 percent of the amount of time currently necessary for processing existing permits. We estimate that the total nationwide additional burden for permitting authorities for title V permits from adding GHG emissions at the 100-tpy threshold would be 340 million hours, which would cost over $15 billion.

As noted in this preamble's discussion of PSD burdens, we also reviewed summary information from State and local permitting agencies, which showed significant burdens associated with adding GHGs in their title V programs in terms of staffing, budget, and other associated resource

needs.[12] Again, note that the permitting agencies based their estimates on numbers of permits that would be required from sources subject to the 100-tpy title V applicability threshold on an actuals–not PTE–basis. Based on that level, the agencies assumed a 40-fold increase in numbers of permits, and estimated that:

- The resulting workload would require an average of 57 more FTEs per permitting agency at an estimated cost of $4.6 million/year;
- Without the additional FTEs, the average processing time for a permit would increase to almost 10 years, which is 20 times the current average permit processing time;
- Permitting authorities would need 2 years on average to add the necessary staff;
- On average, permitting authorities would need 29 additional enforcement and judicial staff;
- Eighty percent of the permitting authorities indicated that their staff would need training in all aspects of permitting for sources of GHG emissions; and
- A quarter of the permitting authorities reported that they were currently under a hiring freeze.

It is important to reiterate that, as with PSD, the State and local information on projected permitting burden is based on the number of additional facilities subject to title V because their emissions of GHGs exceed the 100-tpy thresholds at actual emissions rates, not the PTE-based emissions rates. However, the title V applicability requirements are based on PTE. As noted elsewhere in this preamble, the State and local agencies estimated a 40-fold increase in numbers of title V permits based on the amount of GHG sources' actual emissions. By adjusting the summary estimates provided by the State and local agencies to account for GHG sources that exceed the 100-tpy threshold based on their PTE emissions, EPA estimated that the average permitting authority would need 570 more FTEs to support its title V permitting program.

C. ANPR Comments

We examined the ANPR comments received for further information on the additional administrative burdens that permitting programs would carry if PSD requirements for sources of GHG emissions were triggered at the current 100/250-tpy thresholds and title V requirements were triggered at the current 100-tpy threshold. Most industry stakeholders who commented on the ANPR believe that triggering title V and PSD applicability for GHG emissions sources would be disastrous and that a regulatory gridlock would ensue. Many of these industry commenters agreed with the U.S. Chamber of Commerce's study[13] which found that regulating GHGs under the CAA would cause 1,000,000 commercial buildings, nearly 200,000 manufacturing operations, and about 20,000 large farms to become CAA-regulated stationary sources. In fact, most of the industry commenters believed that these estimates underestimated the impacts. Commenters expressed that the implications of all these sources becoming CAA-regulated stationary sources would cause a large permitting backlog, as States do not have the staff or training to take on such a large burden. In addition, commenters stressed that many of these sources have never needed an air permit before and would have to obtain basic knowledge of the permitting regulations and how to comply with them, which would also impose more burdens on the permitting authorities. Many of the new sources would be small emitters not previously regulated under the CAA.

VI. What is the legal rationale for this proposed action?

This section of the preamble discusses the legal rationale for phasing in the applicability thresholds for PSD and title V purposes as proposed, which are two doctrines that courts have relied on in interpreting and applying statutory requirements: The ''absurd results'' doctrine and the ''administrative necessity'' doctrine. These doctrines are related, apply in this case because of the same factual circumstances, and justify the same application—that is, the phased approach—of the PSD and title V applicability provisions. But they are independent justifications, and therefore will be discussed independently.

A. ''Absurd Results'' Doctrine

This proposed action establishing the first phase of the PSD and title V applicability thresholds, in lieu of applying the statutory 100/250 tpy thresholds literally for GHG sources, is supported by a judicial doctrine that may be termed the ''absurd results'' doctrine. Applying the threshold provisions literally for the period immediately after PSD and title V are triggered for GHG emissions would lead to results that contravene congressional intent and, in fact, undermine Congress's purposes for both permitting programs.

1. Overview

As discussed in detail below, the courts are reluctant to invoke this doctrine precisely because it entails departing from the literal application of statutory provisions, but they nevertheless do so when the literal application produces results that are inconsistent with other statutory provisions, run contrary to expressed congressional intent or actually undermine congressional intent, or are otherwise so illogical or contrary to sensible policy as to be beyond anything that Congress could reasonably have intended. This is one of the rare cases in which the doctrine applies because the extraordinary increases in PSD and title V permit applications that would result from a literal application of the 100/250 tpy threshold requirements would, at least during the near term—until EPA and the permitting authorities can develop streamlining methods and ramp up resources—extensively disrupt the two permitting programs and impose undue regulatory burdens in the aggregate on the sources newly subject to PSD and title V permit requirements. These results would create tensions with other explicit requirements of the PSD and title V provisions, run contrary to expressed congressional intent for the PSD and title V provisions, and, in fact, severely undermine both programs.

The applicability of the absurd results legal doctrine to this proposal should be reviewed with EPA's proposed action in mind: EPA proposes to establish a process for implementing the PSD and title V applicability requirements, including a first phase that would consist of establishing the specified thresholds and vigorously developing streamlining methods; then, after 5 years, preparing an assessment; and then, by the sixth year, promulgating a rulemaking for further action. In addition, during this first phase, we expect the permitting authorities to ramp up resources for permit issuance.

With respect to PSD, a literal application of the applicability thresholds in CAA sections 165(a)(1) and 169(2)(C) of 100 or 250 tpy for GHG emitters would create significant tensions with two other PSD provisions during at least the first phase in period after the triggering of PSD applicability by the light-duty vehicle rule, and before the development of streamlining

[12] ''NACAA Summary on Permitting GHGs Under the Clean Air Act''; Memorandum from Mary Stewart Douglas, National Association of Clean Air Agencies to Juan Santiago, EPA/OAQPS, September 3, 2009.

[13] ''A Regulatory Burden: The Compliance Dimension of Regulating CO_2 as a Pollutant''; Prepared for the U.S. Chamber of Commerce; September 2008. *See* Docket ID No. EPA–HQ–OAR–2008–0318–0402.1.

methods and the addition of permitting resources. First, a literal application would render it impossible for permitting authorities to meet the requirement in CAA section 165(c) to process permit applications within 12 months. During this initial period, the number of permit applications would increase by 150-fold, an unprecedented increase that would far exceed administrative resources. Permitting authorities have estimated that it would take 10 years to process a PSD permit application, on average, and the resulting backlog would affect the permit applications for all sources, not just the GHG emitters.

This backlog would grow by tens of thousands each year following the triggering of PSD applicability—again, for at least the first few years—and thereby undermine a second express PSD provision, section 160(3). This provision describes, as one of the purposes of the PSD program, ''to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.'' Because the PSD requirements apply on a preconstruction basis—that is, they require permits before sources may construct or modify—tens of thousands of sources seeking to construct or modify during at least the first few years after the triggering of PSD would instead face many years of delay. This delay would impede economic growth by precluding any type of source—whether it emits GHGs or not—from constructing or modifying for years after its business plan contemplates.

In addition, a literal application of the 100/250 tpy threshold in the PSD provisions during at least the first few years after PSD is triggered for GHG emitters would be contrary to, and in fact would undermine, expressed congressional intent in several important ways: As just noted, it would undermine congressional intent to authorize economic growth, albeit with environmental safeguards. In addition, the PSD requirements entail significant regulatory costs to affected sources because the sources must identify and implement BACT on a source-specific basis. 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. In enacting the PSD requirements during the 1977 Clean Air Act Amendments, Congress, focused as it was on sources of conventional pollutants and not global warming pollutants, expected that the 100/250 tpy applicability thresholds would limit PSD to larger sources. But because very small sources emit CO_2 in quantities as low as 100/250 tpy, 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 permitting authorities' capacity to process those applications. Thus, a literal application of the 100/250 tpy thresholds would sweep into the PSD program tens of thousands of smaller sources that Congress did not intend to include, and the resulting strain on administrative resources would preclude the hundreds of larger sources that Congress did intend to be subject to the program from obtaining permits at least for an initial period. In time, the development of streamlining methods and the ramping up of administrative resources would bridge the gap between the literal language and congressional intent, and make it possible to expand the PSD program in a sensible manner that would make sense from the standpoint of the sources and the permitting authorities. But at least for the initial period, these circumstances qualify as ''absurd results'' that merit avoiding a literal application of the threshold provision.

We reach similar conclusions for title V. A literal application of the applicability threshold in CAA sections 502(a), 501(2)(B), and 302(j) of 100 tpy for GHG sources would bring some 6.1 million sources into the title V program. For at least the first few years after title V is triggered, until streamlining methods are developed and administrative resources are ramped up, this would create significant tensions with other title V provisions. The extraordinary number of permit applications would render it impossible for permitting authorities to meet the requirements of section 503(c) to process title V permit applications within 18 months. Further, this number of permit applications would severely disrupt implementation of the rest of the carefully calibrated set of statutory requirements that Congress set out in title V. These requirements set out specific—and brief—time frames for EPA review and for public participation, and they simply could not be complied with at least initially for this number of permit applications.

A literal application of the 100 tpy threshold would also be inconsistent with express congressional intent concerning title V. The statutory provisions by their terms, supported by the legislative history, indicate that Congress designed the title V program to promote compliance by compiling into a single document all of the requirements applicable to the source under the Act. The legislative history indicates that some in Congress expected the title V permit program to approximate the size of the Federal water permit program. However, applying the 100 tpy threshold for GHG emitters would lead to permit applications in numbers—some 6.1 million—that are almost 100 times greater than what Congress expected. The large permit backlog and inevitable multi-year delays in permit issuance that would ensue would thwart Congress's purposes in enacting title V to promote compliance with CAA requirements. As with PSD, this disruption would affect all sources covered by the provisions, whether or not they emit GHGs.

Moreover, 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. Because Congress designed title V to require permits to address applicable requirements, and because Congress envisioned a much smaller program, immediately sweeping these sources into the program is contrary to congressional intent. Yet, their inclusion in the program would overwhelm administrative resources for at least an initial period, until streamlining methods are developed, and preclude the timely issuance and reissuance of permits to sources that Congress clearly contemplated should be included in the program. Thus, a literal application of the title V threshold provisions would bring in millions of sources that Congress did not intend to cover, and thereby interfere with the administration of the program for the thousands of sources that Congress did intend to cover. As with PSD, in time, the development of streamlining methods and the ramping up of administrative resources would bridge the gap between the literal language and congressional intent, and make it possible to include more of these sources in the title V program in a manner that makes sense for both the permittees and the permitters. But for the initial period, as with PSD, these circumstances qualify as ''absurd results'' that merit avoiding a literal application of the threshold provisions.

In the cases that apply the ''absurd results'' doctrine, the courts go on to apply the statutory provisions in question in a manner that—while not in

accordance with their literal reading—effectuates congressional intent as much as possible. We believe that the process we propose in this notice, which includes a first phase that establishes thresholds at the specified levels while allowing time to develop streamlining approaches and ramp up resources, followed by a study and further rulemaking, is consistent with this caselaw.

2. Tailoring Approach

In discussing the absurd results caselaw and its applicability in this case, it is important to keep in mind EPA's proposed action. As discussed in detail elsewhere in this notice, EPA proposes a phased plan designed to achieve full compliance with the PSD and title V threshold requirements. The first phase entails the establishment of applicability thresholds at the 25,000 tpy CO_2e levels, and significance levels at between 10,000 and 25,000 tpy CO_2e. In addition, the first phase entails development of streamlining methods—including potential revisions to the definition of potential to emit, general permits, and presumptive BACT—that allow us to craft the application of PSD and title V in ways that are achievable and effectively balance the burdens on both the permitting authorities and the regulated community with the reductions achievable. The first phase also includes the collection of information and further assessments in a report, to be completed within 5 years, and culminates in a rulemaking to be promulgated by the sixth year that will establish further action.

3. PSD and Title V Threshold Provisions

Several PSD and title V provisions are relevant for present purposes because of the specific requirements that they establish and the window that they provide into congressional intent. These provisions start with the PSD and title V applicability provisions. For PSD purposes, the key applicability provisions are found in CAA sections 165(a) and 169(1), which identify the new sources subject to PSD, and CAA § 111(a)(4), which describes the modifications of existing sources that are subject to PSD. CAA section 165(a), 42 U.S.C. 7475, provides:

> No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
>
> (1) A permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;
>
> (2) The proposed permit has been subject to a review in accordance with this section * * *, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations; * * *
>
> (4) The proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility * * *.

The term ''major emitting facility'' is defined, under CAA § 169(1) to include:

> * * * stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from [28 listed] types of stationary sources. * * * Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

The thresholds in CAA section 169(1) of 100-tpy for sources in the 28 listed categories and 250-tpy for all other sources may be referred to as the 100/250-tpy thresholds.

As for modification of existing sources, CAA section 169(1)(C) provides that the term ''construction,'' as used in CAA section 165(a) (the PSD applicability section) ''includes the modification (as defined in section 111(a)(4)) of any source or facility.'' Section 111(a)(4), in turn, provides:

> The term ''modification'' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

As interpreted by EPA regulations, these provisions, taken together, provide that new stationary sources are subject to PSD if they emit at the 100/250-tpy thresholds air pollutants that are subject to EPA regulation, and that existing stationary sources that emit such air pollutants at the 100/250-tpy thresholds are subject to PSD if they undertake a physical or operational change that increases their emissions of such air pollutants by any amount.

For title V purposes, the key applicability provisions are found in CAA sections 502(a), 501(2)(B), and 302(j). These provisions provide that it is unlawful for any person to operate a ''major source'' without a title V permit, section 502(a), and define a ''major source'' as ''any major stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.'' CAA section 501(2)(B) and section 302(j). As noted elsewhere, these provisions, taken together and as interpreted by EPA, provide that stationary sources are subject to title V if they emit at the 100-tpy threshold air pollutants that are subject to EPA regulation.

Other provisions of particular relevance are the requirements in the PSD and title V programs for timely issuance of permits. For PSD, the permitting authority must ''grant[ ] or den[y] [any completed permit application] not later than one year after the date of filing of such completed application.'' CAA § 165(c). For title V, ''the permitting authority shall approve or disapprove a completed application * * * and shall issue or deny the permit, within 18 months after the date of receipt thereof * * *.'' CAA section 503(c). Title V goes on to include several provisions designed to support this 18-month requirement. First, the permitting authority must develop ''adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice * * * and for expeditious review of permit actions, including * * * judicial review in State court of the final permit action by [specified persons].'' CAA section 502(b)(6). Second, title V includes a ''hammer'' provision designed to reinforce timely permit issuance, which is that the permitting authority's program must include:

> To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in [CAA § 503] * * *) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay. CAA § 502(b)(7).

Third, the permit program must include ''[a]uthority and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public [certain permit-related documents]''. CAA section 502(b)(8).

In addition, PSD includes a set of provisions that specifically state ''the purposes of [the PSD program],'' which are to balance environmental protection and growth. CAA § 160. One of the purposes, in subsection (1), is specifically ''to protect public health and welfare,'' and another, in subsection

(3), is ''to insure that economic growth will occur in a manner consistent with the preservations of existing clean air resources.'' Title V does not have a parallel set of provisions describing its purpose, but it is clear from its provisions and its legislative history, discussed below, that its key goal is to gather into a single document the Clean Air Act requirements applicable to a source and impose conditions necessary to assure compliance with such requirements, and thereby promote the enforceability of CAA requirements applicable to the covered sources. CAA § 503(b)(1) requires that the source's permit application must assure ''compl[iance] with all applicable requirements'' of the CAA, and § 504(a) requires that ''[e]ach permit issued under [title V] shall include * * * such * * * conditions as are necessary to assure compliance with applicable requirements of [the Clean Air Act].'' *See* H.R. Rep. No. 101–490, at 351 (1990) (''It should be emphasized that the operating permit to be issued under this title is intended by the Administration to be the single document or source of all of the requirements under the Act applicable to the source.'').

In addition, both PSD and title V include detailed procedures for implementation. The PSD provisions most relevant for sources of GHG are that the proposed permit for each source must be the subject of a public hearing with opportunity for interested persons to comment, CAA § 165(a)(2), and each source must be subject to best available control technology, as determined by the permitting authority on a source-by-source basis, CAA § 165(a)(4), 169(3). Title V includes a comprehensive and finely detailed implementation schedule that mandates timely issuance of permits while building in EPA and affected State review, public participation, and timely compliance by the source with reporting requirements. Following the date that sources become subject to title V, they have 1 year to submit their permit applications. CAA § 503(c). As noted above, the permitting authority then has 18 months to issue or deny the permit. CAA § 503(c). Permitting authorities must provide an opportunity for public comment and a hearing. CAA § 502(b)(6). If the permitting authority proposes to issue the permit, the permitting authority must submit the permit to EPA, and notify affected States, for review. CAA § 505(a)(1). EPA then has 45 days to review the permit and, if EPA deems it appropriate, to object to the permit. CAA § 505(b)(1). If EPA does object, then the permitting authority must, within 90 days, revise it to meet the objections, or else EPA becomes required to issue or deny the permit. CAA § 505(c). If EPA does not object, then, within 60 days of the close of the 45-day review period, any person may petition EPA to object, and EPA must grant or deny the petition within 60 days. CAA § 505(b)(2). If a permit is issued, it must include a permit compliance plan, under which the permittee must ''submit progress reports to the permitting authority no less frequently than every 6 months,'' and must ''periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and [ ] promptly report any deviations from permit requirements to the permitting authority.'' CAA § 503(b).

4. ''Absurd Results'' Doctrine

The familiar *Chevron* two-step analysis provides the starting point for EPA's interpretation of these statutory provisions. Under *Chevron* step 1, an agency must determine whether Congress's intent in a particular provision on a particular question is clear; if so, then the agency must follow that intent. If the intent of a provision is not clear, then the agency may, under step 2, fashion a reasonable interpretation of the provision. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842–43 (1984).

Here, the applicability provisions for PSD and title V are clear on their face. However, the U.S. Supreme Court has held that the plain meaning of a statutory provision is not conclusive ''in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters' * * * [in which case] the intention of the drafters, rather than the strict language, controls.'' *Ron Pair*, 489 U.S. at 242 (citations omitted).[14]

In describing these cases as ''rare,'' the U.S. Supreme Court seemed to be referring to the small percentage of statutory-construction cases that are decided on the basis of the doctrine. The D.C. Circuit, in surveying the doctrine over more than a century of jurisprudence, characterized the body of law in absolute numbers as comprising ''legions of court decisions.'' *In re Franklyn C. Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991). The U.S. Supreme Court cases include, among others, *Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 132–33 (2004) (''any entity'' includes private but not public entities); *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 542–45 (2002) (''implying a narrow interpretation of * * * 'any claim asserted' so as to exclude certain claims dismissed on Eleventh Amendment grounds''); *Ron Pair*, 48 U.S. at 242; *Green* v. *Bock Laundry Machine Company*, 490 U.S. 504 (1989) (provision in Federal Rule of Evidence that protects ''the defendant'' against potentially prejudicial evidence, but not the plaintiff, refers to only criminal, and not civil, defendants); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 23–24 (1976) (prohibition in Federal Water Pollution Control Act against discharging into navigable waters ''pollutants,'' which are defined to include ''radioactive materials,'' does not apply to three specific types of radioactive materials); *Lynch* v. *Overholser, 369 U.S. 705, 710, (1962)* (statutory construction is not confined to the ''bare words of a statute''); *Utah Junk Co.* v. *Porter, 328 U.S. 39, 44 (1946)* (''literalness may strangle meaning''); *Markham* v. *Cabell, 326 U.S. 404, 409* (1945) (''The policy as well as the letter of the law is a guide to decision.''); *United States* v. *American Trucking Associations, Inc.* 310 U.S. 534 (1940) (the term ''employees'' in the Federal Motor Carrier Act, is limited to employees whose activities affect safety); *C.V. Sorrels* v. *U.S.*, 287 U.S. 435, 446–49 (1932) (provisions of National Prohibition Act that criminalize possessing and selling liquor do not apply if defendant is entrapped; Court declines to apply the ''letter of the statute'' because doing so ''in the circumstances under consideration is foreign to its purpose''); *Holy Trinity Church* v. *U.S.*, 143 U.S. 457, 516–17 (1892) (''any alien'' does not include a foreign pastor; Court stated, ''It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers * * * If a literal construction of the words be absurd, the Act must be construed as to avoid the absurdity''); *United States* v. *Kirby, 7*

[14] Judge Learned Hand's formulation of the doctrine is often quoted in the caselaw:

> Of course, it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing. * * * But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. *Markham*, 148 F.2d 737, 738 (2d Cir.), aff'd 326 U.S. 404 (1945). See *Giuseppi* v. *Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (opinion by Judge Hand) (''There is no surer way to misread any document than to read it literally'').

Wall, 482, 486, 19 L.Ed. 278 (1868) (the statute punishing obstruction of the mails is not to be applied to obstruction for the lawful purpose of arresting a mail carrier indicted for murder).

The D.C. Circuit has also handed down several decisions that applied the absurd results doctrine to avoid a literal interpretation or application of statutory provisions. *See Buffalo Crushed Stone, Inc.* v. *Surface Transportation Board*, 194 F.3d 125, 129–30 (D.C. Cir. 1999) (regulation of Surface Transportation Board providing that if a notice of exemption ''contains false or misleading information, the use of the exemption is void *ab initio*'' does not apply to a notice containing false information when declaring the notice void *ab initio* would undermine the goals of the governing statute; a conflict between the ''literal application of statutory language'' and maintaining the integrity of the regulatory scheme should be resolved by construing the text in accordance with its purpose); *U.S.* v. *Stewart*, 104 F.3d 1377, 1388 (D.C. Cir. 1997) *Environmental Defense Fund* v. *EPA*, 82 F.3d 451, 468–69 (D.C. Cir. 1996) (although Clean Air Act requires that a Federal action conform to the State implementation plan that is currently in place, EPA may instead require conformity to a revised implementation plan that State commits to develop; ''[t]his is one of those rare cases * * * [that] requires a more flexible, purpose-oriented interpretation if we are to avoid 'absurd or futile results.' ''); *In re Nofziger*, 925 F.2d 428, 434–35 (D.C. Cir. 1991) (provision authorizing payment of attorney fees to the subject of an investigation conducted by an independent counsel of the Department of Justice only if ''no indictment is brought'' against such individual does not preclude payment of attorney fees when an indictment is brought but is determined to be invalid).

To determine whether ''the intentions of the drafters'' differ from the result produced from ''literal application'' of the statutory provisions in question, the courts may examine the overall context of the statutory provisions, including whether there are related statutory provisions that either conflict or are consistent with that interpretation,[15] and including whether there is legislative history that exposes what the legislature meant by the terms in question. In addition, the courts may examine whether a literal application of the provisions produces a result that the courts characterize variously as absurd, futile, strange, or indeterminate, and therefore so illogical or otherwise contrary to sensible public policy as to be beyond anything Congress would reasonably have intended. After concluding this examination, the courts uphold an application of the provisions that, albeit not the literal application, is one that is nevertheless as consistent with congressional intent as possible.

The U.S. Supreme Court applied the absurd results doctrine in *Green* v. *Bock Laundry Machine Company*, 490 U.S. 504 (1989). There, the Court considered Federal Rule of Evidence 609(a), which provides:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted * * * but only if the crime (1) [is of a specified type] and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the *defendant*.

(Emphasis added.) The Court recognized that read literally, Rule 609(a) applies in both criminal and civil litigation and gives an advantage to defendants. Specifically, the rule extends to both the criminal and civil defendants the protection of weighing the probative value of evidence of certain crimes against its prejudicial effect, but as for plaintiffs, the rule requires that evidence of those crimes be admitted without weighing against prejudicial effect. The Court found that for criminal litigation, this result makes sense because it is consistent with the greater protections generally afforded to defendants. However, for civil litigation, the Court found that this ''literal reading would compel an odd result'' because, among other things, civil defendants are not accorded greater protections than civil plaintiffs and, in any event, whether a litigant is designated plaintiff or defendant often is happenstance. The Court emphasized that ''[n]o matter how plain the text of the Rule may be,'' it could not accept this result, and concluded that ''as far as civil trials are concerned, Rule 609(a)(1) 'can't mean what it says.' '' 490 U.S. at 509–11 (citations omitted). The Court reviewed the legislative history, and concluded that notwithstanding the plain language, Congress ''intended that only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1).'' *Id.* at 523–24.

In cases in which the ''absurd results'' doctrine of statutory constructions authorizes an agency to depart from the literal meaning of the statute, the agency must do so in as limited a manner as possible to effectuate underlying congressional intent. As the D.C. Circuit has stated:

> The rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the ''unambiguously expressed intent of Congress,'' * * * and thus to overcome the first step of the *Chevron* analysis. But the agency does not thereby obtain a license to rewrite the statute. When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent.

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

5. PSD and Title V Applicability Requirements

The plain meaning of the PSD applicability provisions in CAA §§ 165(a)(1) and 169(1) is clear that once PSD is triggered for GHG emissions, a source will be subject to PSD if it either belongs to one of 28 specifically identified source categories and ''emit[s], or ha[s] the potential to emit, one hundred tons per year or more of any air pollutant,'' including GHGs, or does not belong to one of those source categories and has ''the potential to emit two hundred and fifty tons per year or more of any air pollutant,'' including GHGs. Similarly, the plain meaning of the title V applicability requirements in CAA §§ 501(2)(B) and 302(j) is clear that once the title V requirements are triggered, they would apply to a source that ''directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant,'' including GHGs.

As described in detail elsewhere, applying the plain meaning of these provisions once PSD and title V are triggered for GHG emissions would impose PSD and title V permitting requirements on an extraordinarily large number of sources: The number of sources subject to PSD permits would increase from less than 300 per year to some 41,000 per year, and the number of sources subject to the title V requirements would grow from less than 14,000 to some 6.1 million. For at least an initial period of time, before permitting authorities could develop streamlining mechanisms, these obligations would have severe effects. From the permitting authorities' standpoint, the number of permit applications would far exceed their

[15] A related line of cases addresses statutory provisions that directly, on their face, conflict with other statutory provisions. In these cases, as with the ''absurd result'' cases, the courts may decline to interpret literally the statutory provisions in question, and instead interpret them to give as much effect as possible to all of the relevant provisions. *See, e.g., Mountain States Telephone and Telegraph Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985); *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480 (1947); *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844 (D.C. Cir. 1977).

administrative capacity, and would inevitably result in delays in issuance of permits to all sources—whether emitting conventional pollutants or GHGs—that would be measured in many years. From the sources' standpoints, thousands of sources that are quite small and that have never been confronted with CAA obligations would incur the expenses of PSD permitting requirements, including, most importantly, indentifying and developing BACT controls on a source-by-source basis. As for title V, millions of sources would be required to submit permit applications that meet title V requirements, even though the great majority of them would not be subject to any applicable CAA requirements. During this initial period, permitting authorities could develop streamlining approaches and ramp up administrative resources so that afterwards, they would be better able to accommodate the large numbers of permit applications and sources would be better able to comply. But, again, during the initial period, severe problems would ensue.

We believe that these effects of a literal application of the PSD and title V applicability thresholds and their collateral consequences are well beyond anything that Congress envisioned when it drafted the PSD and title V requirements, and indeed undermine both permitting programs. As a result, these effects bring into play the ''absurd results'' doctrine.

a. PSD

(1) Tensions With Other Statutory Requirements

Turning first to PSD, an important indication that Congress would not have intended that the threshold provisions be applied literally under the present circumstances may be found in the tensions that this literal application would create with other PSD provisions. CAA § 165(c) is particularly important in this regard. It requires that the permitting authority grant or deny ''[a]ny completed permit application for a major emitting facility * * * not later than one year after the date of filing of such completed application.'' A literal interpretation of CAA sections 165(a)(1) and 169(1) to apply at the 100/250 tpy levels for GHG sources would render compliance with this provision impossible by requiring far more permit applications than permitting authorities could process under this 12-month deadline, for at least an initial period of time until streamlining methods are developed. As noted elsewhere, States have estimated that the number of PSD permits that would be required under a 100/250 tpy threshold on an actuals basis would result in an average processing time of 10 years.[16]

A literal interpretation of CAA sections 165(a)(1) and 169(1) to apply at the 100/250 tpy levels would also be directly inconsistent with the PSD-purpose provision in CAA § 160, in particular, § 160(3), which is ''to insure that economic growth will occur in a manner consistent with the preservation of existing clear air resources.'' As the legislative history makes clear, Congress enacted the PSD provisions to resolve issues arising when sources of criteria pollutants seek to build or expand in areas with air quality that meets the national ambient air quality standards, but that would deteriorate with the addition of such new or expanded sources. Congress designed the PSD provisions to provide a mechanism for allowing sources to construct or modify in those clean-air areas, but with safeguards that both protected health and welfare, and that also left enough room in the airshed for still more economic growth. *See, e.g.*, H. Rpt. 95–294, 95th Cong., 1st Sess., at 154 (legislation ''not only protect[s] public health and welfare but also assur[es] future air resources will be available for continuing the industrial and energy development so necessary for the growth of the Nation''). Because PSD is a preconstruction requirement, increasing permitting authorities' workload from 300 to 41,000 permits would severely undermine this purpose of facilitating economic growth, at least initially, until permitting authorities can develop streamlining methods and ramp up resources. Each year, many thousands of sources would face multi-year delays in receiving their permits, and as a result, for all practical purposes, they would be forced to place on hold indefinitely their plans to construct or modify.

(2) Inconsistency With Congressional Intent

The legislative history of the PSD provisions—enacted, again, in the 1977 Clean Air Act Amendments—also makes clear that a literal application of the applicability provisions would lead to results that are diametrically inconsistent with Congress's expressed intent. In reviewing the legislative history, it should be borne in mind that Congress was focused on sources of criteria pollutants—primarily sulfur dioxide (SO_2), particulate matter, nitrogen oxides (NO_X), and carbon monoxide (CO)—and not GHG emissions. This focus stems from the basic purpose of the PSD program, which is to safeguard maintenance of the NAAQS, combined with the limited awareness at that time of the problem of climate change. *See* S 95–127 (95th Cong., 1st Sess.), at 27.

Congress designed the PSD provisions to impose significant regulatory requirements, on a source-by-source basis, to identify and implement BACT and, for criteria pollutant, to also undertake certain studies. Congress was well aware that because these requirements are individualized to the source, they are expensive. Accordingly, Congress designed the applicability provisions to apply these requirements to industrial sources of a certain type and a certain size—sources within 28 specified source categories and that emit at least 100 tpy—as well as all other sources that emit at least 250 tpy, and, by the same token, to exempt other sources from these requirements. 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 entails to the larger sources in certain industries. The D.C. Circuit has had occasion, in *Alabama Power,* to acknowledge this legislative history: ''Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air.'' *Alabama Power,* 636 F.2d at 353. The Court added, ''Though the costs of compliance with [the PSD] requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1).''. *Id.* at 354.

Although Congress required that CAA requirements generally apply to ''major emitting facilities,'' defined as any source that emits or has the potential to emit 100 tpy of any pollutant, Congress applied PSD to only sources at 100 tpy or higher in 28 specified industrial source categories, and at 250 tpy or more in all other source categories. This distinction was deliberate: According to Sen. McClure, Congress selected the 28 source categories after reviewing an EPA study describing 190 industrial source categories. 122 Cong. Rec. 24521 (July 29, 1976) (statement by Sen. McClure).

[16] As noted elsewhere, because the applicability provisions apply on a potential-to-emit basis, as well as an actuals basis, the number of permit applications would be much greater than the permitting authorities assumed, and therefore the processing times would be much longer than 10 years.

Congress also relied on an EPA memorandum that identified the range of industrial categories that EPA regulated under its regulations that constituted the precursor to the statutory PSD program, and listed both the estimated number of new sources constructing each year and the amount of pollution emitted by the ''typical plant'' in the category. The memorandum was prepared by B.J. Steigerwald, Director of the Office of Air Quality Planning and Standards and Roger Strelow, EPA's Assistant Administrator for Air and Waste Management (''Steigerwald-Strelow memorandum). The Steigerwald-Strelow memorandum makes clear that the 100 tpy cut-off for the 28 listed sources categories, and the 250 tpy cut-off for all other sources, was meaningful; that is, there were a large number of sources below those cut-offs that Congress explicitly contemplated would not be included in PSD. *Id.* at 24548–50.

Consistent with this, the legislative history on the Senate side also specifically identified certain source categories that Senators believed should not be covered by PSD. The Senate bill language limited PSD to sources of 100 tpy or more in 28 listed source categories, and to any other categories that the Administrator might add. Sen. Muskie stated that the Senate bill excluded ''houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources.'' 123 Cong. Rec. 18021 (June 8, 1977) (statement of Sen. Muskie). Sen. McLure's list of excluded source categories were ''[a] small gasoline jobber, or a heating plant at a community college, [which] could have the potential to emit 100 tons of pollution annually.'' 122 Cong. Rec. 24548–49 (July 29, 1976) (statement of Sen. McClure). The Senate Committee Report included a comparable list, and in describing it, concisely articulated the cost-conscious basis for the line-drawing: ''[the PSD] procedure * * * must include an effective review-and-permit process. Such a process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually.'' S. Rpt. 95–127 at 96–97.

The enacted legislation differs from the Senate bill by replacing the authorization to EPA to include by regulation source categories in addition to the listed 28 source categories with an inclusion of all other sources if they exceed 250 tpy, and with an authorization for the States to exempt hospitals and educational institutions. But Congress's overall intention remains clear, as the D.C. Circuit described in *Alabama Power:.* ''Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air * * * [With respect to] the heating plant operating in a large high school or in a small community college * * * [w]e have no reason to believe that Congress intended to define such obviously minor sources as 'major' for the purposes of the PSD provision.'' [17] 636 F.2d at 353–54. However, applying the 100/250 tpy threshold literally to CO_2 emissions would frustrate congressional intent by subjecting to PSD sources that Congress specifically intended not to include. This occurs simply because although Congress evaluated whether sources should be included in PSD by reference to the amount of the emissions of conventional pollutants, many sources combust fossil fuels for heat or electricity, and the combustion process produces quantities of CO_2 that are far in excess of the sources' quantities of conventional pollutants and, in many cases, Congress's carefully considered 100 and 250 tpy thresholds. As a result, many of the ''typical plant[s]'' identified in the Steigerwald-Strelow memorandum that Congress thought would be excluded from PSD due to the relatively small amounts of their conventional pollutants would in fact be included due to the CO_2emissions from their heating or electricity generating equipment.But the clearest and most important indication that applying the 100/250 thresholds literally in the case of GHG emissions would undermine congressional intent comes in considering the emissions profile of the small-sized boilers. Congress focused closely on identifying which sources with emissions in excess of 100 tpy should not be subject to PSD even though they are subject to CAA requirements generally. But Congress viewed a large set of sources as emitting below 100 tpy and therefore not included in the PSD program and, indeed, not even subject to debate as to whether they should be included in the PSD program. Chief among these sources, in terms of absolute numbers of sources, were small boilers. The Steigerwald-Strelow memorandum identified two categories of these boilers, differentiated by size. The first ranges in size from 10 to 250×10^6 Btu/hr, and has a ''typical plant'' size of 10^7 Btu/hr, with ''BACT emissions from typical plant'' of 53 tpy, and a total of 1,446 sources in the category. The second category ranges in size from 0.3 to 10×10^6 Btu/hr, and has a ''typical plant'' size of 1.3×10^6 Btu/hr, with ''BACT emissions from typical plant'' of 2 tpy, and a total of 11,215 sources in the category. The memorandum discusses these two categories in the context of explaining which source categories exceed a size of 100 tpy—and therefore would be subject to PSD if a 100 tpy threshold were set—by stating, ''Fortunately, most truly small boilers and typical space heating operations would not be covered.'' 122 Cong. Rec. 24549 (July 29, 1976). However, if the CO_2 emissions of these small boilers are considered, then most of them would be subject to PSD. In general, most boilers of these small sizes are fired with natural gas, and a natural gas boiler greater than 0.5×10^6 Btu/hr emits at least 250 tpy CO_2. As a result, the small commercial and residential sources that include these boilers would become subject to PSD, and this would directly contravene Congress's intention to limit PSD to ''industrial plants of significant impact.'' 122 *Cong. Rec.* 24548–49 (statement of Sen. McClure). The legislative history also provides a window into the scope of the program that Congress anticipated and related administrability concerns. According to the Steigerwald-Strelow memorandum, the number of new sources each year whose ''BACT emissions from typical plant'' exceed 100 for the 28 listed source categories and 250 for all other source categories is less than 100 per year. Although the Steigerwald-Strelow memorandum does not attempt to estimate the number of modifications, it appears that based on this information, Congress had reason to expect the total size of the PSD program to be measured in the hundreds of permits each year. A program of this size would be manageable by EPA and the permitting authorities.

The D.C. Circuit based its holding in *Alabama Power* that potential-to-emit for purposes of the applicability thresholds should be defined as

[17] Note that although Congress specifically authorized the States to exempt ''nonprofit health or education institutions'' from the definition of ''major emitting facility,'' this statement by the D.C. Circuit should be taken as the Court's view that Congress did not design PSD to cover sources of the small size described.

emissions at full capacity with implementation of control equipment, in part on its view that with this definition, the number of sources subject to PSD would be manageable:

Though the costs of compliance with section 165 requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1). The numbers of sources that meet these criteria, as we delineate them, are reasonably in line with EPA's administrative capability.

Alabama Power, 636 F.2d at 354 (emphasis added). However, applying the thresholds literally to GHG emissions would increase the size of the PSD program far beyond what Congress had reason to expect and what the D.C. Circuit evidently had in mind. Returning to the Steigerwald-Strelow table, applying the thresholds literally would bring into PSD the great majority of the small boilers constructed each year, which numbered, in total, 12,661. Adding more sources from other source categories, and, most importantly, modifications, indicates that the size of the PSD program would very likely be at least an order of magnitude greater than what Congress intended. At least for an initial period of time, until streamlining methods could be developed, these numbers of sources would be well beyond the ''administrative capability'' that the D.C. Circuit described EPA as having.

(3) Absurd Results

Applying the PSD thresholds to sources of GHG emissions literally results in a PSD program that is so contrary to what Congress had in mind—and that in fact so undermines what Congress attempted to accomplish with the PSD requirements—that it should be avoided under the ''absurd results'' doctrine. As described above, Congress designed the PSD program as a mechanism to allow construction of new sources and expansion of existing sources in areas meeting the NAAQS, but only after those sources, on a source-by-source basis, undertook analyses to demonstrate that their emissions would not significantly deteriorate air quality and implemented controls representing BACT. Recognizing that PSD imposed significant costs on sources, Congress constructed a statutory scheme that it viewed as limiting PSD to large industrial sources that could bear the financial costs and that caused most of the pollution problem. These limits were the 100/250 tpy thresholds. Congress had reason to expect that with these thresholds, the program would approximate the size of the current PSD program, which numbers in the hundreds of sources each year. Throughout its deliberations, Congress focused primarily on emissions of conventional pollutants.

But applying the 100/250 tpy thresholds literally to sources of CO_2 would sweep aside this carefully designed construct by bringing in tens of thousands of sources of a different type and much smaller size than Congress had in mind: Commercial and residential sources whose primary—if not sole—source of emissions is CO_2 from small boilers that primarily provide heat. Moreover, applying the thresholds literally would bring in many additional sources in the source categories Congress expected PSD to apply to, but of a size Congress expected to be below the cut-off. Congress did not intend to apply PSD to these sources because of the expenses that compliance with PSD entails and because Congress did not view these sources as causing a sufficiently great part of the pollution problem. Including these sources would also expand the PSD program to well beyond what Congress had reason to expect, and what permitting authorities can administer.

The administrability problems lead the results of applying the thresholds literally beyond contravening congressional intent and into actually undermining congressional intent. At least for an initial period, until streamlining methods could be developed, the extraordinary number of sources subject to PSD would preclude the permitting authorities from processing permit applications for all sources, including those that Congress intended be subject to PSD. Because PSD is a preconstruction program, those sources would face many years of delay before they could construct or modify, which would undermine congressional intent to allow economic growth in PSD areas. These results are the types of ''absurd results'' from a literal reading of statutory provisions that courts have declined to sanction.

b. Title V

For title V, the application of the absurd results doctrine parallels that of PSD. First, a literal application of the 100 tpy threshold requirement in CAA §§ 502(a), 501(2)(B), and 302(j) would be in tension with a specific CAA requirement, that of CAA § 503(c), which imposes a time limit of 18 months from the date of receipt of the completed permit application for the permitting authority to issue or deny the permit. It would be flatly impossible for permitting authorities to meet this statutory requirement if their workload increases from some 14,000 permits to 6.1 million. Instead, permit applications would face multi-year delays in obtaining their permits.

Moreover, these delays would undermine the overall statutory design that promotes the smooth-running of the permitting process, and the very purpose of the title V program itself. As noted elsewhere, Congress intended through title V to facilitate compliance by establishing an operating permit program that requires the source to combine in a single permit all of its CAA requirements. Congress established a comprehensive process to implement the operating permit program. Through this process, following the date that sources become subject to title V, they have 1 year to submit their permit applications. CAA § 503(c). As noted, the permitting authority then has 18 months to issue or deny the permit. CAA § 503(c). Permitting authorities must provide an opportunity for public comment and a hearing. CAA § 502(b)(6). If the permitting authority proposes to issue the permit, the permitting authority must submit the permit to EPA, and notify affected States, for review. CAA § 505(a)(1). EPA then has 45 days to review the permit and, if EPA deems it appropriate, to object to the permit. CAA § 503(b)(1). If EPA does object, then the permitting authority must, within 90 days, revise it to meet the objections, or else EPA becomes required to issue or deny the permit. CAA § 503(c). If EPA does not object, then, within 60 days of the close of the 45-day review period, any person may petition EPA to object, and EPA must grant or deny the petition within 60 days. This set of applicant, permitting authority, and EPA actions and deadlines establishes the process for the prompt and efficient issuance of operating permits for the appropriate universe of sources.

The legislative history of title V, enacted by Congress in the 1990 CAA Amendments, indicates that Congress expected the provisions to apply to a much smaller set of sources than would become subject at a 100-tpy GHG threshold level. The Senate Committee report noted that under the title V provisions that would be enacted, ''the additional workload in managing the air pollution permit system is estimated to be roughly comparable to the burden that States and EPA have successfully managed under the Clean Water Act[,]'' under which ''some 70,000 sources receive permits, including more than 16,000 major sources.'' S. Rep. 101–228,

at 353. Applying title V to GHG emitters at the 100-tpy threshold would result in approximately 6.1 million sources becoming subject to title V, which is far in excess of the number that Congress contemplated.

Moreover, the great majority of these sources will not be subject to any CAA requirements, so that although they would need to apply for and receive a permit, there would be no applicable requirements to include in the permit and the exercise would not improve compliance. But at least for an initial period, until streamlining methods could be developed, the extraordinary numbers of these sources would sweep aside Congress' carefully constructed program, with its multi-step process and deadlines of as short as 45 days—and instead, backlog the permit authorities for many years. Multi-year delays in issuance of all permits would ensue, those for sources that have applicable requirements and that Congress clearly intended the program to cover, and for the millions of sources that are not subject to any applicable requirements. Thus, as with PSD, a literal interpretation of the title V threshold provisions would apply title V to millions of sources that Congress did not intend be covered, and the ensuing administrative burdens—at least initially—would impede the issuance of permits to the thousands of sources that Congress did intend be covered. This result is the type of ''absurd results'' from a literal application of statutory provisions that the courts have held should be avoided.

c. Application of PSD and Title V Thresholds

Because a literal application of both the PSD and title V threshold requirements produces absurd results, EPA may develop a different application that promotes consistency with other statutory provisions and is consistent with congressional intent. We believe that this proposal would achieve these objectives by establishing a threshold for the first phase at the level of 25,000 tpy CO_2e, and committing to vigorous efforts to streamline implementation of both programs' requirements and to complete a study and then conduct further rulemaking.

A first phase 25,000-tpy CO_2e major source GHG threshold, combined with vigorous efforts to develop streamlining methods, is consistent with congressional intent for the PSD provisions for several reasons. The 25,000-tpy CO_2e threshold reconciles the PSD provisions that, absent this regulation, would be in tension with each other, and thereby maintains the overall functioning of the PSD program. The threshold maintains the environmental purposes of the PSD program, while allowing economic growth, as set forth in CAA § 160. As discussed elsewhere in this preamble, a majority of stationary source GHG emissions in the U.S. come from a relatively small number of high-emitting sources that would remain subject to PSD because they emit at or above the 25,000-tpy CO_2e threshold. By comparison, about 75 percent of stationary source GHG emissions come from all sources above 250 tpy. Accordingly, the 25,000-tpy CO_2e threshold would, during this first phase, exempt from PSD numerous small sources that emit only about 7 percent of GHGs, and that smaller amount of emissions coverage would not jeopardize the environmental protection goals of PSD. Moreover, the program will remain of a manageable size, so that permitting authorities will be able to process permit applications and issue permits, which sources must have to construct or expand. As discussed elsewhere, the information available to us indicates that the 25,000-tpy CO_2e level is the level closest to the statutory levels that permitting authorities can reasonably administer during this initial phase. The ''absurd results'' caselaw requires that if a statutory provision cannot be applied literally, then it should be applied as close to literally as possible, consistent with congressional intent. With this level of 25,000-tpy CO_2e, permitting authorities would be able to reasonably comply with the 12-month deadline requirement for acting on PSD permit applications under CAA § 165(c). Further, the first phase threshold of 25,000 tpy and the development of streamlining methods is consistent with congressional intent to limit the PSD program—with the high costs that result from its source-by-source applications—to sources that can bear the costs. The first phase would allow for the implementation of streamlining methods, which could facilitate the orderly development of the program by reducing the costs of compliance for sources of GHG emissions. In addition, the first phase threshold maintains the program at a manageable size so that permitting authorities will be able to continue to timely issue permits to sources seeking to construct or expand.

The first phase 25,000-tpy CO_2e threshold, combined with the development of streamlining methods and the study and subsequent regulations, is also consistent with the purposes of the title V provisions. This first phase would assure a manageable size for the program so that permitting authorities could continue to issue permits to sources with applicable CAA requirements, as Congress intended. The implementation of streamlining methods—in particular, general permits—could facilitate the orderly development of the title V program to include a broader set of sources based on their GHG emissions.

B. ''Administrative Necessity'' Doctrine

1. Overview

Once EPA takes regulatory action to trigger PSD and title V requirements for GHG emitters, a literal application of the PSD and title V applicability requirements (*i.e.,* the 100/250-tpy PSD major stationary source threshold and a ''zero'' significance level threshold, and the 100-tpy title V threshold) would result in a volume of permit applications that is so high that the PSD and title V programs would become impossible for State and Federal authorities to administer. The PSD and title V permitting processes would become overwhelmed and essentially paralyzed.

Under these circumstances, the judicial doctrine of administrative necessity authorizes EPA to undertake a process for rendering the PSD and title V requirements administrable. As part of this process, EPA must consider ways to streamline the PSD and title V definitions and operative requirements so that the permitting authorities may more efficiently process the expected influx of GHG permit applications. These streamlining methods may include refinements to the definition of PTE and issuance of some form of general permits with presumptive BACT. *See* section VII.A of this preamble for a description of what these streamlining methods entail for PSD and title V programs, respectively.

However, the development, adoption, and implementation of these streamlining approaches would take several years, and, upon their completion, would still leave permitting authorities confronting a sufficiently large increase in workload that, absent a corresponding increase in resources, would continue to render the PSD and title V programs impossible to administer. *See* section VII of this preamble for an explanation of the procedures and timeframes necessary to develop these streamlining techniques.

As a result, under the doctrine of administrative necessity, EPA is authorized to phase in the PSD and title V requirements in as refined a manner as possible, so as to allow

administration of the PSD and title V programs. As part of the first phase, EPA proposes to establish the thresholds at the levels proposed, as well as undertake streamlining as much as possible and as quickly as possible, and explore with permitting authorities methods to ramp up resources for processing GHG permit applications. EPA also commits to conduct an assessment of the administrability issue within 5 years and, by the end of 1 year later, promulgate the second phase of the tailoring process, which would include the thresholds and streamlining methods determined at that time to be appropriate.

2. Chevron Standard for Statutory Interpretation

As noted above, the PSD requirements apply to the construction and modification of a ''major emitting facility,'' CAA §§ 165(a)(1), 169(2)(C), which is defined as a ''stationary source[ ] [in one of 28 listed categories of sources] of air pollutants which emit[s], or ha[s] the potential to emit, one hundred tons per year or more of any air pollutant'' or ''any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant,'' with certain exceptions. CAA § 169(1). The title V requirements apply to any ''major source,'' CAA § 502(a), which is defined to include ''any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.'' CAA §§ 501(2)(b), 302(j).

Although these applicability provisions are clear by their terms, the Courts have held that the *Chevron* approach of applying the literal language of the provisions may not apply when the administrability of the provisions is at issue.

3. Doctrine of Administrative Necessity

a. Administrative Necessity Doctrine in the Context of *Chevron*

The Courts have acknowledged the administrative necessity doctrine as an overlay on the *Chevron* doctrine of statutory construction, so that even when a statutory requirement expresses a clear congressional intent, if the provision is impossible for the agency to administer, then the agency is not required to follow the literal requirements, and instead, the agency may adjust the requirements in as refined a manner as possible to assure that the requirements are administrable, while still achieving Congress's overall intent. As discussed below, the D.C. Circuit set out the doctrine of ''administrative necessity'' in a line of cases that most prominently includes *Alabama Power* v. *Costle,* 636 F.2d 323 (D.C. Cir. 1980). The Court cited the doctrine most recently in *New York* v. *EPA,* 443 F.3d 880, 884, 888 (D.C. Cir. 2006).[18]

b. Alabama Power

The Court provided its most robust expression of the ''administrative necessity'' doctrine in the seminal decision, *Alabama Power Co.* v. *Costle,* 636 F.2d 323 (D.C. Cir. 1980) (*Alabama Power*), a case that resolved industry and citizens group challenges to many aspects of the regulations EPA promulgated shortly after enactment of the 1977 CAA Amendments to implement the newly enacted statutory provisions. One regulatory provision purported to exempt sources that qualified as major emitting facilities if their actual emissions were 50 tpy or less. EPA sought to justify this provision on grounds that some 2,400 major emitting facilities emit 50 tpy or less, and that the large burdens on the agency and industry of permit development and review would outweigh the small benefits of permitting. The Court invalidated this regulatory exemption as not authorized by the statute, but in so doing, recognized EPA's concerns about administrative burdens and, anticipating future agency efforts to adjust statutory mandates to administrative realities, went on to articulate the basis for the administrative necessity doctrine.[19] 636 F.2d at 356–57.

First, the D.C. Circuit described the basis for the administrative necessity doctrine as, in effect, an overlay on clear statutory intent. Specifically, in a section of the opinion titled, ''Exemptions Born of Administrative Necessity,'' the Court stated:

> Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them.

Id. at 357.

Second, the Court identified several types of administrative relief that may be available to an agency. One is ''[c]ategorical exemptions from the clear commands of a regulatory statute,'' which the court stated are ''sometimes permitted,'' but emphasized ''are not favored.'' *Id.* at 358. A second is ''an administrative approach not explicitly provided in the statute,'' such as ''streamlined agency approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress.'' *Id.* A third is a delay of deadlines upon ''a showing by [the agency] that publication of some of the guidelines by that date is infeasible.'' *Id.* at 359 (quoting *NRDC* v. *Train,* 510 F.2d 692, 712 (D.C. Cir. 1974).

Finally, the Court explained it would evaluate whether the agency faced an administrative impossibility, and the acceptability of the agency's choices, based on the essential circumstances confronting the agency, including the volume and nature of the tasks required of the agency, its financial and personnel resources, and the time available to it. Specifically, the Court observed that the administrative necessity doctrine would apply based on the ''administrative need to adjust to available resources * * * where the constraint was imposed * * * by a shortage of funds * * *, by a shortage of time, or of the technical personnel needed to administer a program.'' *Id.* at 358. The Court added that another administrative constraint could be ''the degree of administrative burden posed by enforcement.'' *Id.* at 405. *See NRDC* v. *Train,* 510 F.2d 692, 712 (D.C. Cir. 1974) (recognizing constraints imposed by budgetary commitments, manpower demands, or inability to evaluate sufficiently the necessary scientific and technical determinations).

Even so, the Court went on to caution that ''administrative necessity'' is a high hurdle: ''[T]he agency [bears] a heavy

[18] It should be noted that numerous cases have held that an agency may consider administrative factors in choosing regulatory policies under statutory provisions that authorize choices. *See, e.g., National Mining Association* v. *EPA,* 59 F.3d 1351, 1364 (D.C. Cir. 1995); *Phillips Petroleum Co.* v. *EPA,* 803 F.2d 545, 562 (D.C. Cir. 1986); *National Wildlife Federation* v. *Gorsuch,* 693 F.2d 156, 182 (D.C. Cir. 1982). While these cases support the general proposition that administrative considerations are important, they differ from the ''administrative necessity'' doctrine because in those cases, the Agency's actions were within the ambit of the statutory language; whereas under the ''administrative necessity'' doctrine, the Agency's actions depart from the statutory language.

[19] The Court also explained that in that case, EPA's concern that large numbers of small sources would be subject to PSD was misplaced because it was based on an erroneous interpretation of the requirement that the threshold for determining whether a source was a major emitting facility (and thereby subject to PSD) was the source's PTE. EPA erroneously believed that PTE had to be calculated without reference to pollution controls, an interpretation that would have meant that many sources of a low level of actual emissions would be treated as major emitting facilities. The Court held, in another part of the *Alabama Power* opinion, that PTE must be calculated with reference to pollution controls, and went on to observe that this holding effectively mooted EPA's concerns that underlay its effort to exempt 50-tpy-or-less sources from PSD requirements.

burden to demonstrate the existence of an impossibility.'' *Id.* at 359. The Court particularly noted its reticence to uphold agency claims of administrative impossibility when those claims are made in advance of actual efforts to administer or enforce: ''The agency's burden of justification in such a case is especially heavy.'' *Id.* at 359.

In *Alabama Power,* the D.C. Circuit emphasized that its exposition of the administrative necessity doctrine was consistent with U.S. Supreme Court decisions holding that administrative considerations could factor into agency decisions. The D.C. Circuit noted that the Supreme Court, in *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968), ''approv[ed] the adopting by the FPC of area rate regulation as the practical means to regulate thousands of natural gas producers,'' and quoted the Supreme Court as explaining, ''[c]onsiderations of feasibility and practicality are certainly germane to the issues before us. * * * We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purpose for which it has acted.'' *Alabama Power,* 636 F.2d at 359 (citing *Permian Basin Area Rate Cases,* 390 U.S. at 777). The Court in *Alabama Power* also cited *Morton* v. *Ruiz,* 415 U.S. 199, 230–31 (1973), in which the Supreme Court ''acknowledged the substantive authority of the Secretary [of the Bureau of Indian Affairs] to take appropriate action to cope with the administrative impossibility of applying the commands of the substantive statute. *Alabama Power,* 636 F.2d at 359.[20]

It should be emphasized that the Court in *Alabama Power* discussed the ''administrative necessity'' doctrine in the context of PSD applicability, which, along with title V applicability, is the subject of this action. The Court discussed the doctrine extensively in the part of its opinion that followed its invalidation of EPA regulations that attempted to overlay an exemption for PSD applicability onto statutory requirements, where the Court stated it was anticipating future agency efforts to adjust statutory mandates to administrative realities. *Id.* at 356–57. Moreover, the Court made clear in another part of its opinion that the doctrine could be applied to another aspect of PSD applicability, concerning existing sources. There, the Court stated:

> EPA does have discretion, in administering the statute's ''modification'' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity.

Id. at 400.

c. Case Law After *Alabama Power*

Shortly after *Alabama Power,* the D.C. Circuit reiterated the validity of the ''administrative necessity'' doctrine in *EDF* v. *EPA,* 636 F.2d 1267 (D.C. Cir. 1980), which reviewed the legality of EPA's regulation of polychlorinated biphenyls (PCBs) under the Toxic Substances Control Act. As the Court noted, ''The statutory language is simple: ''no person may * * * use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.'' 15 U.S.C. 2605(e)(2)(A). Similarly, the prohibitions on manufacture, processing, and distribution refer to ''any polychlorinated biphenyl.'' *See id.* § 2605(e)(3)(A).'' *EDF* v. *EPA,* 636 F.2d at 1281. EPA's regulations exempted materials containing concentrations of PCBs less than 50 parts per million (ppm). EPA justified the 50-ppm cutoff as an exemption based on administrative necessity. The Court reiterated that such an exemption was at least potentially available. Quoting *Alabama Power,* the Court stated:

> Under the heading of ''administrative necessity,'' this court has recognized that an agency may depart from the requirements of a regulatory statute. * * * While the court in *Alabama Power* emphasized that ''categorical exemptions from the clear commands of a regulatory statute, though sometimes permitted, are not favored.'' *Id. at 358–360,* it also noted that there is ''substantive authority (for an agency) to take appropriate action to cope with the administrative impossibility of applying the commands of the substantive statute.'' *Id.* at 358–359.

EDF v. *EPA,* 636 F.2d at 1283. However, on the facts before it, the Court found that EPA had not ''made [a] showing that it cannot carry out the statutory commands for concentrations of PCBs below fifty ppm,'' and therefore that ''EPA [had] fail[ed] to meet its heavy burden. Thus, administrative need, on this record, provides no basis for the fifty ppm cutoff.'' *Id.*

Some 3 years later, the D.C. Circuit handed down a decision concerning the ''administrative necessity'' doctrine in *Sierra Club* v. *EPA,* 719 F.2d 436, 463 (D.C. Cir. 1983). There, the Court reviewed EPA's efforts to justify a narrow regulatory definition of ''dispersion techniques'' on administrative necessity. CAA § 123 prohibits the use of tall stacks and ''other dispersion techniques'' to meet emissions limitations. The Court found that the term ''dispersion techniques'' should be defined broadly ''to encompass * * * the use of devices, alterations to the stack, or other techniques when they are significantly motivated by an intent to gain emissions credit for greater dispersion.'' *Id.* at 462. EPA's regulations defined the term narrowly to include only certain types of equipment, and not to require an inquiry into intent. The Court observed, that ''[s]ince the regulations do not regulate all the techniques contained in this definition, the regulations effectively create an exemption not indicated in the statute itself. Such categorical exemptions are generally not favored * * * but there are two situations in which they are allowed: Cases of administrative necessity and de minimis situations'' (citing *Alabama Power*). *Id.* Thus, the Court affirmed that the doctrine of ''administrative necessity'' could be used to allow an agency to depart from the requirements of the statute.

The Court went on to find, however, that in this case, EPA's justification for ''administrative necessity'' was not sufficient. EPA had explained that defining ''dispersion techniques'' more broadly to necessitate inquiring into a source's subjective intent as to whether other equipment or methods were designed to disperse emissions, as opposed to achieving some other end, would be ''difficult'' to enforce, a conclusion generally supported by a few State and local agencies that commented on the rule. The Court found that the Agency's narrow definition of ''dispersion techniques'' amounted to a

[20] Although *Alabama Power* presented the D.C. Circuit's most robust exposition of the administrative necessity doctrine, the Court first identified the doctrine, albeit in the relatively narrow application of a deadline extension, in the 1974 decision, *NRDC* v. *Train,* 510 F.2d 692 (D.C. Cir. 1974). There, the Court considered EPA objections that it would be unable to meet a statutory requirement that established a deadline for promulgating effluent limitations. While declining to grant extensions of the deadline in that case, the Court acknowledged that under certain circumstances, judicial relief in the form of a deadline extension would be warranted in light of administrative considerations. The Court observed that ''budgetary commitments and manpower demands'' needed to meet a deadline could be ''beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs;'' and that ''EPA may be unable to conduct sufficient evaluation of available control technology'' by the deadline. Under these circumstances, the Court stated, ''[t]he courts cannot responsibly mandate flat * * * deadlines * * *.'' The Court grounded its conclusion, that a court could consider administrative considerations in evaluating an agency's claimed inability to meet a statutorily mandated deadline, in a court's equitable powers to fashion appropriate relief. *Id.* at 713 (citations omitted). Although the *NRDC* v. *Train* decision concerned the agency's compliance with deadlines, which are a relatively narrow issue, the case established the proposition that an agency may, under certain circumstances, depart from a statutory mandate due to administrative considerations.

categorical exemption from statutory requirements, and one that was based on Agency predictions of future enforcement difficulties rather than actual experience. The Court reiterated its statements in *Alabama Power* under these circumstances, that the Agency's burden of showing impossibility is especially heavy, and that in this case, EPA's showing ''falls far short.'' *Id.* at 463. The Court added that EPA may be able to develop ''less taxing'' ways to define ''dispersion techniques,'' including developing classes of plant techniques that could be considered to be dispersion techniques. *Id.*[21]

In 1989, in *Public Citizen* v. *FTC*, 869 F.2d 1541 (D.C. Cir. 1989), the D.C. Circuit reiterated the validity of the ''administrative necessity'' doctrine, although on the facts, the Court held that the Federal Trade Commission's (FTC) claims of administrative necessity failed. There, the Court considered the Smokeless Tobacco Act, which, according to the Court, ''imposes a blanket requirement, subject only to one narrow and specifically mentioned exception for billboard advertising, that producers and distributors of smokeless tobacco products must include a warning label whenever they 'advertise * * * any smokeless tobacco product.' 15 U.S.C. 4402(a)(2).'' *Id.* at 1553. In the face of this provision, the FTC issued an exemption for utilitarian items (ranging from golf balls to T-shirts) distributed for promotional purposes, so that such objects would not need to include the warning label. The FTC attempted to justify the exemption on grounds of administrative necessity. The Court acknowledged the doctrine, stating that ''there exists a narrow range of inherent discretion in an agency to create case-by-case exceptions in order to come within the practical limits of *feasibility* in administering a statute.'' *Id.* at 1556 (citing *Alabama Power*) (emphasis added by Court). However, the Court went on to dismiss the FTC's claims of administrative necessity, stating that the FTC had not justified its application and suggesting that the FTC had improperly undertaken a cost-benefit analysis in the guise of an administrative necessity claim. *Id.*

d. Analogous Case Law Concerning Other Legal Obligations

There is another line of case law, which involves contempt-of-court proceedings, in which the Courts recognize that impossibility of performance is relevant to the lawful discharge of legal obligations, and this case law provides some analogous support to the administrative necessity doctrine. In contempt-of-court proceedings, as the Supreme Court has noted, ''a defendant may assert a *present* inability to comply with the order in question'' and may thereby be excused from the duty to comply. *U.S.* v. *Rylander*, 460 U.S. 752, 757 (1983) (citing *Maggio* v. *Zeitz*, 333 U.S. 56, 75–76 (1948); *Oriel* v. *Russell*, 278 U.S. 358, 366 (1929)) (emphasis in original) (''*Rylander*''). In addition, as discussed below, this doctrine applies fully to administrative agencies, providing even closer analogous support for the doctrine of administrative necessity. Even so, it should be acknowledged that the extent of support is limited because the contempt-of-court line of cases involves a court's equitable discretion in enforcing court orders, and the administrative necessity line of cases involves the extent to which a Court will allow deviation from explicit statutory requirements.

In *Rylander,* which involved a corporate officer's failure to comply with a civil contempt order imposed for noncompliance with an earlier order enforcing an IRS summons, the Court stated that ''[w]hile the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.'' *Rylander,* 460 U.S. at 757 (finding that contemnor failed to meet the burden of production sufficient to establish an impossibility defense).

The D.C. Circuit, noting that ''[i]t is well established that impossibility of performance constitutes a defense to a charge of contempt,'' has recognized that the Court has an obligation to ''consider carefully a claim by the alleged contemnor that compliance was impossible. * * * Although both the fact and duration of noncompliance with [an] order are elements to be considered, the court must consider as well [a party's] inability, without fault on its part, to render obedience.'' *Tinsley* v. *Mitchell*, 804 F.2d 1254 (D.C. Cir. 1986) (quoting *SEC* v. *Ormant Drug & Chemical Co.*, 739 F.2d 654, 656–57 (D.C. Cir. 1984)) (remanding to District Court to adjudicate contemnor's claim of inability to pay fines).

Importantly, the doctrine is fully available to government agencies, as the D.C. Circuit affirmed in *Evans* v. *Williams*, 206 F.3d 1292 (D.C. Cir. 2000). There, in a class action challenging conditions at a public institution for the mentally retarded, the District of Columbia failed to comply with deadlines set in a consent decree, citing unanticipated ''financial problems of horrendous proportions.'' *Id.* at 1293. Discussing the district court's refusal to make retroactive a modification of the consent decree ameliorating the financial penalties for missing deadlines, the Court noted,

> We do not of course suggest that a party may be relieved from the obligation to comply with an injunction simply by making a motion for a modification. But here the District claimed that it could not comply, despite making a good faith effort to do so. If true, this should have relieved it from liability. *See Tinsley* v. *Mitchell*, 804 F.2d 1254, 1256 (D.C. Cir. 1986) (''If a party lacks the financial ability to comply with an order, the court cannot hold him in contempt for failing to obey.'')

Id. at 1299. Finding that the district court based its order on irrelevant information regarding the District's financial circumstances, the Court reversed and remanded for further proceedings. *Id.*

The Courts have also recognized that a party may avoid compliance with a court order by showing that it made a good-faith effort to comply but fell short, and that under these circumstances, the party is not required to demonstrate that compliance is absolutely impossible. In *Washington Metropolitan Transit Authority* v. *Amalgamated Transit Union*, 531 F.2d 617 (D.C. Cir. 1976), the D.C. Circuit vacated a final contempt judgment and

[21] Shortly after *Sierra Club,* the D.C. Circuit considered another case that raised an ''administrative impossibility'' issue, *Northern Colorado Water Conservancy Dist.* v. *FERC,* 730 F.2d 1509 (D.C. Cir. 1984) (*NCWCD*). However, there the Court did not appear to follow the line of cases that included *Alabama Power.* In *NCWCD,* the Court found that the Federal Energy Regulatory Commission (FERC) improperly failed to comply with requirements under section 4(f) of the Federal Power Act to give written notice to local water authorities of preliminary permit applications filed by private developers for a hydroelectric power project. In failing to give notice, FERC had followed a longstanding, but unannounced policy, which it justified in part on grounds ''that strict adherence to the statute's language would be administratively impossible.'' FERC explained that the requirement to notify municipalities required administrative flexibility in light of the ''estimated 50,000 specialized local governmental units performing a myriad of services,'' many of which, ''such as water, utility or drainage districts, are not readily identifiable.''

The Court rejected FERC's contention that those administrative concerns justify FERC's practices. Without citing *Alabama Power* or any of its other decisions concerning the ''administrative necessity'' doctrine, the Court stated that those practices must nevertheless remain ''within a range of reasonableness with respect to Congress' instruction,'' that is, within the ambit of the statutory requirements, as well as be reasonably well articulated and generally made known to the public, and that in this case, FERC's practices failed on all those counts. 731 F.2d at 1521. Notwithstanding this case, the weight of the D.C. case law supports the availability of the administrative necessity doctrine to authorize agency departure from statutory requirements in limited circumstances.

fine against a labor union for continuing to strike in contravention of a restraining order; among other procedural failings, the district court made no findings of fact on the union's defenses of substantial compliance and inability to comply. *Id.* at 619–20. In directing the district court to provide adequate due process on remand, the court emphasized, ''[e]valuation of good faith efforts to comply, once raised, is necessary to determine the possibility of compliance. In our view good faith should also be considered in mitigation of penalty.'' *Id.* at 621 (citation omitted).

This aspect of the doctrine is also fully applicable to agencies. In *Chairs* v. *Burgess,* 143 F.3d 1432 (11th Cir. 1998), the Eleventh Circuit emphasized that good-faith compliance efforts by a State agency could support a claim for relief based on impossibility. There, the State of Alabama was required under a consent decree to remove State prisoners from a county jail within a certain timeframe. *Id.* at 1434. The county sought a court order to enforce the decree and requested that the Court hold the State in contempt. *Id.* In light of the fact that the State was then subject to 79 identical court orders, the Court accepted the State's defense of present inability to comply due to ''entirely inadequate'' resources in the State prison system. *Id.* at 1437. The Court vacated the district court's order, declaring: '' 'Inability,' as a defense to contempt, does not mean that compliance must be totally impossible. Instead, the inability that will absolve a party from being held in contempt requires only that the noncomplying party has made 'in good faith all reasonable efforts to comply' with the terms of a court order.'' *Id.* (citations omitted).

3. Step-by-Step Process for Implementing the Administrative Necessity Doctrine

We believe that the administrative necessity case law establishes a three-step process under which an administrative agency may, under the appropriate circumstances, in effect revise statutory requirements that the agency demonstrates are impossible to administer so that they are administrable. This section of the preamble describes the requirements for each step, along with a brief application of each step to PSD permitting thresholds and significance levels as well as title V permitting thresholds.

In brief, the three steps are as follows: When an agency has identified what it believes may be insurmountable burdens in administering a statutory requirement, the first step the agency must take is to evaluate how it could streamline administration as much as possible, while remaining within the confines of the statutory requirements. The second step is that the agency must determine whether it can justifiably conclude that even after whatever streamlining of administration of statutory requirements (consistent with those statutory requirements) it conducts, the remaining administrative tasks are impossible for the agency because they are beyond its resources, *e.g.,* beyond the capacities of its personnel and funding. If the agency concludes with justification that it would be impossible to administer the statutory requirements, as streamlined, then the agency may take the third step, which is to phase in or otherwise adjust the requirements so that they are administrable. However, the agency must do so in a manner that is as refined as possible so that the agency may continue to implement as fully as possible Congressional intent.

Step 1: Reduce administrative burdens by streamlining administration as much as legally permissible. When an agency has identified what it believes may be insurmountable burdens in administering a statutory requirement, the agency must first evaluate how it could streamline administration as much as possible, while remaining within the confines of the statutory requirements. *Sierra Club,* 719 F.2d at 463 (even if EPA's claims that its method for enforcement ''is in fact impossible, there nevertheless may be less taxing ways to enforce the law''); *Alabama Power,* 636 F.2d at 358 (''Courts frequently uphold streamlined agency approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress'').

As discussed in detail below, EPA believes that it may have several potentially useful tools available in the streamlining toolbox for the PSD permitting threshold level, the PSD significance level, and the title V permitting threshold. For the PSD permitting threshold level and significance level, there are at least three such tools: The first is interpreting the definition of ''potential to emit'' so that the amount of a source's emissions that counts in determining whether it qualifies as a major source and therefore is above the permitting threshold requirements is closer to the amount of its emissions when it is in actual operation, rather than the amount of emissions that the source would emit if it were operating continuously. Narrowing the definition of PTE is a potentially extremely important tool in this context because identifying the amount of a source's emissions as closer to its actual emissions in this manner would mean that very large numbers of residential and commercial sources would have significantly lower emissions and would fall below the statutory threshold requirements for triggering PSD. Second, EPA believes it may be able to develop programs involving general permits, under which large numbers of similarly situated sources would each be covered by essentially the same permit established through a regulatory action by the permitting authority. This approach could achieve economies of scale and thereby reduce administrative burden. Third, EPA believes it may be able to streamline the single most time-consuming element of the PSD permit program, which is the determination of BACT as required under CAA § 165(a)(4), by establishing presumptive BACT levels for certain source categories that comprise large numbers of sources. As for title V, as discussed below in detail, EPA believes that defining ''potential to emit'' to reflect more closely a source's actual operation and developing a program of general permits could streamline the administration of title V permits.

As also discussed below, these streamlining efforts cannot be implemented as soon as PSD and title V are triggered, or even shortly thereafter. However, EPA intends to develop these streamlining methods as vigorously and as quickly as possible and phase them into the program. These streamlining methods were described in the ANPR and EPA received comment on them, and EPA is continuing to develop the methods and to solicit further comment with this action.

Step 2: Determine that the task that remains is impossible to administer. The agency must determine whether it can justifiably conclude that even after whatever streamlining of administration of statutory requirements the agency is able to effectuate, the agency's remaining administrative tasks are impossible for the agency because they are beyond its resources. To make this determination, the agency must consider: (1) When it can complete streamlining administration of the statutory requirements and how well it can administer those requirements in the meantime; and (2) what administrative tasks would remain after it achieves streamlining and how well it can handle those tasks. To make this latter determination, the agency must compare its resources to the tasks at

hand. The agency must then determine whether it can administer the statutory requirements as mandated by Congress, or whether it may justifiably conclude that those requirements remain impossible to administer.

As discussed below, PSD and title V requirements will become applicable to very large numbers of sources immediately following a final rule regulating GHG emissions. EPA expects to complete such a rule, establishing emissions limits for motor vehicles, by the end of March 2010.

As discussed below, although EPA intends to aggressively develop streamlining methods to the extent feasible, EPA simply does not have time to do so prior to the date that we expect PSD and title V to become applicable. As a result, EPA and the States will have to implement PSD for those sources as soon as PSD is triggered. Preliminary information that we have obtained concerning State permitting authority resources, and data we collected concerning the numbers of sources that emit GHGs (using both a CO_2 and CO_2e basis) at the 100- and 250-tpy levels, make clear that as of the date that PSD and title V applicability is triggered, the number of sources needing permits would overwhelm permitting authorities and thereby effectively paralyze the permitting.

Specifically, the total number of PSD permits that are issued in the U.S. is approximately 280 per year. A permitting authority's action on each PSD permit is resource-intensive because for each permit, the authority must apply source-specific BACT, apply other source-specific requirements, and allow public comment. However, EPA estimates that when the PSD requirements are triggered for sources of GHGs, more than 40,000 PSD permits both from newly constructed facilities that emit at greater than 250 tpy (using either a CO_2 or CO_2e metric) and from modifications at existing major sources will be required. Under the PSD program as presently constituted, permitting authorities' actions on each of these permits will be resource-intensive, as described above.

This volume of permitting represents more than a 140-fold increase from the current volume—again, approximately 280 permits per year—of major PSD permits that are processed by permitting authorities nationwide. We estimate that this increase in volume of PSD permits would require an annual increase in labor hours of almost 44 times the current labor allocation for PSD programs. This increase in workload would overwhelm the permitting authorities' resources and paralyze the permit issuance process.

The problem for title V purposes is comparable. Specifically, the total number of existing title V permits in the U.S. is approximately 14,700. However, EPA estimates that when the title V requirements are triggered for sources of GHGs, approximately 6.1 million sources that emit at least 100 tpy (using either a CO_2 or CO_2e metric) will be required to obtain a title V permit. These sources will be required to submit a permit application within 1 year, and the permitting authorities will be required to act on those applications, including allowing an opportunity for a public hearing.

We estimate that this additional volume of permitting would require an annual increase in labor hours of almost 250 times the current labor allocation for title V programs. Like the increase in PSD workload, this increase in title V workload, combined with the source-by-source nature of the permitting process and the requirements for public input, would overwhelm the permitting authorities' resources and paralyze the permit issuance process.

For both PSD and title V permits, permitting authorities would be required to hire and train staff in numbers that are multiples of their current staff, a task that cannot be accomplished—or, indeed, can barely be begun—by the time PSD and title V requirements become applicable to GHG emitters.

Step 3: Implement a scheme that is administrable, but in doing so, depart from the statute as little as possible.

If the EPA concludes with justification that it would be impossible to administer the statutory requirements, as streamlined, then the agency may phase in or otherwise adjust the requirements so that they are administrable. However, the agency must do so in a manner that is as refined as possible so that the agency may continue to implement as fully as possible congressional intent.

In this tailoring rulemaking, EPA is proposing, as the first phase, to establish a temporary ''major stationary source'' threshold for PSD purposes, a temporary ''significance level'' threshold for PSD purposes, and a temporary ''major source'' threshold for title V purposes, for sources that emit GHGs, to levels that capture a significant share of GHG emissions while rendering both permitting programs administratively feasible. The specific options proposed for temporary thresholds and the rationale for their selection are described below.

Moreover, and as explained in detail below, EPA intends to proceed aggressively to develop streamlining methods, and it is possible that permitting authorities will be able to augment their permitting resources. Even so, available information does not confirm that EPA and the permitting authorities will be able to rely on these steps within 6 years after PSD and title V requirements become applicable to GHG emissions. Accordingly, it is necessary to maintain the major stationary source threshold and significance level proposed and also necessary to reassess the administrative situation and conduct further rulemaking to address it within 6 years.

5. Consistency With Case Law

EPA's proposed application of the administrative necessity doctrine to phase in the major source permitting thresholds for PSD and title V purposes, and to establish the significance level for PSD purposes, is consistent with the case law.

It is clear under the D.C. Circuit case law that the administrative necessity doctrine is available under certain circumstances, to authorize an agency to ''depart from the requirements of a regulatory statute.'' *EDF* v. *EPA,* 636 F.2d at 1283 (citing *Alabama Power*). Thus, it is clear that the doctrine may be applied—under the appropriate circumstances—to authorize EPA to phase in the major source thresholds for PSD and title V permitting as well as to establish a PSD significance level. Indeed, the D.C. Circuit established the administrative necessity doctrine, in *Alabama Power,* in the context of efforts by EPA to establish thresholds for PSD permitting of new and existing sources. *Alabama Power,* 636 F.2d at 357, 400.

The D.C. Circuit has emphasized, however, that the agencies have a high threshold to justify the use of the doctrine, *EDF* v. *EPA,* 636 F.2d at 1283, and the Court did not uphold the attempts by the agencies in those cases to invoke the doctrine. *EDF* v. *EPA,* 636 F.2d at 1283; *Sierra Club* v. *EPA,* 719 F.2d at 463; *Public Citizen* v. *FTC,* 869 F.2d at 1556.

We believe that the facts here are much more supportive of an administrative necessity application than in those cases. EPA's application of the administrative necessity doctrine hews closely to the three-step process that we read the case law to establish.

Step 1: Reduce administrative burdens by streamlining administration as much as legally permissible. In some of the case law described above, the D.C. Circuit emphasized that the agencies had failed to consider means of solving

their alleged administrative problems in ways consistent with the statutory requirements. In *Sierra Club* v. *EPA,* the Court invalidated EPA's effort to narrow the definition of ''dispersion techniques'' to only certain types of equipment and thereby exempt from the definition certain categories of methods that were intended to disperse emissions. The Court based its holding in part on the grounds that EPA had failed to explore available, ''less taxing'' regulatory alternatives that would reduce the administrative burden of determining the purpose of changes in stack or plume parameters. *Sierra Club* v. *EPA,* 719 F.2d at 463–64. The Court offered examples of possible streamlining measures, such as quantifying the amount of plume rise that could be presumed to have an engineering rationale, or selectively exempting classes of improvements that have a trivial impact on the goals of the CAA or for which use as a dispersion technique was only theoretically possible. *Id.* at 464. Stating that ''[w]e see no evidence that EPA has adequately explored these regulatory alternatives,'' the Court overturned EPA's effective categorical exemption. *Id.*

The Court used similar reasoning in *EDF* v. *EPA,* where the Court found that EPA's proposed 50-ppm cutoff for regulating PCBs was not administratively necessary. *EDF* v. *EPA,* 636 F.2d at 155. There, although basing its dismissal of the claim primarily on EPA's failure to make a *prima facie* showing of impossibility, the Court emphasized that statutorily authorized alternatives were available to EPA. *See id.* at 154–156. ''While some cutoff may be appropriate,'' the Court noted, ''the Administrator did not explain why the regulation could not be designed expressly to exclude ambient sources, thus directly fulfilling congressional intent, rather than achieve that goal indirectly with a cutoff, thereby partly contravening congressional intent.'' *Id.* at 154.

Here, in contrast, EPA has begun the process of narrowing the administrative burden through means consistent with the statutory requirements by evaluating what streamlining approaches would be feasible but, as discussed below, this process is complex and EPA cannot complete it for several years. EPA is soliciting comment on those methods and any others that may occur to stakeholders or the public. In *NRDC* v. *Train,* the Court indicated that an agency's diligent, good-faith efforts to discharge its statutory responsibilities will factor in favor of the Court's resolution of an impossibility claim. *NRDC* v. *Train,* 510 F.2d at 333.

Step 2: Determine that the task that remains is impossible to administer. In *Alabama Power,* the D.C. Circuit described the administrative necessity doctrine as rooted in agency workload and resources: Specifically, the Court stated that the administrative impossibility doctrine would apply based on the ''administrative need to adjust to available resources * * * where the constraint was imposed * * * by a shortage of funds * * *, by a shortage of time, or of the technical personnel needed to administer a program.'' 636 F.2d at 358. The Court added that another administrative constraint could be ''the degree of administrative burden posed by enforcement.'' *Id.* at 405. However, the Court cautioned that ''the agency [bears] a heavy burden to demonstrate the existence of an impossibility.'' *Id.* at 359.

In several of the cases described above, the D.C. Circuit emphasized that the agencies had failed to meet their heavy burdens of establishing administrative impossibility. In *NRDC* v. *Train,* EPA neglected to specify the resource or methodological constraints that prevented the agency from meeting a mandatory deadline for promulgating effluent limitation guidelines. *NRDC* v. *Train,* 510 F.2d at 712–13. Although the Court inferred from the imminent deadline that the Agency would likely experience a burden on its resources in promulgating the guidelines for most source categories, the Court was reluctant to grant EPA an extension in response to a merely conclusory statement that compliance with the deadline would be impossible. *Id.* at 713.

A few years later, in *EDF* v. *EPA,* the Court based its dismissal of EPA's administrative necessity claim on the fact that the Agency did not provide sufficient data to support the claim that administering the statute as written was impossible. In that case, EPA failed to provide information relating to the amount of PCBs that would be left unregulated by its use of a 50-ppm cutoff, where the statute required ''any'' PCB to be prohibited. *EDF* v. *EPA,* 636 F.2d at 155. As a result, EPA could not show that carrying out the statutory requirements for concentrations of PCBs below 50 ppm would be administratively impossible. *Id.* ''Thus,'' the Court found, ''administrative need, on this record, provides no basis for the fifty ppm cutoff.'' *Id.* Furthermore, the Court noted in a footnote that EPA's claim that the burden to industry justified a categorical exemption was undermined by EPA's lack of ''firm data'' on the extent of the burden. *Id.* at 155, fn. 43.

Likewise, in *Sierra Club* v. *EPA,* EPA alleged only that it would be ''difficult'' to administer a proposed subjective intent test that would examine whether dispersion techniques were used for the prohibited purpose of achieving compliance with emissions limitations. Without more, the Court determined, EPA's showing fell ''far short'' of meeting the heavy burden of demonstrating the existence of an impossibility. *Sierra Club* v. *EPA,* 719 F.2d at 461–62.[22]

Thus, in the cases concerning administrative necessity, the agencies generally did not attempt to quantify the administrative workload and resource constraints that they thought merited departure from the statutory requirements and instead limited themselves to generally conclusory assertions. In *NRDC* v. *Train,* the Court recognized that EPA could cure its insufficient record and demonstrate the administrative impossibility of complying with the deadline once it specified the actual burden on its resources. *NRDC* v. *Train,* 510 F.2d at 713. In the event that EPA could demonstrate that ''manpower or methodological constraints'' threatened to delay the promulgation of guidelines for particular categories of sources, the Court held open the possibility of an exemption from the deadline. *Id.* at 714.

Here, in sharp contrast to that case law, EPA has developed specific factual evidence concerning the administrative difficulties of implementing PSD and title V at the statutory threshold levels. Moreover, those constraints are compelling; it is clear from just the evidence collected so far that at the time that EPA expects to trigger application of the PSD and title V programs to sources that emit GHGs—which, if based on a possible mobile source final rulemaking, would be near the end of March 2010—it will be flatly impossible for permitting authorities to administer the PSD and title V programs at the statutory threshold levels. The massive number of permits would overwhelm the limited resources available to the permitting authorities. EPA expects to collect as much specific information concerning administrability as possible through the comment period.

[22] In *Public Citizen* v. *FTC,* the D.C. Circuit dismissed FTC's claims of administrative necessity where the agency's rationale for its categorical exemption appeared to rely on an impermissible weighing of the relative costs and benefits of compliance, rather than on the impossibility of compliance. *Public Citizen,* 869 F.2d at 1556.

The administrative burdens that EPA confronts in administering the PSD and title V thresholds have no precedent in the case law. The closest situation appears to be *Alabama Power,* where the Court rejected EPA's interpretation of ''potential to emit'' as a matter of legal interpretation, and not on administrative necessity grounds, but where the Court noted that EPA's interpretation would have brought approximately 2,400 additional facilities into the PSD program, which entailed the case-by-case review and BACT determination for each permit application. *Alabama Power,* 636 F.2d at 356. Even so, the PSD and title V program burdens anticipated for GHG emitters at the statutory thresholds are exponentially greater than the burdens alleged in *Alabama Power.* The projected resource burden for administering the PSD program alone will be greater than 10-fold the burden alleged in *Alabama Power:* Each year, regulating GHGs under the CAA is estimated to trigger PSD requirements for approximately 41,000 sources that emit at levels greater than the 100/250-tpy threshold when they engage in new construction or significant modifications. As for title V, in total, some six million permits would be required, which would entail an enormous expenditure of administrative resources, as described elsewhere.

It should be acknowledged that the D.C. Circuit has stated that the administrative necessity doctrine is particularly difficult to assert when the agency had not yet tried to enforce the statutory requirements. *Sierra Club* v. *EPA,* 719 F.2d at 463. Although the Court did not spell out its reasoning for this distinction, a logical reason would be that actual efforts to implement the statutory provision would more clearly establish the extent of the administrative problems than would advance predictions. Even so, the Court left the door open to approving claims of administrative necessity in advance of actual implementation efforts. Here, EPA does not propose to attempt to administer the statutory thresholds once PSD and title V requirements are triggered for GHG emitters, but the impact of the statutory thresholds on permitting authority caseloads and resources are so massive as to be predictable with a sufficient degree of accuracy to support a claim of administrative necessity. EPA has gathered a substantial amount of evidence concerning those impacts and intends to gather more through the comment period on this notice. Under these circumstances, it is not necessary to await actual implementation. Attempting to do so—that is, allowing the statutory thresholds to apply, assessing the extent of the administrative problem, and then conducting rulemaking to raise the thresholds—would leave the PSD and title permitting process in disarray for years.

Step 3: Phase-in the statutory requirements to be administrable, but in doing so, depart from the statute as little as possible. In Alabama Power, the D.C. Circuit listed the types of departures from the statute that it would sanction, under the appropriate circumstances, on grounds of administrative necessity. One is ''[c]ategorical exemptions from the clear commands of a regulatory statute,'' which the Court stated are ''sometimes permitted,'' but ''are not favored.'' A second is an ''administrative approach,'' such as ''streamlined agency * * * procedures'' in lieu of, for example, case-by-case determinations, and a third is a delay of deadlines. 636 F.2d at 358.

Here, turning first to PSD, EPA is proposing to phase in the threshold for PSD permitting, which would have the effect of allowing sources that are above the statutory threshold of 100/250 tpy but below the regulatory threshold of 25,000 tpy CO_2e to build new facilities or modify existing ones without being subject to PSD. Thus, this proposal is a type of exemption.

Although the Court has said that ''categorical exemptions'' are ''not favored,'' the Court has indicated that they are ''sometimes permitted,'' and the exemption at issue here is one that should be permitted. For one thing, it is time limited. In addition, during phase one of the phase-in period, establishing the thresholds at 25,000 tpy CO_2e and [10,000 to 25,000] tpy CO_2e, and thereby exempting sources from PSD applicability at the time that they construct or modify, is the only way to address the administrative burdens that would otherwise result at the time that PSD is triggered. At that time, EPA will not have been able to develop any streamlining methods, which is the second type of relief that the D.C. Circuit identified in *Alabama Power.* Even so, this proposal is that, as quickly as possible, during the next 6 years, EPA will implement as extensive a streamlining of PSD requirements as possible (consistent with statutory requirements) and then will reassess the administrative burdens and conduct additional rulemaking concerning the thresholds and streamlining techniques. This approach has the potential to limit the extent of the exemption. It should be noted that a deferral of the permitting obligation, which is the third type of relief that the D.C. Circuit identified, would not be useful. For PSD purposes, because sources cannot construct or modify without first obtaining a permit, a deferral would prevent construction and modification activities. In addition, a deferral would simply create a backlog that would quickly become unmanageable at any foreseeable point in the future and would create unacceptable uncertainty for the regulated community. In particular, because sources cannot construct or modify without first obtaining a permit, the backlog would prevent construction and modification activities.

As discussed elsewhere, for PSD purposes, the 25,000-tpy and [10,000 to 25,000] tpy CO_2e levels proposed for the major source permitting threshold and significance level, respectively, are the lowest levels that we believe permitting authorities will be able to administer for the upcoming 6-year period. By the end of the first 5 years, EPA will conduct a study and, within the following year, will conduct another rulemaking to revisit and possibly revise those thresholds, depending on the Agency's findings of the maximum extent to which permitting authorities can administer the statutory program. In this manner, the levels proposed are the least possible departure from the statutory requirements.

For the title V purposes, the first phase threshold level of 25,000 tpy CO_2e must also be considered to be the narrowest possible departure from the statutory requirements because it is the lowest amount that is administrable and because there are no other choices. There is not enough time for EPA to develop streamlining measures or for the States to ramp up resources. Although sources have 1 year to submit permit applications, and, once they submit them, they receive the protections of the permit shield, failure to phase in the threshold level would leave permitting authorities confronting an influx of millions of permit applications that would begin within a year. Little can be done during that year to meaningfully streamline the program.

In addition, for title V purposes, the first-phase threshold must be considered a deferral of, and not an exemption from, permitting obligations because existing sources must apply periodically for a title V permit. That is, if, during the second-phase rulemaking, EPA lowers the threshold, sources that are able to avoid title V permitting obligations under the first phase may be required to obtain a title V permit.

C. Step-by-Step Process

In addition to the ''absurd results'' and ''administrative necessity'' case law, a separate line of cases may be relevant for this action: Cases that have held that agencies may approach problems one step at a time. In these cases, the Courts have dismissed challenges to agency actions that implement part of, but not the entirety of, a statutory mandate, on grounds that agencies may proceed in an incremental fashion. In these cases, the Courts emphasized that the agency's partial action was a step in an overall path toward achieving full implementation of the statutory mandate. We solicit comment on whether this caselaw is supportive of our action in this notice.

In *Massachusetts* v. *EPA,* 549 US 497, 524 (2007), the U.S. Supreme Court, in holding that EPA has authority under the Clean Air Act to regulate GHG emissions, noted that ''[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.'' Instead, they may permissibly implement such regulatory programs over time, ''refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.''

The D.C. Circuit, in *Grand Canyon Air Tour Coalition* v. *FAA*, 154 F.3d 455, 477–78 (DC Cir 1998), considered a challenge to the Federal Aviation Administration's (''FAA'') final rule for reduction of aircraft noise from sightseeing tours in Grand Canyon National Park. There, the 1987 Overflights Act required the FAA to develop a plan within 120 days for limiting aircraft overflights in order to achieve substantial restoration of natural quiet. The Overflights Act further required that the FAA implement the plan by regulation; and then, within 2 years after the date of the plan, submit to Congress a report discussing whether the plan had met the statutory goals or whether revisions to the plan were needed. The FAA did issue a final rule—the one that was challenged—but did not do so until 10 years after enactment, and that rule required only partial action for limiting overflights. At the same time that it issued the rule, the FAA proposed two additional rules, and stated that the set of three rules together would achieve substantial restoration of natural quiet in another 10 years. The Court upheld the final rule and declined to compel the FAA to take additional action on a faster time frame. The Court explained:

> We agree that it would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all. * * * But the FAA has not taken that course here. It has never defended the Final Rule as the sole means for restoring the natural quiet, but only as the first of three steps. Its contemplation was that the three rules together would achieve that goal [within 10 additional years].

Id.

Similarly, in *City of Las Vegas* v. *Nevada Dev. Comm'n,* 891 F.2d 927, 935 (DC Cir 1989), the Court upheld the Department of Interior's emergency regulation listing as endangered species the tortoise population in the Nevada portion of the Mojave Desert, even though the regulation excluded the population in the Sonoran portion. The Court found that ''agencies have great discretion to treat a problem partially,'' and held that it would not strike down agency action ''if it were a first step toward a complete solution.''

In these cases, the agencies were required to implement a statutory directive through rulemaking. The D.C. Circuit upheld partial action by the agencies when the Court considered it to be an initial step towards meeting the directive. This action is set in a somewhat different context. The statutory provisions at issue here—the PSD and Title V applicability thresholds —provide that when GHG requirements are triggered, GHG emitters must obtain permits. When the triggering event occurs, the agency need take no further action before regulatory consequences ensue; sources included within the PSD and Title V programs must obtain permits once these statutory provisions are triggered. However, as we have described, if sources are required to apply for permits in accordance with the literal requirements of the statute, the permitting authorities would not have the resources to process those permits, and severe adverse results would occur. This action would ameliorate that situation by establishing a process for compliance with the statutory requirements. As discussed elsewhere, this process consists of a first phase that entails establishing the applicability thresholds at the specified levels, developing methodologies for general permits and other streamlining approaches, collecting data, preparing an assessment, and then promulgating rulemaking for further action. This process would allow us to craft the application of PSD and title V in ways that are achievable and effectively balance the regulatory burdens with the reductions achievable. In this sense, this action bears similarity to the agency actions upheld by the D.C. Circuit as partial steps.

We solicit comment on whether this line of cases is relevant for our action in this notice.

In particular, we solicit comment on whether an approach that includes step-downs in the applicability thresholds, coupled with regular examination of whether the administrative situation is improving, is an appropriate way to achieve compliance while taking into account the administrative imperatives. If so, we ask for suggestions on how we could structure such an approach (*e.g.,* when future phases should begin, how we should determine the appropriate thresholds for each phase, *etc.*) In addition, we solicit comment on the level of detail with which we would be required to identify our path towards facilitating full administration of the PSD and title V applicability requirements in order for the Court to uphold our initial steps under this case law. We also solicit comment on whether this proposal establishes such a path with sufficient detail and, if not, what further actions we should include in the final rulemaking or commit to undertake in subsequent rulemaking.

D. What were the ANPR comments received on GHG tailoring options for regulating GHG emissions under PSD and title V?

Responses to the ANPR give us some perspective of the initial views of some of the permitting authorities, sources, and the public on permit GHG tailoring options. Many of the ANPR commenters, including representatives from States, environmental groups and industry, recommended that EPA limit permitting, at least initially, to higher-emitting sources. While there were few recommendations on specific permitting levels, suggestions ranged from 10,000 to 100,000 tons per year CO_2. A number of environmental groups stated that if the rationale for treating smaller sources differently relies on principles of administrative necessity, the cutoff point should relate to what is administratively feasible while maximizing the objectives of the CAA.

Most industry stakeholders, representing a broad profile of affected sources, stated that title V and PSD applicability for sources of GHG emissions at current permitting thresholds would be economically disastrous and would create regulatory gridlock. Alternatively, some environmental groups opposed any temporary permitting thresholds, stating that EPA does not have legal authority to change thresholds to limit applicability.

Some States and environmental groups recommended streamlining

through the use of general permits and presumptive BACT. This option was supported mostly by States, but one industry commenter also agreed that it was an alternative worth pursuing if EPA insisted on regulating GHG emissions under the current CAA. Some States noted that they have a successful history of using general permits and believe the use of general permits as well as presumptive BACT could be part of an effective and reasonable approach to reduce regulatory costs and administrative burdens. Other industry groups said that presumptive BACT and general permits are unaffordable and require too much negotiation, and EPA lacks authorization to use them.

States and industry commenters acknowledged that it would take a significant amount of time to define presumptive BACT or general permits for different categories, although some States said that, over time, they have developed similar approaches to permitting with success for non-GHG gases for certain source categories. Industry commenters argued that the case-by-case review of permit applications that the NSR program requires is the epicenter of NSR, and that a one-size-fits-all approach will not mesh with the diversity of different manufacturing industries of all sizes. Furthermore, even with the use of these streamlining approaches, industry claims that there will still be tens of thousands of previously unregulated sources who would need to undergo PSD permitting. To review comments received on the ''Regulating Greenhouse Gas Emissions Under the Clean Air Act'' ANPR (73 FR 44354, July 30, 2008), see Docket ID No. EPA–HQ–OAR–2008–0318.

VII. Streamlining Options and Tools To Address the Administrative Burdens of PSD and Title V for GHGs

As noted in earlier sections of this preamble, we believe that the application of PSD and title V requirements to sources of GHG emissions at current statutory thresholds would be administratively impossible at the time that we expect PSD and title V requirements to be triggered for those sources, which we expect to be the end of March 2010. These requirements would also impose undue burdens on the sources. However, we recognize that there are several streamlining techniques with the potential to reduce over time the burdens on sources and the administrative burdens of the PSD and title V requirements. We have initially assessed the general availability and usefulness of the streamlining techniques that are consistent with the statutory requirements to address, manage and reduce the administrative burden on permitting authorities. In addition, if we are compelled to promulgate regulatory requirements that depart from the statutory requirements, we recognize that we must do so to the smallest extent possible and must remain as close as possible to congressional intent. Other of these streamlining techniques may depart from the statutory requirements, but they may be preferable to the extent that the departure is to a smaller degree than raising the applicability thresholds.

However, as we will discuss below, we do not believe that we can develop and implement any of these streamlining techniques in the near term in the manner necessary to make the programs administrable at the statutory PSD and title V permitting thresholds. Accordingly, at this time, we cannot rely on these techniques in lieu of phasing in the applicability thresholds in the manner that we propose. However, we believe that these streamlining techniques should be an integral part of a strategy during the first phase of the phase-in period—which includes evaluating the threshold we propose to establish—to address and reduce the burden on permitting authorities. Thus, during the first phase, we plan to aggressively pursue further development of these techniques, and we plan to implement as many of them for as many source categories as possible and to do so as soon as possible. The reassessment and additional rulemaking that we propose to undertake at the end of the first phase will take into account the extent to which these streamlining techniques, as well as the permitting authorities' ability to enhance their resources, promote administrability. Moreover, for smaller sources for which PSD and title V requirements would not apply due to the increase in the major source applicability thresholds, EPA will also assess and identify cost-effective opportunities available in this notice to achieve GHG reductions through means other than PSD (*e.g.,* energy efficiency and other appropriate measures).

In section VII.A of this preamble, we discuss streamlining techniques that either have been used or could potentially be used in the PSD and title V programs. Some techniques may have applications to both programs (*e.g.,* general permits), while some are applicable to only one program (*e.g.,* presumptive BACT for PSD). In sections VII.B and VII.C of this preamble, we describe the implementation of these techniques as they relate both to permitting GHG emitters under current PSD and title V permitting thresholds and to a broader GHG tailoring strategy that involves the applicability thresholds proposed with this action.

We solicit comment on the permit streamlining approaches discussed in section VII.A of this preamble and also request information and comment on any other tools or options that could address or reduce the administrative burden of implementing PSD and title V for major GHG sources and reduce the burdens on the sources.

A. Permit Streamlining Techniques for PSD and Title V

We believe that a strategy to address the administrative burden associated with implementing the PSD and title V programs for sources of GHGs could include one or more of the following permit streamlining techniques or processes.

1. Redefining ''Potential to Emit''

Both PSD and title V requirements apply to ''major'' sources, and ''major'' sources are defined as sources that emit, on a PTE basis, 100/250 tpy for PSD purposes and, in general, 100 tpy for title V purposes. PTE is basically defined as the maximum capacity of a source to emit any air pollutant under its physical and operational design, including legal limitations, if any, on, for example, emissions or hours of operation. Many source categories have no legal limits on their hours of operation and, as a result, are treated as if operating 24 hours per day, seven days per week—which totals 8,760 hours per year—and emitting during that entire time. As a result, basing the applicability thresholds on PTE, rather than on actual emissions, has the effect of sweeping enormous numbers of additional sources into the PSD and title V programs. For example, sources that do not in fact operate for part of the year, but that have no legal limitation on their operating hours, must calculate their PTE on the basis of the amount of emissions that would result if those sources did operate, and therefore emit, on a year-round basis.

However, sources in such situations may take legally and practically enforceable limits on their operational parameters, by, for example, agreeing to operate during only part of the year or during only a limited number of hours per day, or employing control devices. These limitations would lower the sources' PTE and thereby allow them to avoid classification as ''major.'' PTE limits are already frequently used in PSD and title V permitting programs. There, the permitting authorities

typically apply PTE limits as a source-specific limit that is crafted in a facility's minor source permit and tailored to the source's individual circumstances.

This approach of reducing PTE to more closely approximate a source's actual emissions—and, in the case of smaller sources, thereby allowing the PTE to fall below the ''major'' source threshold that triggers PSD or title V applicability—offers promise to significantly reduce the number of sources subject to PSD and title V, and thereby significantly ease administrability of those programs once GHG emitters become subject to them.

This approach may be particularly suitable to sources in certain categories of GHG-emitting, combustion-related, small sources that do not operate at anywhere close to the 8,760 possible hours over a given year that is generally assumed in the PTE calculation. These categories may include: Furnaces, which likely only operate during the winter season and parts of spring and fall; water heaters, which only combust fuel at periodic intervals necessary to maintain water temperature; and small stationary engines, which may operate only for limited and defined periods of time for certain businesses.

The permitting authorities typically apply PTE limits as a source-specific limit that is crafted in a facility's minor source permit and tailored to the source's individual circumstances.

However, creating PTE limits for very large numbers of GHG-emitting sources nationwide would require a more efficient approach than creating them through individual minor source permits, as permitting authorities have done to date. Otherwise, the sheer volume of permits and the process involved for each permit would themselves create administrative burdens that would be self-defeating. This could particularly be the case for the title V program, for which many sources may seek PTE limits as soon as the program becomes effective for GHG emitters, and as a result, permitting authorities would need to deal with a large number of sources at the same time.

In lieu of individual minor source permitting, we intend to evaluate and to consider adopting, or encouraging State permitting authorities to adopt, rules for source categories that we expect to include large numbers of sources whose actual GHG emissions are well below major source thresholds but which, absent such rules, have PTE above those thresholds.

There are several approaches through which EPA could take this action or encourage States to undertake similar actions. For certain source categories, it may be possible to define the source so that its PTE more closely tracks its actual emissions. To return to one of the examples provided earlier, it may be possible to define furnaces (which have the potential to operate year-round) to include the thermostats to which they are attached, which constrain them from operating in warmer weather. In this manner, the PTE of the furnace-thermostat source would take into account the operational constraints, so that PTE would more closely approximate actual emissions. This type of rule would not constitute any legal constraint within which the source must comply; rather, it would define the source as including specified pieces of equipment that, in turn, incorporate operational constraints.

For other source categories, it is conceivable that the only way to limit PTE would be to promulgate regulations that limit a source's operation. These regulations are often referred to as ''prohibitory rules.'' For example, the permitting agency could promulgate a regulation that would preclude certain sources from operating for more than a certain number of hours per year, while also providing a streamlined method to allow a source to operate for longer hours upon request to the permitting agency.

We have some experience with developing and issuing guidance on PTE calculation methodologies through 1990s guidance for States wishing to create PTE limits through prohibitory rules or other mechanisms for several categories that were subject to seasonal operational shutdowns or that did not operate at maximum capacity for each hour of each day, so that actual emissions were well below their unadjusted PTE. See the memorandum entitled ''Potential to Emit (PTE) Guidance for Specific Source Categories,'' from John S. Seitz, Director, OAQPS, OAR, EPA, to EPA Regions, April 13, 1998, found at EPA–HQ–OAR–2009–0517. These categories included grain elevators, industrial boilers, gas stations, emergency generators, printing operations, and cotton gins. The guidance document provided assumptions and calculations that States could use to develop prohibitory rules or other mechanisms to easily limit the PTE of sources in these categories.

We envision a similar approach to establish PTE calculation methods for various categories of sources that emit GHGs. The following steps would need to occur for full development and implementation of such a program:

Step 1: EPA identifies source categories that are generally conducive to this approach, considering the amount of their GHG emissions, complexity of operations, and emissions unit characteristics.

Step 2: EPA collects data from the industry and individual sources on typical operations, including emissions unit and process parameters.

Step 3: Acting through guidance or regulatory changes to the Federal PSD regulations, EPA develops PTE calculation methodologies and implementation procedures for the appropriate source categories.

Step 4: EPA solicits comment from permitting authorities and affected sources on PTE calculation methodologies and implementation procedures.

Step 5: EPA issues the final regulations or guidance.

Step 6: Permitting authorities adopt revisions that incorporate EPA's regulations or guidance.

Step 7: Sources comply with any applicable legal limits.

Based on our efforts in the 1990's, we believe that it would take EPA approximately 1 year to issue guidance for a given source category. We believe many States would be able to immediately apply this guidance. Some States may need to adopt the guidance in their SIP, which EPA must then approve, a process that could take approximately 3 years. Finally, for those rules that would not be self-implementing, sources would need time to meet the requirements of the rule. We ask for specific comment on stakeholders' experience with limiting PTE by rule rather than through individual permits, considerations in phasing in this approach to GHG sources, and identification of categories that might benefit from the use of rules limiting PTE.

2. Presumptive BACT

CAA section 165(a)(4) requires that sources subject to PSD implement BACT for each pollutant subject to regulation under the Act, and CAA section 169(3) requires that BACT emissions limits be determined ''on a case-by-case basis'' that reflects the use of state-of-the-art demonstrated control technology at the time of the permit action. Thus, BACT is required to be source-specific, changes over time, and requires continual updating. The permitting authority's decision as to what control requirements constitute BACT affords flexibility to consider a range of case-specific factors, such as available control options and collateral cost, energy, and environmental impacts.

However, full consideration of those factors requires significant data and analysis in order for permitting authorities to arrive at a case-by-case permitting decision that is appropriate for each individual source when it constructs or modifies. For all these reasons, determining BACT for a particular source can often be a complicated, resource-intensive, time-consuming, and sometimes contentious process. If the number of required PSD permitting decisions increases significantly, these challenges will be magnified, and BACT determinations will be a major factor contributing to uncertainty and delay for sources seeking PSD permits. Furthermore, the increase in workload of BACT determinations will require large investments of resources by permitting authorities, sources, EPA, and the public interested in commenting on these decisions.

In order to streamline the BACT process for the many new small sources that will be brought into the PSD program based on their GHG emissions, EPA will investigate ways to move from a system under which permitting authorities set BACT limits on an individual, case-by-case basis to a system under which they make BACT determinations for common types of equipment and sources, and apply those determinations to individual permits with little to no additional revision or analysis. The EPA has previously introduced this concept, known as ''presumptive BACT'', to streamline permitting for desulfurization projects at refineries as well as in other instances,[23] and some State permitting authorities have adopted similar approaches.[24] Based on our understanding of the types of sources that will become subject to PSD if GHG emissions are regulated at the statutory 100/250-tpy threshold, we believe the presumptive BACT process could offer significant streamlining benefits. These benefits arise because many of the sources that would become subject to BACT will likely have very similar emissions producing equipment, and there will be little variation across sources with respect to the cost, energy, and environmental considerations in the BACT decision.

The central component of a presumptive BACT approach would be the recurring technical determination, subject to notice and comment, of the presumptive BACT levels for various categories. Because of the limited data currently available about the number and types of sources that would become subject to the BACT requirement for GHGs, we cannot at this time predict how many or which categories might benefit from such an approach. We recognize that considerable work will be needed to determine what options exist for controlling GHG emissions from these categories of sources and the various types of emitting equipment they use.

As noted above, the CAA requirement for BACT, found in sections 165(a)(4) and 169(3), mandate that BACT determinations be made for each pollutant on a ''case-by-case basis.'' Accordingly, we need to explore whether we can develop a process that benefits from the efficiencies that presumptive BACT would provide while also allowing for individualization of permits. A possible approach would be to develop, through notice-and-comment rulemaking, a presumptive BACT level for sources in a particular source category, but require that permitting authorities allow public comment on individual permits as to whether there are significant case-specific energy, economic, and/or environmental impacts that would require adjustment of the presumed limit for that particular source. This phase in approach could streamline the BACT determination process to some extent, although the prospect that presumptive BACT determinations would, as a result of public comment, still have to be reviewed for numerous individual sources could well negate those streamlining benefits.

Accordingly, we believe that we also need to investigate a system under which presumptive BACT levels for a source category are developed through notice-and-comment rulemaking but applied to individual sources in that category without requiring permitting authorities to individualize the BACT determination or to allow for public comment on how presumptive BACT levels would apply to an individual source. The D.C. Circuit, in the *Alabama Power* case discussed above, stated that courts ''frequently uphold streamlined agency [regulatory] approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress.'' 636 F.2d at 358. The Court recognized that such streamlining measures may be needed when time or personnel constraints or other practical considerations ''would make it impossible for the agency to carry out its mandate.'' *See id.* at 359. Given the significant increase in new sources that would likely be brought into the PSD program once GHGs are regulated, maintaining individual case-by-case BACT determinations may well be impractical and may well warrant a presumptive BACT approach that does not authorize individualized, source-specific determinations. This approach could well be an important tool to allow EPA, State and local permitting authorities to carry out the PSD program in as timely and efficient manner as necessary to promote (rather than hinder) control of GHG emissions from the many new, small source categories that would be required to have PSD permits based on their GHG emissions. This approach would preserve opportunities for public participation by taking comment during the determination of presumptive BACT levels for a source category. Although this type of presumptive BACT approach—one that does not permit individualized, source-specific determinations—would depart from a literal application of the statutory requirements for BACT, it may nevertheless remain closer to the congressional intent for the PSD program than maintaining the applicability threshold at a level higher than the statutory level. If this is the case, then EPA could be required to establish a presumptive BACT approach and lower the applicability thresholds from the first phase level proposed in this action.

Several other factors should be taken into account when considering a change from case-by-case BACT determinations to a presumptive BACT process for some specific source categories within the PSD program. As a general matter, we will need to consider how such presumptive BACT limits should be established and used, and what provisions in the CAA would set requirements or limits on their establishment and use. In particular, EPA recognizes the CAA section 169(3) requirement to set BACT limits after taking into account site-specific energy, economic, and environmental impacts (otherwise known as collateral impacts).

In addition, while case-by-case BACT determinations allow for the continual evolution of BACT requirements over time (as controls applied in prior

[23] *See* Memorandum, ''BACT and LAER for Emissions of Nitrogen Oxides and Volatile Organic Compounds at Tier 2/Gasoline Sulfur Refinery Projects,'' from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors (January 19, 2001).

[24] For example, Wyoming has a minor source permitting program that includes a BACT analysis, and they use a presumptive BACT process for issuing minor source permits to a particular source category—oil and gas production facilities. See Permitting Guidance for Oil and Gas Production Facilities, Wyoming Dept. of Environmental Quality, Air Quality Division (August 2007 revision).

permits are considered in each subsequent case-by-case BACT determination), EPA recognizes that application of presumptive BACT to a category of sources over many permitting decisions may diminish the technology forcing effects of PSD. EPA is interested in options that would help maintain advances in control technologies, such as a requirement to update and/or strengthen BACT at set intervals (such as after 3 years).

EPA seeks comment on all aspects of the use of presumptive BACT limits within the PSD program, including EPA's authority to do so, whether there is need for and value to such an approach, and suggestions for how such limits could be established, updated, and used consistently within the requirements of the CAA, or by departing as little as possible from those requirements. We also ask for comment on whether there are issues at traditional PSD major sources that arise for GHGs and that would not be addressed by a presumptive BACT approach. If so, we ask for comment on additional options for streamlining the BACT requirement to address these issues.

3. General Permits and Permits-by-Rule

A general permit is a permit that the permitting authority drafts one time, and then applies essentially identically (except for some source-specific identifying information) to each source of the appropriate type that requests coverage under the general permit. Congress expressly codified the concept of general permits when it enacted the title V program and States have been using general permits and similar processes for years in their own permit programs, particularly for minor source NSR and operating permits. Due to the case-by-case nature of PSD for ''traditional'' major sources and the differences among individual PSD sources, there has not been much interest or activity in general permitting for the PSD program. However, we believe this approach merits strong consideration for both PSD and title V programs due to the large number and similar characteristics of many of the sources that EPA expects will become newly subject to these permitting programs because of their GHG emissions.

A general permit provides a streamlined application and permitting process for sources that are similar in terms of operations, emissions units, and applicable requirements. By issuing a general permit, a permitting authority indicates that it approves the activities authorized by the general permit, provided that the owner or operator of the source registers with the permitting authority and meets the requirements of the general permit.

Permit-by-rule provisions may be very similar to general permit provisions, but they typically authorize a source owner to operate in accordance with certain requirements provided that the source owner registers with the permitting authority or certifies that they are complying with all applicable requirements. Thus, a source subject to the permit-by-rule would not need to wait for permitting authority approval, as is the case with the general permit, prior to operating under a permit-by-rule.

General permits are attractive in their ability to dramatically reduce permitting timeframes for affected source types. At the same time, general permits are highly conducive to automation and the development of web-based applications. For example, New Jersey's Department of Environmental Quality has fully automated its air general permitting process, allowing source owners to go online, apply for a general permit, build the permit themselves, issue it to themselves by printing it out, and pay for it by credit card. This type of one-stop processing has the potential to dramatically streamline the air permitting process for source types covered by general permits, and the resulting electronic records create spillover benefits for compliance tracking, inspection management, and pollution prevention outreach.

a. General Permits for the PSD Program

EPA has limited experience in developing general permits and permits-by-rule under the PSD program due to the predominance of the case-by-case BACT decision process described in section VII.A.2 of this preamble. In considering the use of general permits within the PSD program, EPA is considering how such general permits should be established and used, and what provisions in the CAA might limit their establishment and use. One option is to model PSD general permits on the general permits used in title V, as provided in 40 CFR 70.6(d). However, an important consideration in establishing PSD general permits is the requirement in CAA § 165(a)(2) that permits be issued after ''a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations.'' One option for addressing this public participation requirement at least to some extent is the approach followed for title V general permits in 40 CFR 70.6(d), which provides that permitting authorities may establish general permits after following notice-and-comment procedures required under 40 CFR 70.7(h) and then grant a source's request to operate under a general permit without repeating the public participation procedures. Other considerations for establishing general permits under the PSD program include the requirement to determine BACT on a case-by-case basis (as discussed in an earlier section of this preamble), and the other procedural requirements referred to in section VII.A.3 of this preamble concerning the Class I consultation and the analysis of air quality and other potential impacts under CAA section 165(e).

Because permitting authorities have had minimal experience in developing general permits and permits-by-rule for PSD, sufficient time would be needed to develop them as useful tools to reduce the administrative burden associated with the application of the PSD program to major GHG sources. Sufficient time would be needed for the following steps: (1) EPA must determine best candidate sources for general permits and permits-by-rule; (2) EPA must determine similar types of processes and source types and sizes to combine; (3) EPA must prioritize the development and use of general permits and permits-by-rule; (4) EPA must issue guidance or rulemaking (as needed) for each grouping of similar sources; (5) States must adopt the guidance or rulemaking in their SIPs, as needed; and (6) sources must implement the requirements. We estimate that EPA would require more than 3 years to develop and deploy general permits and permits-by-rule would require more than 3 years to develop and deploy for a candidate group of sources, and that additional time would be needed for the States and sources to take the indicated steps.

EPA seeks comment on the use of general permits within the PSD program, including both EPA's authority to do so and suggestions for how general permits would be established and used consistent with the requirements of the CAA and identification of source categories that could benefit from such an approach.

b. General Permits for the Title V Program

In contrast to the PSD program, in the title V program, general permits are specifically authorized under CAA section 504(d), which provides:

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general

permit shall comply with all requirements applicable for permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 503 of this Act.

EPA regulations describe general permits in 40 CFR § 70.6(d). These provisions specifically authorize the use of general permits covering numerous similar sources under the title V program. The general permit must also follow the public participation requirements of 40 CFR 70.7(h). The information development and review conducted as part of streamlining for an individual source can be used by the permitting authority to generate a general permit for similar sources or portions of sources. If a general permit were used, EPA and public review beyond that needed to issue the general permit would not be necessary when sources subsequently applied for the streamlined permit conditions established under the general permit. Even where a general permit is not issued, the availability of information obtained from the streamlining of one source may be useful as a model for future streamlining actions involving other similar sources. EPA notes that the part 71 regulations addressing title V permits issued by EPA (and delegated authorities) contain parallel provisions regarding general permits. See 40 CFR 71.6(d).

We believe general permits may have more near-term applications for the title V program than for the PSD program because of past experience of permitting authorities, however limited, in using this permit streamlining technique for title V. Certain States have already used general permits for a relatively narrow population of certain minor, mainly area-type sources with a simple set of applicable requirements that were relatively easy for both permitting authorities and sources to implement. These general permits allowed the sources a more focused ''roadmap'' to meeting their regulatory requirements with far less burden associated with applying for the permits and administering them in general. In response to the ANPR, some State commenters noted that they have a successful history of using general permits and believe the use of general permits could be an effective and reasonable approach to reduce regulatory costs and administrative burdens.

We agree that there are similarities between the way general permits have been used in the past, particularly under title V, and the challenges permitting authorities would face for permitting GHG emissions for sources that would not already have, or necessarily need, a more comprehensive title V permit. However, most permitting authorities lack experience with general permits and with GHG sources in general. As a result, we believe that the process of developing general permits for title V purposes would parallel in certain respects the process of developing them for PSD purposes. Specifically, title V permitting authorities would need sufficient time to (1) determine candidate sources for general permits, (2) determine similar permit elements for those sources and develop adequate templates and formats for the general permits for those sources, (3) conduct formal EPA and public review of the general permit, and (4) develop an adequate implementation plan for sources to apply for such permits and for permit review staff to process such permits. After this, sources would need additional time to comply with the general permits. We believe this process would take at least 2 to 3 years for a partial set of general permits to be fully developed and ready for deployment.

4. Electronic Permitting

Implementation of electronic permitting (e-permitting) systems is growing across the U.S., as more and more States implement new or upgraded systems. We believe these systems, possibly in conjunction with general permitting procedures, could assist in addressing some of the administrative burden created by adding GHG emissions sources to the PSD and title V programs.

Most States are currently using agency Web sites to deliver a range of air permitting program services, from enabling electronic submittal of permit applications to providing the public web access to permits and related documents. Permitting authorities find value in e-permitting systems because these systems can lead to improved customer service, decreased data entry errors, shortened permit review timeframes, and improved systems for managing permitting processes. In short, e-permitting systems can make better permits more quickly. Common State e-permitting activities include:

- Development of air permit application forms which can be accessed, completed, and submitted online;
- Development of specialized software or database applications to review submitted permit applications and to support the permit development process; and
- Posting issued permits and draft permit documents to air permitting Web sites.

New technology is expanding the opportunity for collaboration and joint development around information system tools. To enable permitting authorities to handle the administrative workload associated with the application of the PSD and title V programs to GHG sources, EPA could assess and identify best practices for e-permitting system implementation and support States in implementing effective and efficient systems using targeted e-permitting tools and resources. For example, EPA could work with States to develop effective GHG permitting strategies in the following areas:

- Permit application submittal which would involve processes for facilities to identify permits needed, determine the scope of information to include in permit applications, access and complete application forms, and submit those forms and supporting data to State and local permitting authorities.
- Application review and draft permit generation which would involve processes for State and local permitting authorities to conduct administrative and technical permit application reviews, develop permit conditions, and sometimes create draft permit documents. This category could also include a broad range of information technology tools and resources that could support permit writers in preparing better permits more quickly.
- Draft permit review and final permit issuance which would involve processes for State and local permitting authorities to manage completion of external reviews (including public and EPA review periods) and any related updates to the draft permit document, issuance of the final permit, and collection of permit fees.
- Post-issuance activities which would incorporate all activities related to permits that are managed by State and local permitting authorities after permits are issued (including public access to permits and related documents, permit appeals, permit modifications, permit renewals, and inspections and compliance monitoring).
- Workflow tracking and management which would incorporate all of the management procedures and tools that State and local permitting authorities use to track the permit development process, including internal permit authority timeline tracking and public access to workflow information.

5. ''Lean'' Techniques for Permit Process Improvement

In the business world, ''lean'' techniques refers to a collection of process improvement principles, methods, and tools designed to help organizations identify and eliminate non-value-added activity (''waste''), in order to meet customer needs better, more quickly, and more efficiently. Lean techniques have been adopted across numerous business sectors and been adapted to address both production and administrative processes. Lean process improvements could help permitting authorities to address administrative burdens that are created if numerous GHG sources are added to their air permitting programs.

In the context of air permitting, Lean improvement events typically focus on eliminating the following types of administrative process waste: Backlogs in permitting; errors in documents; unnecessary rework on documents; and delays associated with transmission of documents between the various parties that develop and approve them. Since 2003, State environmental agencies have increasingly used Lean manufacturing principles and methods to drive rapid, continuous improvement in air permitting and other agency processes.

B. Implementation of Streamlining Techniques and Overall Approach To Administering PSD and Title V Programs

As noted above, these potential streamlining options and tools will require time to develop, issue, and reach full deployment. Each technique would generally take from 3 to 4 years to fully develop and implement. Therefore, if we did not phase in the applicability thresholds for sources of GHG emissions as soon as PSD and title V requirements are triggered for them, there would be a significant time period when numerous GHG sources exceeding the statutory permitting thresholds for PSD and title V would need to obtain permits, and permitting agencies would be faced with overwhelming administrative burdens. Also, at this point in time we do not have enough information to predict the full potential applications and impact of these streamlining techniques for permitting GHG sources. Therefore, it is impossible to predict a specific time in the future when and if such streamlining techniques would reduce the administrative burden of permitting authorities sufficiently for them to administer PSD and title V programs for GHGs at the current permitting thresholds. Instead, we propose to commit to investigating and developing these techniques as vigorously and as soon as possible as part of an overall GHG tailoring strategy that involves phasing in the GHG major source permitting thresholds as soon as PSD and title V requirements are triggered for GHG emitters, but that further involves reassessing the situation, completing a study within 5 years, and then taking up to 1 additional year to finalize regulations adopting the lowest threshold that we conclude is administrable based on the study.

Even so, we have enough information now about some streamlining techniques, such as presumptive BACT in support of PSD permitting and general permits in support of title V permitting, to recognize that those techniques are quite likely to be beneficial to both permitting agencies and affected sources. We believe that within the framework we propose in this action there will be sufficient time to deploy the streamlining techniques and to evaluate their effectiveness in addressing administrative burden.

Therefore, in conjunction with our proposed action to tailor the GHG permitting thresholds, we are committing to a concurrent effort to investigate, evaluate, and support the implementation of permit streamlining techniques to address GHG sources. We believe that while the proposed temporary thresholds will allow the permitting authorities to implement their programs for PSD and title V, it is also necessary for us to pursue applicable streamlining techniques that may help our assessment of the temporary thresholds as part of the threshold evaluation study. We believe that at the end of the threshold evaluation period we will have a better understanding and a sufficient record of the effectiveness of different permit streamlining techniques and how these techniques may influence the need to consider alternative thresholds.

We request comment on which types of streamlining techniques, and for what source categories, would be of most value to permitting authorities and affected sources. We also request comment on the anticipated impact such techniques would have on permitting authorities' administrative capabilities to address GHG permitting and how such impact would affect the need for the temporary thresholds proposed under this action. We also request comment on the time periods needed to develop and implement any such streamlining techniques and on how such time frames can expeditiously meet CAA requirements in light of the administrative burden that would remain.

C. Strategies for Obtaining GHG Reductions From Sources Under the Proposed GHG Permit Thresholds

In addition to pursuing permit streamlining techniques that may ultimately have application to smaller GHG source categories (*e.g.,* those in the commercial and residential sectors), we also recognize that there are both current and future EPA programs that could be used to mitigate GHG emissions from these smaller sources. It may well be the case that, for the smaller sources, these approaches, which are summarized in this section, will result in more efficient and cost-effective regulation than would case-by-case permitting. We therefore intend to fully explore the use of all available tools for addressing these sources at the same time as we explore streamlining the permitting programs.

While EPA is proposing that during the first phase, GHG sources less than 25,000 tpy CO_2e will not be subject to PSD and title V requirements for purposes of applicability, there are feasible, cost-effective opportunities for reductions from these sources through means other than PSD and title V during the first phase. The tailoring proposal does not restrict our ability to explore these opportunities during this first phase. EPA has strong interest in pursuing such opportunities and therefore requests your comments on the practicability of near-term regulatory and nonregulatory programs to address smaller sources.

The near-term opportunities for GHG emissions reductions in smaller-scale stationary sources include increased energy efficiency, process efficiency improvements, recovery and beneficial use of process gases, and certain raw material and product changes that could reduce inputs of carbon or other GHG-generating materials. The use of alternative fuels and energy are also promising methods for achieving GHG reductions.

One key challenge in addressing sources emitting less than 25,000 tpy CO_2e is their diversity. The source types may range from landfills to small stationary fuel combustion devices to waste water treatment plants and electronics manufacturing. In addition to including a range of processes, these source categories may include large (>25,000 tpy CO_2e) and small sources. EPA is soliciting public comment on a fair and systematic way to address the diverse number of categories where individual sources are comparatively small, but the source category could be addressed through some cost effective means.

Controls on sources at this scale would likely involve decisions on how proposed installations of equipment and processes for a specific source category can be redesigned to make those sources more energy efficient, for example, while taking cost considerations into account. However, these types of approaches have yet to be adopted widely, because of market barriers, insufficient financial and legal incentives, or other barriers. Below, EPA provides some examples of approaches that could be taken and existing programs that could provide useful platforms to address smaller sources.

We request comment on the types of strategies that may be appropriate for these sources, considerations—such as cost and feasibility—with respect to implementing programs for smaller sources, approaches to incentivize these types of programs, and ways to measure the effectiveness of such initiatives. We also request comment on whether these initiatives have the potential to be developed in such a way as to meet the essential PSD and title V program requirements for sources, even if the initiatives do not necessarily meet the letter of those requirements (such as the case-by-case determinations required under the PSD program), based on administrative imperatives.

For instance, EPA could design a hybrid approach where sources on the larger end of the below-25,000-tpy CO_2e range could be required to analyze pathways to reduce GHG emissions by a certain percentage, but EPA or the States could use flexible criteria in requiring reductions from those sources, including the timeframe for achieving such reductions. These requirements could be supplemented by an incentive program, through which a State could use loan, grant, or emissions credit incentives to help such sources lower their GHG emissions profile, especially when the source is performing a modification. Any approach would have to be systematic, in that the criteria used would have to be responsive to the source volume of emissions, the reductions that might be achieved, cost-effectiveness, permanence and enforceability.

A further alternative would be the use of section 111(d) of the CAA to work with smaller sources to reduce emissions. In contrast to other provisions in the Act which require regulation of all sources above specific size thresholds, section 111 gives EPA significant discretion to identify the facilities within a source category that should be regulated. To define the affected facilities, EPA can use size thresholds for regulation and create subcategories based on source type, class or size. Emissions limits also may be established either for equipment within a facility or for an entire facility. EPA also has significant discretion to determine the appropriate level for the standards.

In addition to exploring regulatory options, EPA will continue to consider existing nonregulatory programs to achieve cost-effective emissions reductions. Some of the EPA's current programs, discussed below, are aggressively working to cost-effectively mitigate GHG emissions through energy efficiency in industry and consumer products and other voluntary programs that address several key CH_4 and other high-GWP sources. The source categories discussed below are not exhaustive, and are discussed as illustrative examples. It is also important to note that particular sources in these categories could fall above or below a threshold value of 25,000 tpy CO_2e.

Energy efficiency is one of the lowest cost means for addressing climate change. Since 1992, EPA, through the ENERGY STAR program, has achieved GHG reductions by helping U.S. businesses adopt cost-effective, energy-efficient technologies and practices. The program combines several elements, including: ENERGY STAR branding of commercial products with superior energy performance and promoting strategic energy management practices across the commercial and industrial sectors. We also work with States to leverage wider use of such ENERGY STAR products as commercial roofing materials, furnaces, and boilers in commercial settings. States can promote the purchasing of ENERGY STAR qualified products in residential multi-family housing and commercial buildings such as offices, hospitals, hotels, schools, and warehouses. These building types comprise the vast majority of sources that would have emissions below the proposed 25,000-tpy CO_2e major source threshold.

Also for these building types, States can take advantage of EPA tools to encourage, track and reward improvements in building efficiency. Already, States are leveraging such tools as Portfolio Manager to make disclosure of building efficiency part of sale/lease transactions. Many States also use ENERGY STAR to incentivize adoption of energy-efficient equipment and buildings through regulated utilities and other energy efficiency program sponsors. Finally, EPA provides resources to help—or to enable States to help—manufacturers improve energy efficiency through a transferable platform that States can adopt which includes sector-targeted energy efficiency guidance, energy program development tools, and a national rating system that scores the energy performance of plants and enables documentation of energy improvement for those interested in demonstrating change in performance. For additional information on these programs, visit *http://www.energystar.gov*.

Methane and other high-GWP gases, including PFCs, HFCs, and SF_6, are potent GHGs that contribute to climate change. In an effort to reduce emissions of these gases, EPA is working cooperatively with a variety of companies and organizations in the energy, waste management, agriculture, and industrial sectors to implement voluntary programs that encourage cost-effective emissions reductions. These programs offer a range of technical and policy information products and exchanges and track emissions reductions in the following key sectors: landfills, oil and gas systems, animal waste, coal mines, industrial processes including aluminum production, semiconductor manufacturing, electric power transmission, magnesium production and processing, and the production of HCFC–22, and wastewater from domestic or industrial sources. Experience and lessons learned through these programs can be used by States and EPA for regulatory and nonregulatory initiatives. For additional information on the CH_4 and high-GWP programs, visit *http://www.epa.gov/methane/voluntary.html* and *http://www.epa.gov/highgwp/voluntary.html*. For more information on opportunities for GHG reductions at wastewater treatment facilities, visit *http://www.epa.gov/chp/documents/wwtf_opportunities.pdf*.

VIII. Description and Rationale of Proposed Action

A. Proposed Permitting Thresholds for GHGs

Based on the legal rationale of ''absurd results'' and ''administrative necessity'' described in section VI of this preamble, EPA is proposing with this action to establish the first phase of the thresholds for determining applicability under both the PSD and title V permitting programs and to set a significance level for GHGs under the PSD program. For both PSD and title V purposes, we are proposing to set the applicability threshold at 25,000 tpy CO_2e. In addition, for the PSD significance level, we are proposing a range from 10,000 to 25,000 tpy CO_2e. Upon finalization of this rule, and based

on comments received and the supporting record, we will establish a singular value for the GHG significance level.

EPA is also proposing in this action to commit to evaluating the impact, effectiveness, and need for these GHG permitting thresholds as well as other aspects of the administrative burden for permitting authorities in a study to be completed within 5 years from the promulgation date of the final version of this rulemaking. Based on the results of that study, EPA would propose and promulgate a rulemaking within a year later that would establish the second phase of the tailoring program. This rulemaking would reaffirm the first-phase GHG permitting thresholds or revise those thresholds, promulgate other streamlining techniques, and/or take action consistent with the goal of expeditiously meeting CAA requirements in light of the administrative burden that remains at that time.

This section of the preamble defines the GHG metric used for purposes of determining whether the proposed thresholds are exceeded, describes the policy and technical rationale for selecting the proposed applicability thresholds for PSD and title V, and discusses the proposed 5-year threshold evaluation study.

While the rest of this section discusses the details of our proposed approach, we note at the outset that there may be other ways to structure the first phase of permit program applicability for GHGs than the one we describe as our preferred approach. For example, we could address the administrative burden by defining the sources in the first phase subject to permitting for GHGs to include only sources that are or become subject to title V or PSD permitting obligations under the existing 100/250 tpy statutory thresholds on the basis of their emissions of a non-GHG pollutant. Under this approach, for example, a new source that triggered PSD for a non-GHG regulated NSR pollutant and that also emits GHGs, or an existing source going through a modification that triggered PSD for a non-GHG regulated NSR pollutant and which also increased its GHG emissions would have to do a BACT analysis for GHGs. This BACT process would be expected to identify control options which are technically feasible and cost effective for a particular source based on the tons emitted, thereby ensuring that the first phase of permitting would apply to the largest sources of GHG that are currently subject to CAA regulation based on emissions of non-GHG pollutants. Sources that do not trigger PSD or title V for a non-GHG pollutant would not be subject to these programs solely on the basis of their GHG emissions. Under such an approach, we may still need to establish a significance level for GHG emissions at sources that are subject to PSD due to their non-GHG emissions, but we could consider setting this based on the 10,000 ton CO_2 eq significance level proposed elsewhere in this package. We solicit comment on this approach, and on other potential variations on our proposal that commenters believe could address the administrative concerns in more effective ways.

B. What is the definition of the GHG pollutant for the proposed permitting thresholds?

1. Background on GHG Metrics

The selection of a GHG metric is an important consideration in developing the GHG permitting threshold options because it sets the basis for evaluating whether a particular source exceeds a given threshold. As noted in section IV.A of this preamble, one commonly utilized metric is to estimate and report emissions of GHGs as the collective sum of emissions of the six primary GHGs, with applicable GWPs applied to the non-CO_2 gases. When GWPs are applied to the mass emissions of one of the primary GHGs, the resulting weight is referred to as CO_2e (*see* section IV.A of this preamble for a description of CO_2e). Another possible metric would consist of individual mass-based emissions for each GHG, without their GWP values applied. The choice of the GHG metric can have a significant impact on design and implementation of the GHG permitting threshold.

For example, if a source only evaluated its CO_2 emissions against a permitting threshold, it may fall below the threshold, but if it evaluated the sum of all its primary GHG emissions on a CO_2e basis, it may fall above the threshold. Although there may be a variety of considerations for including one GHG metric over another, the choice of a GHG metric, whether it be the sum of the CO_2e emissions or individual GHGs, for both PSD and title V programs, must include any of the individual GHGs that may be subject to regulatory action under the CAA, as discussed in section IV.D of this preamble.

One of the reasons EPA is undertaking this rulemaking is because it intends to propose and finalize a separate rule that regulates GHG emissions from light-duty motor vehicles and that would trigger PSD and title V permitting requirements for stationary GHG emissions sources. The light-duty motor vehicle rule will identify a GHG pollutant or pollutants subject to regulation. However, at the time of this proposal there is uncertainty as to exactly what GHG metric will ultimately be finalized in the light-duty motor vehicle rule. Also, as discussed in the ANPR, there may be other future regulatory actions or decisions by EPA that would determine what form of GHGs would be subject to regulation under the CAA, such as new source performance standards for certain source categories under CAA section 111. This uncertainty over the form of the GHG metric in future regulatory actions is an important factor in our selection of the GHG metric for the permitting threshold.

In order to better inform our consideration of different GHG metrics for the proposed GHG permitting thresholds, we also reviewed the GHG metrics used in two recent EPA proposals: the endangerment finding and the GHG mandatory reporting rule.

In the proposed endangerment finding for GHGs, the Administrator proposed to define the air pollutant as the ''[c]ollective class of the six greenhouse gases,'' and referred to the widespread use of CO_2e as a means to evaluate the six primary GHGs as a group (74 FR 18886, April 24, 2009). The Administrator also identified this collective approach to defining GHGs, for the contribution test, as most consistent with the treatment of GHGs by those studying climate change science and policy, where it has become common practice to evaluate GHGs on collective CO_2e basis. However, the Administrator also recognized in the proposed finding that each GHG could be considered a separate air pollutant and that defining the air pollutant as the group of six GHGs does not preclude setting standards that control emissions of individual GHGs, as constituents of the group.

Under EPA's GHG Mandatory Reporting Rule proposal, the emissions-based applicability thresholds for reporting are based on total CO_2e calculated from the sum of a facility's emissions of the six primary GHGs plus other fluorinated GHGs, applying GWP values to non-CO_2 gases (74 FR 16448, April 10, 2009). However, annual reporting is required for both total CO_2e and individual GHGs on a mass basis, with no GWPs applied for non-CO_2 gases.

We also note that both domestic regional cap-and-trade programs (*e.g.,* the Regional Greenhouse Gas Initiative) and international trading programs (*e.g.,*

the European Union Emission Trading Scheme) make use of the CO_2e metric for purposes of offsets accounting and emissions trading that involves different GHGs. Under the United Nations Framework Convention on Climate Change (UNFCCC), the U.S. and other countries also report their annual emissions of the six GHGs in terms of CO_2e units.

2. Rationale for GHG Metric Selection for Proposed Permitting Thresholds

As discussed elsewhere, EPA interprets the PSD and title V requirements to apply to each ''air pollutant'' that is ''subject to regulation'' under other provisions of the CAA. It is important to determine which GHGs to treat as the ''air pollutant'' that is subject to PSD and title V requirements and how to measure those GHGs. Taken together, this is termed the GHG metric. As noted above, in the proposed endangerment and cause or contribute findings under section 202(a) of the CAA, EPA proposed to define the ''air pollutant'' for the contribution analysis as the class of six GHGs CO_2, CH_4, N_2O, SF_6, HFCs, and PFCs); but EPA also took comment on the concept of defining each GHG as a separate air pollutant. In connection with the light-duty vehicle rule under CAA § 202(a) that EPA is proposing at the same time as this action, four of those six GHGs which are emitted by light-duty motor vehicles are proposed to be subject to controls under the light-duty vehicle rule (all but SF_6 and PFCs). As EPA explains in the light-duty vehicle rule and below, EPA has discretion under section 202(a) to establish controls at the GHG-specific level regardless of whether the final definition of ''air pollutant'' for the contribution analysis is the class of six GHGs or each GHG individually. In light of the ongoing relevant rulemakings, this proposal discusses several possible ways for identifying the GHG metric for PSD and title V requirements. First, the metric could address each GHG individually, or it could address them as a single GHG group. Second, the metric could include (whether individually or as a group) all six of the GHGs, or only those four GHGs subject to controls in the light-duty vehicle rule. Third, the metric could measure the GHGs (whether individually or as a group) on the basis of their actual tonnage or their equivalent tonnage based on global warming potential (GWP), which we refer to as CO_2 equivalent, or CO_2e.

We propose to identify the GHG metric as the group of six GHGs, on a CO_2e-basis. Using a CO_2e basis, a source's emissions for any of the six primary GHGs that are ''subject to regulation'' under the Act, and therefore considered ''regulated NSR pollutants,'' are summed on a CO_2e basis using their GWP values. The summed CO_2e emissions would then be compared to the applicable permitting threshold to determine whether the source is subject to PSD and title V requirements. We solicit comment on whether we should identify the GHG metric in a different way, such as one of the options identified above.

a. Legal Rationale

Because PSD and title V apply to each ''air pollutant'' subject to regulation, it is necessary both to examine the definition of ''air pollutant'' and to determine which air pollutant or pollutants are proposed to be subject to regulation under CAA § 202(a).

PSD applies to a ''major emitting facility,'' under CAA § 165(a), and that term is defined under CAA § 169(1) as—

> any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any *air pollutant* from * * * stationary sources [in 28 listed categories]. * * * Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any *air pollutant.*

(Emphasis added.) Similarly, Title V requirements apply to ''major source[]s,'' under CAA § 502(a), and that term is defined under CAA § 501(2)(B) and CAA § 302(j) as—

> any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any *air pollutant* * * *.

(Emphasis added.) The term ''air pollutant,'' which, as just noted, is central to the applicability provisions of both PSD and title V, is defined under CAA § 302(g) as—

> any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air.

As just noted, EPA treats sources emitting air pollutants as subject to PSD and title V requirements only if the air pollutants are ''subject to regulation'' under other provisions of the CAA. EPA's current interpretation of ''subject to regulation'' is found in the PSD Interpretive Memorandum, which defines the term as meaning subject to either a provision in the CAA or a regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant, and to exclude pollutants for which EPA regulations only require monitoring or reporting. Accordingly, under the PSD Interpretive Memorandum, the air pollutant that is subject to regulation is the air pollutant for which actual controls are required under other provisions of the CAA.

We believe that PSD and title V requirements will be triggered for GHGs if EPA completes the rulemaking that EPA is currently proposing for light-duty vehicles and vehicle engines. That rule is based on CAA § 202(a). Paragraph (1) of § 202(a) provides, in relevant part:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any *air pollutant* from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(Emphasis added.) This provision, by its terms, requires, as a pre-requisite for regulating an ''air pollutant'' from the described mobile sources, that EPA must make what has come to be called an ''endangerment finding'' for that ''air pollutant;'' and further requires that once EPA makes that endangerment finding, EPA must proceed to ''set standards [for new motor vehicles] applicable to the emission of [the] air pollutant'' for which the endangerment and companion cause or contribute finding was made. EPA has already proposed an endangerment finding for the air pollutant comprised of the collective group of six GHGs: CO_2, CH_4, N_2O, SF_6, HFCs, and PFCs, as well as a finding that new motor vehicle emissions of the 6 GHGs, viewed as a single group air pollutant, contribute to this endangerment. 74 FR 18886, 18904, 18907 (April 24, 2009).[25] Four of these GHGs are emitted by light-duty motor vehicles; as a result, concurrently with this rule, EPA is proposing to set emissions standards for those four GHGs. As noted in the light-duty vehicle rule and below, EPA can set standards for the specific GHGs emitted by light-duty motor vehicles versus for the single air pollutant that is comprised of the six GHG, and still comply with the requirement in section 202(a) regardless of how EPA finally defines ''air pollutant'' in the final endangerment and contribution findings. EPA is proposing to regulate the GHGs emitted by light-duty vehicles by establishing separate emission

[25] In the proposed endangerment finding, the Administrator also stated that if each of the four GHGs emitted by new motor vehicles were treated as separate air pollutants, she would find that each of the four contributes individually to the air pollution that endangers.

standards that limit emissions of CO_2, CH_4, and N_2O. EPA would also allow credit towards the CO_2 standard based on vehicle air conditioner controls that reduce emissions of HFCs.

In light of how the proposed endangerment and contribution finding identifies, and light-duty vehicle rule regulates, emissions of, the ''air pollutant'' under CAA § 202(a), EPA's task in this proposal is to identify the ''air pollutant'' for which PSD and title V will become applicable under CAA §§ 165(a)/169(1) and CAA §§ 502(a)/501(2)/302(j). This ''air pollutant,'' for PSD and title V purposes, is the ''air pollutant'' that is ''subject to regulation'' under CAA § 202(a), according to EPA interpretation.

We are proposing that the relevant ''air pollutant'' for purposes PSD and title V applicability is the single air pollutant that is comprised of the group of six GHGs, as proposed in the § 202(a) endangerment and contribution findings. These six GHGs as a class comprise the air pollutant that is the subject of the endangerment finding and companion contribution finding and constitute the air pollutant that is regulated by the light-duty vehicle rule through measures that address the components of that air pollutant that are emitted from the mobile sources. Thus, although the CAA § 202(a) proposal establishes controls only with respect to four GHGs, as a legal matter the proposal covers the entire set of GHGs that as a class are the single ''air pollutant'' in the proposed endangerment and contribution findings.

We also solicit comment on whether only the four GHGs actually controlled under the mobile source rule should be treated as the ''air pollutant'' subject to PSD and title V applicability. In particular, we solicit comment on whether such an approach would be consistent with our treatment of other ''air pollutants'' that are comprised of numerous individual substances (*e.g.,* VOCs or PM), and how it interacts with EPA's duty under section 202(a) to sets standards for emissions of the ''air pollutant'' for which a contribution finding is made under that section.

In addition, we further believe that the definition of ''air pollutant'' for PSD and title V purposes provides for sufficient flexibility that the form of the standard—that is, the metric—that EPA adopts for PSD purposes may differ from the form that EPA adopts for purposes of regulation under CAA § 202(a). Section 202(a) authorizes EPA to set ''standards applicable to the emission of [the] air pollutant.'' This provides EPA significant discretion in determining how to structure its new motor vehicle standards, as long as they are ''applicable to emission'' of the air pollutant. How EPA exercises its discretion under this provision, whether by separate standards, a collective standard, or some combination of these, as has been proposed, does not change the fact that each of these approaches has the same result—regulating the air pollutant which is the subject of the contribution finding under section 202(a). It is this overall result—regulation of the air pollutant—that determines the applicability of PSD and title V, not the particular form of the standards adopted under section 202(a). To reiterate, under 302(g), ''air pollutant'' means ''any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air.'' We believe that as long as the same ''air pollution agent or combination of such agents'' is regulated for PSD and title V purposes as is regulated under CAA § 202(a), then the PSD and title V applicability requirements are met, whether or not the structure of the regulation is the same as employed under section 202(a). Accordingly, we believe that as long as the six GHGs that are the ''air pollutant'' being regulated under CAA § 202(a) are subject to PSD and title V applicability through some metric, then the precise metric through which they are subject to PSD and title V may differ from the precise manner in which they are regulated under CAA § 202(a). Thus, we believe we may treat the six GHGs as a group for PSD and title V purposes, and weight them by their GWP, even though they are generally regulated individually under the mobile source rule.

b. Policy and Programmatic Rationale

For individual GHGs, differing CO_2 equivalent factors (such as GWP values) are found in the literature. As noted earlier in this preamble, the U.S. and other countries report their annual emissions of the six GHGs in terms of CO_2e units, following UNFCCC guidelines. The UNFCCC reporting guidelines for national inventories, as updated in 2006, require the use of GWPs from the IPCC SAR (IPCC 1996) for CO_2e calculations, even though the IPCC has subsequently updated its GWP values.[26] Consistent with these most recent guidelines, we are proposing to use the same SAR-derived GWP values, which are based on the effects of GHGs over a 100-year time horizon, for purposes of calculating GHG emissions in tpy CO_2e for this tailoring rule.

We recognize a number of advantages in the use of a cumulative CO_2e measure (''cumulative'' here refers to the summation of emissions of CO_2e for all applicable GHGs) using GWP over an individual, mass-based metric, including: (1) A cumulative CO_2e metric, by incorporating the GWP values, addresses the combined radiative forcing of the GHGs emitted; (2) a cumulative CO_2e metric by definition includes any of the six primary GHGs that are emitted and therefore would effectively include any one or combination of the six primary GHGs that might become subject to regulation, thus encompassing a greater variety of possible future regulatory approaches; (3) a cumulative CO_2e metric would be consistent with the proposed mandatory reporting rule thresholds (thereby creating a ''common currency'' for recordkeeping for both industry and permitting authorities); and (4) a CO_2e metric could allow more flexibility for designing and implementing control strategies that maximize reductions across multiple GHGs and would also likely align better with possible future regulations that allow for such flexibility.

We also considered a GHG permitting threshold metric based on individual GHGs on a mass basis, with no GWP applied. The main benefit of an individual-GHG-based metric is that it may provide some ability to better differentiate sources and project emissions that affect one particular GHG. Because of this differentiation, it also may allow for simpler program implementation with regards to establishing emissions limits, establishing BACT, compliance assessment, and measurement/monitoring methods. However, we believe that the benefits in using the cumulative group of GHGs outweigh any implementation advantages to using an individual-GHG-based metric. In particular, the cumulative-GHG, CO_2e-based metric addresses all GHGs and their radiative forcing potential and would provide some flexibility to a source to design and maximize GHG reductions across the facility. Conversely, an individual-GHG-based metric may limit a facility's flexibility to maximize GHG reductions across GHGs and is generally less consistent with the widespread treatment of GHGs in inventory, reporting, and emissions

[26] ''Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2007,'' U.S. Environmental Protection Agency, EPA 430–R–09–004, April 15, 2009. p. ES–3. *See also* the SAR GWPs (IPCC 1996) in table 1–2, p. 1–6. *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.*

offset protocols mentioned in section VIII.B.1 of this preamble.

We solicit comment on the benefits and limitations of our proposed GHG PSD and title V permitting threshold metric based on CO_2e. We also request comments on proposed alternative metrics (such as individual GHG basis) and the effect those alternative metrics would have on setting permitting thresholds for GHGs.

3. Possible Limitation of Proposed Metric for PSD and Title V Thresholds and for PSD Netting Purposes

a. PSD and title V applicability thresholds

This proposed metric may also warrant a limitation for PSD and title V threshold purposes. In rare instances, it is possible that a source may emit only a non-CO_2 GHG in very small amounts, on a mass basis, but one that carries a very large GWP. In this case, it is possible that the source may emit the GHG in amounts that fall below the PSD statutory applicability threshold of 100/250 tpy on a mass basis, and fall below the title V statutory applicability threshold of 100 tpy on a mass basis, but exceed the 25,000 CO_2e PSD and title V applicability thresholds (which, as discussed above, are calculated on a GWP basis) proposed in this action. Under these circumstances, the source would trigger PSD and title V under our proposed rule even though its GHG mass emissions would not, in fact, exceed the statutory triggers.

We seek comment on whether we should address this case; that is, whether such a source should be subject to PSD or title V. Because the PSD and title V statutory thresholds are expressed on a mass basis—*i.e.,* tpy—we are concerned that the metric proposed with this action could have the effect of subjecting to PSD or title V requirements a source whose emissions fall below the statutory threshold limits on a mass basis. Accordingly, we seek comment on whether we should include some refinements to the CO_2e metric, such as adding a 100- or 250-tpy metric that is mass-based. Under this refinement, a source would be subject to PSD and title V only if its GHG emissions exceeded the statutory threshold levels on an actual tonnage basis and if its GHG emissions exceeded the first phase threshold emissions proposed in this notice on a CO_2e basis.

However, we are also concerned that efforts to address this circumstance—for example, by requiring separate tracking of individual GHG mass emissions in addition to CO_2e for up to six gases—would be complex and confusing to administer. Similarly, as discussed above, we are concerned that implementing permitting only on an individual gas basis would have several disadvantages compared to our proposed CO_2e-based approach.

b. Netting

The same issue is also a concern as the proposal relates to PSD netting. By way of background, an existing source becomes subject to PSD when it makes a major modification, which generally occurs when the source is a major emitting facility and makes a physical or operational change that increases its emissions of a regulated air pollutant by a significant amount. In calculating the amount of the increase in emissions, the source must add to the increase the amount of any contemporaneous—generally, within the previous 5 years—increases and decreases that resulted from other changes the source made. If the total amount, so calculated, does not exceed the significance level, then the source is not subject to PSD for the change, and instead has ''netted out'' of PSD.

In rare instances, it is possible that a source of two or more different types of GHGs, with different GWPs, may make two or more contemporaneous changes that increase its emissions of one type of GHG and decrease its emissions of another type of GHG. The effect of those changes may be that the source will have decreased its emissions of its GHGs on a mass basis, but increased its emissions of GHGs on a CO_2e basis above the significance level. Under these circumstances, we are seeking comment on whether that source should be treated as being subject to PSD due to its physical or operational change.

We could prevent the source in this example from becoming subject to PSD by requiring that for an existing source's physical or operational change to be treated as a modification that triggers PSD due to its GHG emissions, the change must, taking into account contemporaneous changes, increase GHG emissions on a mass basis by any amount, and increase GHG emissions on a CO_2e basis by the amount of the significance level proposed in this action. However, we are concerned that efforts to address this circumstance would be even more complex and confusing to administer for netting than it would be for major source determinations.

We therefore solicit comment on how best to address these situations involving new source permitting and netting in light of our proposed choice of a GHG PSD and title V permitting threshold metric based on CO_2e. We are asking for comment on whether these rare circumstances should be addressed in light of the statutory language, and if so, how. Would a mass-based metric for each individual GHG be an appropriate way to address the issue and, if so, should it be implemented in addition to, or in place of, our proposed CO_2e metric?

C. What is the rationale for selecting the proposed GHG permitting thresholds for PSD?

1. Major Stationary Source Applicability Threshold for Sources of GHGs

With this action, we are proposing to establish, for the first phase of the PSD GHG tailoring program, the PSD major source threshold at 25,000 tpy CO_2e and the significance level at 10,000 to 25,000 tpy CO_2e, based on the legal doctrine of ''absurd results'' and ''administrative necessity,'' as described in section VI of this preamble. This first phase will be followed by a study and then promulgation of additional rulemaking that will establish the next phase of requirements. This section provides a more detailed discussion of the technical and policy basis for establishing these threshold levels.

a. Administrative Burdens Associated With the Statutory Threshold Level and the Proposed Permitting Threshold Level

As noted previously, for PSD purposes, if we do not establish a different ''major'' source level for GHG emitters, the effect would be that the statutory threshold level would apply, so that GHG sources in the 28 listed categories under CAA section 169(1) would be subject to a 100-tpy threshold, and all other GHG sources would be subject to a 250-tpy threshold. Under this scenario, tens of thousands of sources each year would undertake projects that would have to comply with the PSD program, which would overwhelm the permitting authorities and interfere with the issuance of permits to all sources, whether they emit GHGs or not.

Accordingly, EPA is proposing a PSD ''major'' source applicability threshold of 25,000 tpy CO_2e. The rationale for this level is to reduce the administrative burden to the point where it is no longer administratively impossible to implement the PSD program. Although requiring permitting authorities to permit sources of GHG emissions at 25,000 tpy CO_2e and higher would increase the level of PSD permitting and therefore increase administrative burdens, compared to current permitting levels, EPA believes that this increase would not exceed the capacity

of permitting authorities to implement the PSD program.

EPA calculated the administrative burden of permitting GHG emitters at the 25,000-tpy CO_2e threshold level as follows: As noted earlier in this preamble, EPA conducted a threshold data analysis that provided information on the numbers of facilities that could potentially be subject to PSD review under different CO_2e-based emissions thresholds and the administrative resources needed to process permits for these facilities. Through the process described in this section of the preamble, we estimate that, at a 25,000-tpy CO_2e applicability threshold for PSD major sources, approximately 400 additional new or modified facilities would be subject to PSD review in a given year. These include approximately 130 new facilities and approximately 270 modifications at existing major sources that would be subject to PSD review as major modifications. Many, but not all, of these facilities would be subject to PSD review for other pollutants that they emit. These estimates compare to the 280 PSD permits that are currently issued in a typical year.

We acknowledge that our estimates for both new facilities and modifications are highly uncertain because they rely on growth trends in industries and businesses, which are inherently difficult to predict, especially under changing economic conditions.

We developed these estimates as follows: To estimate the number of new sources, we identified the various source or industry categories included in the threshold data analysis, along with the number of sources in each category. We then applied source- or industry-specific growth rates to estimate the number of new facilities that would be added in a year at a given major source threshold for a source or industry category. The methodology and results for estimating new sources is described in the Technical Support Document, in the docket for this rulemaking.[27]

To estimate the number of modifications at existing major sources, EPA first calculated the number of existing facilities that would be treated as ''major'' sources due to their PTE-based CO_2e emissions rates. At a 25,000-tpy CO_2e permitting threshold, EPA estimates that about 13,600 existing facilities would be classified as ''major'' sources. Second, EPA determined the current rate of PSD-permitted modifications occurring at major sources nationwide, which is approximately 2 percent of existing major sources. The basis for this modification rate is described in a technical support document found in the docket for this rulemaking.[28] Then, we assumed that GHG sources would modify at the same 2-percent rate. Based on this assumption, EPA estimates that approximately 270 modifications would result from a 25,000-tpy CO_2e major source permitting threshold.

We calculated the additional administrative burden in workload hours and costs based on the per-permit hourly workload estimates and costs for PSD permitting from the PSD ICR.[29] Of the group of 130 new sources, we estimated the number of industrial sources and of commercial or residential sources. For the industrial sources, we assumed that permitting authorities would need to spend 301 hours, on a per-permit basis, for issuing permits that cover both the GHG and non-GHG emissions. This is the same amount of time that permitting authorities need to permit non-GHG emissions from industrial sources. We did not assume additional workload requirements for the GHG emissions because permitting authorities will have some experience with the emissions units, sources, and configurations at these facilities. Also, although there will be new and unique GHG sources to consider at some of these facilities, this experience should provide some administrative efficiencies in preparing and processing GHG-based permit applications for these facilities. Note that some of the 130 new sources would be sources that are subject to PSD only because of their GHG emissions. We estimate that the permitting authorities would need to spend the same amount of time and money on these permits, on a per-permit basis, as the authorities do on new sources of non-GHG emissions. For the commercial or residential sources, we assumed that permitting authorities would require 20 percent of the time for industrial sources, or 60 hours, because these sources tend to be less complex than industrial sources.

The next group of permittees is the 270 GHG sources that are subject to PSD each year because they undertake modifications. For modifications involving industrial sources, we assumed that permitting authorities would need to expend 301 hours, the same as for new sources; for modifications involving commercial or residential sources, we assumed 60 hours—the same, again, as for new sources.

All told, the increase in burden for permitting authorities from including sources of GHGs at a 25,000-tpy CO_2e level, on a total national basis, would be approximately 112,000 staff hours at an additional cost of approximately $8 million. This workload amount represents an increase of about 1.3 times, or 32 percent, in the current burden for permitting authorities on a nationwide basis. We believe that this additional burden is manageable, but that it will necessarily pose some challenge to permitting authorities, and that to accommodate the additional burden, permitting authorities may need to expand their resources or seek efficiencies in processing permits. We believe that any threshold lower than 25,000 tpy CO_2e, would create undue administrative burdens. Thus, we believe that the amount of administrative burden attendant to a threshold level of 25,000 tpy CO_2e is consistent with the administrative necessity case law, which, as described earlier, we read to limit us to depart from the statutory requirements to the smallest extent possible, consistent with congressional intent.

We request specific comments on our estimated burden at the 25,000-tpy CO_2e threshold and on whether the additional workload would be manageable to permitting authorities.

We also request comment specifically on the assumptions we used for calculating the administrative burden from modifications. As noted earlier, our estimate for the number of modifications that would undergo PSD review as a result of a 25,000-tpy CO_2e permitting threshold is based on the modification rate at existing major sources for currently regulated pollutants, which means that the estimate assumes that the modification rate for GHG sources is similar to that for sources of currently regulated pollutants despite the potential difference in types of projects and significance levels. We acknowledge that our estimates for modifications are highly uncertain because they rely on growth trends in industries and businesses, which are inherently difficult to predict, especially under changing economic conditions. Thus, there is significant uncertainty in applying this modification rate and therefore in predicting not only how many major sources will undergo

[27] ''Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation;'' Air Quality Policy Division, Office of Air Quality Policy and Standards; U.S. Environmental Protection Agency; July 7, 2009.

[28] ''Methodology for Estimating Modified Sources That Would be Subject to PSD Permitting for GHGs;'' Prepared by EPA Staff; August 2009.

[29] ''Summary of ICR-based Data Used to Estimate Avoided Burden and Evaluate Resource Requirements at Alternative GHG Permitting Thresholds;'' Prepared by EPA Staff; August 2009.

physical or operational changes in any given year, but also which of those changes would result in GHG emissions increases that would exceed a proposed GHG significance level. We are therefore requesting specific comment on our estimate of modification rates at major sources and soliciting any additional information and data that would improve our estimate of the number of modifications affecting GHG emissions at different types of source categories.

b. Administrative Burdens Associated With Other Permitting Threshold Levels

In addition to the 25,000-tpy threshold for CO_2e, we also considered major source applicability thresholds for PSD ranging from 1,000 to 100,000 tpy CO_2e. Using the basic analysis of new and modified facilities that would become subject to PSD review as described above, we estimated the number of new facilities and modifications at each of these thresholds. A summary of these results is shown in table VIII–1. The results shown in table VIII–1 are based on estimates of potential to emit, measured in short tons of CO_2e, from affected facilities at each threshold level. It should be noted that the use of short tons here, while consistent with the units used for existing major source thresholds for other pollutants identified in the CAA and permitting program rulemakings, differs from the units of metric tons used in EPA's GHG Mandatory Reporting Rule proposal. For consistency within the permitting programs, all data and discussion in this rule are based on short tons.

We believe that the number of new permits that would be subject to PSD at the 10,000-tpy-and-below CO_2e major source thresholds would not be administratively feasible for permitting authorities. For example, we estimate that the 10,000-tpy CO_2e threshold would cause an approximately three-fold increase in the number of PSD permits annually (830 compared to 280), resulting in an additional workload for permitting authorities of approximately 187,000 hours, or an increase of about 2.2 times over their current PSD workload. We believe that this increase in the number of PSD permits and workload would create insurmountable resource demands for permitting agencies in the near term, which would jeopardize the functioning of the PSD program. These time demands are due to not only the increase in number of permits but also the need to implement BACT determinations, GHG emissions evaluations, and other evaluations required under the PSD program for a wide variety of formerly unpermitted sources, including significant numbers and varieties of small manufacturing and commercial establishments. Permitting authorities would confront substantial challenges because the authorities have little experience with these sources and their GHG emissions.

We request comment on our assessment of the impact of major source GHG thresholds lower than 25,000 tpy CO_2e on PSD program administration, including any additional information on the number of sources and modification projects that might be affected at these lower thresholds for different GHG source categories. We also request comment on our conclusion that the 10,000-tpy threshold (or a lower threshold) would be too low to sufficiently address the administrative concerns.

TABLE VIII–1—ESTIMATED NUMBER OF EXISTING FACILITIES AND ANNUAL NUMBER OF NEWLY CONSTRUCTED FACILITIES AND MODIFICATIONS POTENTIALLY SUBJECT TO PSD REVIEW AT DIFFERENT GHG MAJOR SOURCE THRESHOLDS

Major stationary source threshold level (tpy CO_2e)	Number of existing facilities exceeding threshold	Number of new facilities that would exceed threshold (facilities/yr)	Number of modifications at existing facilities that would exceed threshold (modifications/yr)
1,000	278,340	4,330	5,567
5,000	52,888	532	1,058
10,000	26,898	289	538
25,000	13,661	128	273
50,000	7,245	77	145
100,000	4,850	66	97

At the 50,000-tpy CO_2e threshold, we estimate approximately 220 PSD permit actions due to GHG emissions. We do not believe that this level of permit activity would challenge the capacity of permitting authorities to properly administer the PSD program to the extent we described above for the 25,000-tpy CO_2e threshold. As noted elsewhere in the legal discussion of the absurd results and administrative necessity doctrines, we are foreclosed from adopting higher thresholds when we believe a lower threshold would be possible to implement. We request comment on our assessment of the impact of major source GHG thresholds higher than 25,000 tpy CO_2e on PSD program administration, including any additional information on the number of sources and modification projects that might be affected at these higher thresholds for different GHG source categories. We also request comment on our determination that this assessment supports a conclusion that the 25,000-tpy threshold is administrable and thus we do not need to adopt a threshold of 50,000 tpy. We note that the 50,000-tpy level does involve about 6,400 fewer major sources than the 25,000-tpy level, including about 1,600 sources that would have been newly defined as major (*e.g.,* landfills, hospitals, offices, hotels). In light of this, we specifically ask for comment on whether a 50,000-tpy level, which would exclude these sources, is administratively necessary.

c. Emissions Impacts

We also evaluated the amount of GHG emissions emitted by facilities that would be subject to PSD requirements at the proposed thresholds, although, strictly speaking, this information is not relevant to the administrative-necessity basis for selecting the proposed major source threshold level for CO_2e. The objective of the emissions evaluation was to generally assess the extent to which, on a national basis, GHG emissions sources would be covered at the proposed thresholds. The basis for this evaluation, with a detailed summary of the results, is provided in the docket for this rulemaking.[30]

We estimate that a 25,000-tpy CO_2e threshold captures approximately 68

[30] "Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation; Air Quality Policy Division, Office of Air Quality Policy and Standards; U.S. Environmental Protection Agency"; July 7, 2009.

percent of national CO_2e stationary source GHG emissions (including approximately 87 percent of CO_2). This emissions coverage is comparable to national stationary source NO_X emissions coverage of 72 percent at the existing PSD major source permitting threshold of 250 tpy NO_X. Lowering the CO_2e threshold to 10,000 tpy increases the amount of emissions covered by only 2 percent compared to the 25,000-tpy threshold but almost doubles the number of facilities covered. We estimate that a 10,000-tpy CO_2e threshold would also affect approximately 7,000 commercial and multi-family residential sources. A 50,000-tpy CO_2e threshold would virtually eliminate all of the commercial/residential sector from being affected for GHG but would fail to capture some high emitters within key GHG categories (for example, iron/steel, refineries, electric generation, pulp and paper, petrochemical) and would reduce emissions coverage by about 2 percent compared to 25,000 tpy CO_2e. A summary of the percentage of national stationary source GHG emissions associated with the affected facilities at different GHG emission thresholds is shown in Table VIII–2.

TABLE VIII–2—PERCENTAGE OF NATIONAL STATIONARY SOURCE GHG EMISSIONS FROM AFFECTED FACILITIES AT DIFFERENT GHG EMISSION THRESHOLDS

Major stationary source threshold level (tpy CO_2e)	Number of existing facilities exceeding threshold	Percent of national stationary source GHG emissions (percent)
1,000	278,340	73
5,000	52,888	71
10,000	26,898	70
25,000	13,661	68
50,000	7,245	65
100,000	4,850	64

Estimates of emissions coverage at different thresholds are not the same as estimates of the actual quantities of emissions that would be reduced through the PSD permitting program at these permitting thresholds; however, they do illustrate that at the proposed 25,000-tpy CO_2e source threshold, the most significant contributors to stationary source GHG emissions would still be covered by the PSD program as major sources, and therefore any modifications or new additions at these source categories would potentially be subject to PSD requirements, including BACT.

2. Significance Levels

With this action, we are also proposing a temporary, first phase GHG PSD significance level threshold based on administrative necessity. As noted previously, there are no existing PSD significance levels set for any of the GHG pollutants.

Until we establish significance levels for these pollutants, those levels in effect remain at zero tpy, so that any physical or operational change that increases GHG emissions by any amount would constitute a modification and therefore would be subject to PSD. Thus, for any major source, any minor change that increases fuel combustion even slightly would increase GHG emissions and, as a result, potentially trigger PSD review. As with administrative burdens associated with the statutory major source PSD applicability threshold, the burdens associated with the hundreds of thousands of modification projects that would have to comply with the PSD program under these circumstances would be enormous, at least in the short term. They would overwhelm the permitting authorities as well as the regulated community, and would interfere with the issuance of PSD permits to sources of all types, whether emitting GHGs or not.

As a result, we believe that the same legal doctrines of absurd results and administrative necessity apply for establishing the significance level. We need to phase in a significance level for GHGs by establishing, in the first phase, a reasonable significance level based on administrative necessity, and then by conducting a study and promulgating further rulemaking to establish the requirements for the second phase.

To do so, we need information concerning the number of modification projects occurring at a facility level for different source categories that would exceed various possible significance levels for GHGs in any given year. However, it is very difficult to acquire or develop this information—and therefore there is great uncertainty in calculating specific administrative burdens associated with modifications—for several reasons. First, information is not available across sectors and source categories on the types and numbers of specific physical and operational changes that would result in emissions increases in amounts that can be estimated and that therefore can be compared to various GHG emissions significance levels. Second, there is general uncertainty in how many project modifications will occur within any given year because decisions on these projects are driven by facility- and sector-based growth patterns and business planning decisions. Lastly, some source categories and units that emit GHGs have not previously been subject to any type of permitting or reporting requirements; as a result, for these sources, there is very little historical record for use in estimating the number and types of projects that would occur at these sources and, in turn, establish an appropriate significance level for GHGs.

Absent comprehensive information on the types and numbers of modification projects nationally that result in increases in GHG emissions, we are proposing and soliciting comment on a range of possible significance levels for CO_2e. Our proposed range starts at 10,000 tpy CO_2e, which reflects, subject to the uncertainty noted above, our current estimate of what would constitute a GHG significance level below which permitting authorities would be unable to adequately administer PSD, and goes up to 25,000 tpy CO_2e, which is our proposed major source applicability threshold for GHGs under PSD. We believe that a 25,000-tpy CO_2e significance level for GHGs would be the highest level we could consider because it is not reasonable to propose a significance level that is higher than the proposed major source threshold.

We selected the GHG significance level at the lower end of the proposed range by analyzing inventory

information for key source categories that would have a substantial number of modification projects potentially subject to PSD permitting requirements for GHGs. Most importantly, depending on the significance level for CO_2e, small fossil fuel-fired combustion units, which are numerous and ubiquitous, could have a substantial number of modifications that would be subject to PSD. Our threshold data analysis shows that almost 80 percent of the facilities that exceed the 25,000-tpy CO_2e major source threshold do so because of fossil fuel combustion units that emit CO_2. Also, the U.S. national GHG inventory shows that approximately 80 percent of all GHG emissions result from fossil fuel combustion sources. The prevalence of combustion units across all affected sectors, and the dominant contribution of CO_2 fuel combustion-related emissions to their GHG emissions total, leads us to conclude that an administrative necessity-based significance level for CO_2e should be based on modifications that involve these combustion units.

Thus, we analyzed sales data for two of the most affected categories of units: Boilers and stationary engines. Our analysis indicates that, on a yearly basis, almost 2,000 of these new combustion units would emit more than 10,000 tpy CO_2e. The exact number of PSD permits that would result from modifications involving these new emissions units would likely be less than 2,000, depending on whether these units are located at a major source facility, whether multiple units are aggregated at one facility or the units are placed at different facilities, and whether they are considered new additions/new capacity or one-for-one replacements. However, we believe these data on combustion unit sales suggest that the significance level should be at least 10,000 tpy CO_2e because, while the estimated population of new units with the potential to trigger PSD is something below 2,000 per year, that is still likely well above the current number of modifications (fewer than 300) that are currently subject to PSD each year. Any lower level would risk enormous numbers of permit applications that would be administratively impossible to process, and therefore we do not propose a GHG significance level lower than 10,000 tpy CO_2e. Further support for the 10,000-tpy CO_2e level is the fact that the combustion units in the industrial sector that emit GHGs at this rate tend to be larger units: boiler-type units with an approximate heat input rating of 15–20 MMBtu/hr (depending on fuel type); and stationary internal combustion (IC) or compression ignition (CI) engines with a rating of greater than 2,000 horsepower. Units of this size provide a good representation of combustion units utilized in the industrial sector that should be subject to PSD. At the same time it does not capture an enormous number of very small combustion units that would overwhelm permitting authorities from an administrative standpoint. For example, using the same sales information referenced above on combustion units, we estimate that approximately 29,000 new boilers and stationary engines would exceed a 250-tpy CO_2e level. A summary of our significance level analysis for CO_2e is provided in the docket for this rulemaking.[31]

Although our significance level range is driven by our analysis of CO_2 combustion units, we believe that the level of 10,000 tpy CO_2e should be administratively feasible for other sources of GHG emissions. Our threshold data analysis shows approximately 3,000 facilities that would have the potential to emit amounts of non-CO_2 GHGs exceeding a 25,000-tpy CO_2e major source threshold based on their non-CO_2 emissions alone. Although this estimate is not directly related to the number of possible modification projects that may exceed a 10,000-tpy CO_2e significance level for non-CO_2 emissions alone, this estimate provides a relative sense of the number of facilities emitting non-CO_2 emissions at rates that approximate the 10,000-tpy CO_2e level, only a portion of which may actually undergo modifications that would potentially be subject to PSD review. For example, if the 3,000 facilities are assumed to have a modification rate of 2 percent, as described above, and each modification results in emissions increases of at least 10,000 tpy CO_2e (in, again, non-CO_2 GHG emissions), then approximately 60 modification projects would come under PSD review just for principally non-CO_2 sources. This alone would be an approximate 20- to 25-percent increase above the current level of 280 annual permits. We believe that an additional PSD permit increase of this magnitude, on top of the modifications resulting from CO_2 emissions from combustion-related projects, may stretch the capacity of, but may not necessarily create an unadministrable burden for, permitting authorities.

Although we believe 10,000 tpy CO_2e represents a reasonable lower bound for the range we are proposing for the GHG significance level, we specifically request comments on whether: (1) A level lower than 10,000 tpy CO_2e would still be administratively feasible; (2) a level higher than 25,000 CO_2e is necessary to avoid an administratively overwhelming number of modification projects becoming subject to PSD permitting due solely to their GHG emissions; and (3) there are data suggesting an appropriate number we should select within the 10,000- to 25,000-tpy range. In suggesting alternative thresholds, we request that commenters submit any available information and data that would allow us to better characterize the number and types of modification projects that would become subject to the PSD program at different GHG significance levels and for different types of source categories.

We note that this basis contrasts with that of our prior significance levels determinations, which were based on *de minimis* emissions levels.

D. What is the rationale for selecting the proposed first phase GHG permitting threshold for title V?

With this action, we are proposing a temporary, first phase GHG title V major source threshold of 25,000 tpy CO_2e, based on the administrative imperatives that underly both the absurd results and administrative necessity legal doctrines.

As noted earlier, if we do not establish a different ''major source'' level under title V for GHG sources, those sources would become subject to the statutory 100-tpy threshold. Under these circumstances, we estimate that 6.1 million sources would have to comply with the title V permitting program. The resulting administrative burdens would be enormous in the short term and would overwhelm the permitting authorities, as well as posing severe burdens on the regulated community. Accordingly, we need to phase in title V applicability by establishing, in the first phase, an administrable permitting threshold, and then by conducting a study and promulgating further rulemaking to establish the requirements for the second phase.

The criterion for establishing the title V major source threshold is to reduce administrative burdens to the point at which the title V program can be implemented. Our analyses, discussed in detail later in this preamble, establish this threshold at 25,000 tpy CO_2e. Although this level would likely see an increase in the volume of title V permitting, compared to current permitting levels, and although this increase would pose some challenges to

[31] ''Summary of Administrative Necessity Basis for a CO_2-e Significance Level''; Prepared by EPA Staff; August 2009.

permitting authorities, EPA believes that this increase would not exceed the capacity of permitting authorities to implement the program.

The title V permitting program requires all existing major sources to obtain operating permits, as compared to the PSD program, which requires permits only for newly constructed major source facilities and major modifications at existing major sources. Therefore, to evaluate permitting thresholds for title V, we analyzed the number of existing facilities that would exceed a given GHG threshold. We considered alternative major source thresholds ranging from 1,000 to 100,000 tpy CO_2e.

Our estimates for the existing number of facilities whose emissions would exceed different GHG thresholds are summarized in table VIII–1 and discussed in more detail in the Technical Support Document in the docket for this rulemaking.[32] For comparison purposes, note that currently there are approximately 14,700 title V operating permits nationwide. We estimate that at a 25,000-tpy CO_2e permitting threshold, about 13,600 existing facilities would be classified as ''major sources'' for their PTE-based CO_2e emissions. As discussed later in this preamble, these 13,600 facilities present additional workload demands on permitting authorities, either because they are not currently required to obtain a title V permit (because their non-GHG emissions fall below the ''major source'' threshold) or because, although they already are required to obtain a title V permit (due to their non-GHG emissions), their permits would need to be revised to cover their GHG emissions. In contrast, at a 10,000-tpy CO_2e threshold the number of existing facilities exceeding the threshold jumps to almost 27,000. At a 50,000-tpy CO_2e threshold, the number of existing facilities exceeding the threshold falls to about 7,200. We believe, based on these estimates, that a 25,000-tpy CO_2e major source threshold is appropriate because it renders the title V program administrable, albeit with additional workload requirements. As discussed later in this preamble, as we move below the 25,000-tpy CO_2e threshold, we believe the administrative burdens related to the increasing number of facilities covered, as well as to the variation in the type of facilities covered, become insuperable. At both the 50,000- and 100,000-tpy CO_2e thresholds, however, we do not believe that the potential level of permit activity would fill the capacity of permitting authorities to properly administer the title V program, and similar to PSD considerations, we believe it would potentially exclude some high-emitting facilities within key GHG source categories.

Although we believe a 25,000-tpy CO_2e threshold would add an additional permitting burden to permitting authorities, we believe that this additional burden could be adequately administered. We expect that many of the 13,600 existing facilities that would exceed the proposed 25,000-tpy CO_2e threshold—the majority of which consist of electric generating units and industrial facilities—already have a title V operating permit for other regulated pollutants, and thus would potentially require only a permit revision or modification to address GHGs. We believe that these permit revisions or modifications under title V would initially be limited due to the lack of new applicable GHG requirements to include in the permits, but would increase in complexity and content as facilities move through PSD permitting processes and as other possible stationary source requirements emerge.

In addition, with a 25,000-tpy CO_2e threshold, some of the 13,600 existing facilities are not currently subject to title V requirements and therefore would require new title V permits. These facilities constitute primarily additional landfills (we estimate approximately 1,700 landfills may be added to the title V program) and some large commercial facilities, primarily large hospitals. These facilities number approximately 800, but the number of new permits they would need would be less than this because approximately 180 are currently subject to permitting under title V for pollutants currently subject to regulation under the Act. Permitting the newly subject sources would not solely involve GHG requirements but may also involve other pollutants emitted by the source.

We estimate that the combination of title V permit revisions, modifications, and new permits that would result from a 25,000-tpy CO_2e applicability threshold would require an estimated additional 492 FTEs by permitting authorities nationwide, or an estimated 50-percent increase over current title V staffing levels, to meet the initial permitting requirements that would apply at the time title V applicability is triggered for GHG sources. We do not believe this 50-percent increase in resources would be administratively impossible to achieve, given that title V is self-funded, and that there are efficiencies gained in revisiting existing title V permits and sources with which the permitting staff are familiar.

In contrast, at a 10,000-tpy CO_2e threshold, we estimate that an additional 1,357 FTEs (an estimated 135-percent increase over current title V staffing levels) would be required by permitting agencies nationwide (again, based on initial permitting requirements). In addition, there would be substantial influx of new title V permits—greater than 13,000—that would need to be processed and issued. This would include over 7,000 newly permitted commercial and residential sources covering a wide variety of source types, including office buildings, retail malls, hotels, apartment buildings and educational facilities. The new variety of sources included at the lower threshold also would require additional training for permitting staff to become familiar with the configuration and emissions from those sources. For these reasons, we believe that at threshold levels below 25,000 tpy CO_2e, even considering the capability of permitting authorities to eventually add additional staff funded through permitting fees, permitting authorities would not be capable of ensuring reasonable processing times for both new permits and revisions resulting from the additions of GHG emitters to the program.

We request specific comment on our estimated burden at the 25,000-tpy CO_2e major source threshold for title V and on whether the additional workload would be manageable to permitting authorities. We also request specific comment on our assessments of the impact of title V major source GHG thresholds higher and lower than 25,000 tpy CO_2e on title V program administration, including any additional information on the number of sources affected and the permitting burdens created at these thresholds. We further request comment on our conclusion that the 10,000-tpy threshold (or a lower threshold) would be too low to address the administrative necessity concerns, that the 25,000-tpy threshold is administrable, and that there is therefore no need to adopt a threshold of 50,000 tpy.

There are additional policy and programmatic considerations that, while not part of the administrative-necessity basis, also support establishing the major source GHG threshold for title V at 25,000 tpy CO_2e. Most importantly, this level would result in consistency between the PSD and title V permitting threshold for GHG sources. Historically, there has been a strong measure of

[32] ''Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation; Air Quality Policy Division, Office of Air Quality Policy and Standards; U.S. Environmental Protection Agency''; July 7, 2009.

consistency in the PSD and title V permitting levels since there is a generally applicable 100-tpy ''major source'' applicability threshold in title V and there is a 100-tpy ''major emitting facility'' applicability threshold applied in PSD for sources in 28 key industrial source classifications. In addition, there is a strong programmatic incentive for the programs to share a common permitting threshold. Because at least initially GHG requirements from the PSD permitting process would constitute the only applicable requirements to be included in the title V permits for many sources, a title V permitting threshold lower than the PSD threshold would create numerous ''empty'' or ''hollow'' permits, that is, permits that do not include any applicable requirements, and many previously unpermitted commercial sources would be required to obtain these hollow permits. Permits hollow in this respect may be viewed as unnecessary and wasteful by the permitting authorities and regulated community. Further, requiring such permits may be at tension with a primary purpose of title V to promote compliance and facilitate enforcement by gathering into one document the requirements that apply to a particular source. *See* CAA Section 504(a) (each title V permit must contain terms ''necessary to assure compliance with applicable requirements'' of the CAA), H.R. Rep. No. 101–490, at 351 (1990) (''It should be emphasized that the operating permit to be issued under this title is intended by the Administration to be the single document or source of all of the requirements under the Act applicable to the source.'').

E. How will EPA assess the GHG permitting thresholds in the first phase of the tailoring program, and how will EPA develop the second phase?

1. Assessment To Be Performed Within 5 Years Following Promulgation of the First Phase

We consider the actions proposed in this rulemaking to set higher GHG major source applicability thresholds for PSD and title V, and to establish a GHG PSD significance level, as interim measures that will need to be reassessed in terms of their administrative necessity. Therefore, as part of this proposed action, we are committing to evaluate the effectiveness of the first phase of the tailoring program, which consists of the proposed GHG thresholds, to enable PSD and title V permitting authorities to adequately administer their programs with the inclusion of GHG emissions sources. We are proposing to complete this evaluation within 5 years from the effective date of this final rulemaking. The results of this study will form the basis for further regulatory action that will constitute the second phase, which may include continuing or lowering the GHG applicability thresholds for PSD and/or title V set in the first phase, adoption of other streamlining techniques that more accurately reflect the administrative capabilities of permitting authorities to address GHG sources during the second phase, and/or taking other actions consistent with the goal of expeditiously meeting CAA requirements in light of the administrative burden that remains at that time.

We believe a 5-year period is necessary for the evaluation of the first phase of the tailoring program to provide an adequate period of time for permitting authorities to implement the proposed GHG permitting thresholds and for a sufficient record of implementation experience to be compiled. We also believe a number of important activities undertaken by EPA and the States over the 5-year evaluation period could potentially impact permitting authorities' administrative capabilities to address GHG emissions sources, and we need sufficient time to implement those activities and assess that impact. These activities will include the following:

- The first activity is the development of streamlining tools to specifically address GHG sources. As discussed in section VII.A of this preamble, several permit streamlining techniques may have applications for GHG emissions sources. However, EPA needs an estimated 3 to 4 years to fully develop some of these techniques. Because many of these techniques are source-specific, or at least source category-specific—*e.g.,* presumptive BACT determinations—EPA may not be able to develop them for all affected sources within the evaluation period. However, we anticipate that EPA may make sufficient progress on enough streamlining techniques to impact the administrative capabilities of permitting authorities to address GHG emissions sources.
- The second activity during the 5-year period involves the ability of permitting authorities to add more staff to their permitting programs, especially the title V program for which additional fees for GHG emissions may support the addition of new staff. Based on the summary of State data on impacts of GHG emissions permitting, it is likely that even under the best-case scenarios, at least a 3- to 4-year period is necessary for most permitting authorities to add and adequately train staff for permitting duties involving GHG emitters. Therefore, we expect that the impact of increased staffing on the administrative capabilities of permitting authorities will be better known by the fifth year of the threshold evaluation period.
- The third activity is the collection of more detailed emissions information resulting from implementation of the proposed GHG mandatory reporting rule. Many permitting authorities have not had any experience to date with quantifying or evaluating emissions and controls of GHG source categories. EPA's proposed GHG mandatory reporting rule will produce significant information about key GHG emissions source categories that will help permitting authorities and EPA better understand the characteristics and quantities of GHG emissions, particularly at the facility level. Reporting facilities will begin to submit data in the year 2011, and we expect a substantial record of emissions data to be collected during the evaluation period. We believe that these facility-level GHG data will be an important component to increasing permitting staff knowledge of GHG emissions sources and will have a positive impact on the permitting staff's ability to address GHG emissions in their programs. We also believe this information will provide additional insight into the level and types of GHG emissions occurring at different facility types that should support EPA's reevaluation of the first phase GHG permitting thresholds.
- The fourth activity during the 5-year assessment period is the development of background information on control technologies and costs for GHG emissions source categories. As discussed in more detail in section X of this preamble, one of the administrative constraints is the fact that permitting authorities must apply BACT to GHG sources subject to PSD, but that endeavor would be highly resource-intensive. The 5-year assessment period will allow EPA and the States to develop information to evaluate GHG control techniques and costs, which, in turn, will be the basis for BACT determinations involving GHG emissions sources.

The 5-year period will serve other purposes, too, including allowing EPA to analyze the impacts of permitting smaller GHG sources to develop methods to mitigate those impacts. To date, EPA has collected very little information on the site-specific configuration and GHG emissions characteristics of many of the smaller industrial and commercial source categories. As a result, it is difficult to fully assess the impact of GHG

emissions permitting on these sources. We believe the 5-year evaluation period will provide EPA the opportunity to develop a more comprehensive profile of these smaller GHG source categories, which will allow a better assessment of the impacts on the small business community and, in turn, ways to mitigate those impacts.

Although we believe there are sufficient reasons to justify a 5-year evaluation period, we ask for comment on whether the activities described above—or at least some portion of them sufficient to begin administering permit programs for significant numbers of sources below the proposed 25,000-tpy CO_2e threshold—could be accomplished in a shorter time frame than our initial estimates. For example, we ask for comment on whether 3 years would be a sufficient evaluation period. We are especially interested in understanding the basis for such an alternative time period and what activities would need to occur during the period.

We further note that, for the proposed applicability thresholds as described above, we did consider a step-down approach for phasing in GHG permitting thresholds for PSD and title V programs. Under a step-down approach, applicability thresholds for GHGs would be lowered to predetermined step-down levels at specified intervals, such as every 2 years or more. However, we rejected the step-down approach on the basis that, without having established sufficient information on source-specific emissions and absent a record of experience with permitting GHG emissions sources on the part of permitting authorities, we were not in position to establish and support specific step-down thresholds. We believe that establishing further specific step-downs prior to evaluating the impact of the proposed GHG thresholds included in this rulemaking, as well as the impact of the proposed streamlining techniques, would prematurely determine what is administratively feasible for permitting authorities to undertake in terms of permitting GHG sources. Nonetheless, in light of the necessity of ultimately achieving compliance with the statute, we solicit comment on whether such an approach, coupled with regular examination of whether the administrative situation is improving, is an appropriate way to achieve compliance while taking into account the administrative imperatives. If so, we ask for suggestions on how we could structure such an approach (*e.g.,* when future phases should begin, how we should determine the appropriate thresholds for each phase, *etc.*)

2. Rulemaking Based on Threshold Evaluation for Second Phase of Tailoring Program

We propose to commit, by rule, that by 6 years after promulgation of the first phase of the tailoring program, and following completion of the threshold evaluation study, we will promulgate a follow-up rulemaking that will establish the second phase of the program. This rulemaking will either confirm the continued use of the GHG permitting thresholds implemented for the first phase, or promulgate alternative GHG permitting thresholds or other streamlining techniques. The results of the 5-year threshold evaluation study will form the basis for determining what thresholds or other techniques will be promulgated in the second phase rulemaking.

At this time, we cannot anticipate specifically what the second phase of this tailoring program will consist of. The situation that we confront is unprecedented. However, we believe the process of establishing the first phase and then assessing it, combined with the development of other streamlining techniques to the extent possible, will provide a sufficient basis for EPA to propose a rulemaking to establish the second phase. Of course, that rulemaking will provide ample opportunity for affected parties to comment on their experiences with the administrative burden at current GHG permitting thresholds and to make recommendations for any changes in the thresholds, for adoption of other streamlining techniques, and/or for actions consistent with the goal of expeditiously meeting CAA requirements in light of the administrative burden that remains at that time.

IX. What would be the economic impacts of the proposed rule?

This section of the preamble examines the economic impacts of the proposed rule including the expected benefits and costs of the proposed rule on affected entities. This proposed rule lifts, for a period of 6 years, the burden to obtain a title V operating permit required by the CAA for smaller sources of GHGs and the burden of PSD requirements for smaller new or modifying sources of GHGs. Thus, this rule provides regulatory relief rather than regulatory requirements for these smaller GHG sources for a period of 6 years. For larger sources of GHGs, there are no direct economic burdens or costs as a result of this proposed rule, because requirements to obtain a title V operating permit or to adhere to PSD requirements of the CAA are already mandated by the Act and by existing rules and are not imposed as a result of this proposed rulemaking.

The regulatory impact analysis (RIA) conducted for this proposed rule provides details of the benefits or regulatory relief that smaller GHG sources will experience in terms of costs avoided as a result of this proposed rule and the potential for social costs in terms of foregone environment benefits during this 6-year period. Complete details of the regulatory impact analysis conducted for this proposed rule may be found in the document ''Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule,'' in the docket for this rulemaking.

This rulemaking provides permitting thresholds for sources of GHGs that exceed levels contained in the CAA. Specifically, sources with the potential to emit less than 25,000 tpy CO_2e are not required to obtain an operating permit or PSD permit for a period of at least 5 years at which time a study will be conducted and the decision revisited after 6 years. In the 6 years following promulgation of this rule, the EPA estimates that, compared to baseline estimates that do not include the effects of this rule, over six million sources of GHG emissions will be allowed to operate without a title V operating permit and tens of thousands of new sources or modifying sources per year will not be subject to PSD requirements for GHGs. For this large number of smaller sources, this rule alleviates the regulatory burden associated with obtaining an operating or PSD permit or complying with NSR BACT requirements. Therefore, this proposed action may be considered beneficial to these small entities as it provides relief from regulation that would otherwise be required.

This decision does potentially have environmental consequences in the form of lesser emission reductions during the 6-year period of time. Given that sources between 250 and 25,000 tons per year account for an estimated 7 percent of the six directly emitted GHGs nationally from industrial, commercial, and residential source categories, while representing over 95 percent of the total number of sources potentially requiring an operating or PSD permit for GHGs under current permitting thresholds in the CAA, the EPA believes this is a prudent decision. Requiring such a large number of small sources to obtain permits for the first time would overtax the permitting authorities' abilities to process new permits without commensurate benefits. Moreover, as described in section VII.C

of this preamble, reductions from these small sources will still be occurring, notwithstanding the fact that permitting requirements would not apply to them. These smaller sources of GHG will be the focus of voluntary emission reduction programs and energy efficiency measures that lead to reductions in GHGs. The EPA will also reevaluate this decision after a 6-year period and complete a study of the implications of permitting smaller GHG sources for those sources and permitting authorities.

A. What entities are affected by this rule?

As previously stated, this proposed rule is essentially providing regulatory relief and does not include direct regulatory provisions for any industrial, commercial, or residential entities. An analysis is presented for smaller sources expected to experience regulatory relief from this rule. This proposal increases the threshold to obtain a title V operating permit to PTE levels of 25,000 tpy CO_2e or greater annual emissions. New sources of GHG emissions with the potential to emit less than 25,000 tpy CO_2e that would otherwise be subject to PSD are not required to obtain a PSD permit or to comply with BACT regulatory requirements as a result of this proposed rule. The significance levels for major modifications at sources of GHG emissions are also increased in this proposal allowing small sources to forego obtaining a PSD permit and to avoid BACT regulatory requirements, when the projected emissions increase from such modification is less than the PSD significant level (with the promulgated level to be selected from a proposed range of values between 10,000 and 25,000 tpy CO_2e). The industry, agricultural, residential and commercial categories anticipated to experience regulatory relief are shown in table IX–1. As table IX–1 shows, this proposal lifts permitting requirements for over six million potential title V sources and tens of thousands of potential PSD new sources that would be otherwise required by the CAA to obtain permits.

TABLE IX–1—ESTIMATED NUMBER OF AFFECTED SOURCES EXPERIENCING REGULATORY RELIEF*

Sector	Number of sources experiencing regulatory relief	
	Title V	New PSD (annually)
Electricity	161	20
Industrial	156,545	303
Energy	3,644	35
Waste Treatment	1,431	0
Agriculture	37,351	299
Commercial	1,354,760	12,034
Residential— Multifamily	610,340	6,397
Residential— Single Family	3,925,000	515
Totals	6,089,232	19,603

* Number of sources is determined on a potential to emit basis for small sources below 25,000 tpy CO_2e threshold. Estimates for PSD sources are for newly constructed facilities and do not include modifications at existing facilities that may also be subject to PSD requirements.

B. What are the estimated benefits to small sources due to regulatory relief?

EPA estimated the benefits or avoided costs for sources that are likely to experience regulatory relief from this proposal. This analysis focuses upon the burdens that are being lifted for smaller sources as a result of this proposed rule. In addition, an accounting of the benefits from this proposal as measured by avoided costs for State, local, and tribal permitting authorities is provided. These avoided costs relate specifically to information collection costs or burden costs postponed for smaller sources of GHG emissions otherwise required to obtain an operating permit under title V or required to modify an existing permit to address GHG emissions. Avoided costs shown also include information collection requirements for additional PSD permits postponed for new or modifying smaller sources of GHGs, as well as the avoided costs to State, local and tribal permitting authorities.

1. What are estimated benefits or avoided burden costs for title V permits?

Table IX–2 shows that the estimated first-year information collection cost avoided as a result of this proposal by an industrial source required to obtain a title V operating permit is approximately $46.4 thousand (2007$) per permit. The EPA estimates that over 195 thousand sources will avoid incurring these permitting costs for a period of at least 6 years as a result of this proposal. The avoided burden cost to obtain a new commercial or multi-family residential operating permit is estimated to be approximately $5.0 thousand (2007$) per permit with over 5.9 million sources benefitting by not incurring these costs due to this proposed rule. In total, EPA estimates that more than $38 billion (2007$) in expenditures relating to title V permitting will be avoided by small sources of GHG for a period of 6 years as a result of this proposal. Much of this burden would have been incurred during the first year following the light-duty vehicle rule because sources have 1 year from the date of becoming subject to title V. However, some ongoing burden for new sources coming into the program would be incurred each subsequent year. State, local, and tribal permitting authorities will also benefit in terms of avoided permitting administrative costs by over $15 billion (2007$) as a result of the decisions proposed in this action. This burden would not all have been incurred during the first year following the light-duty vehicle rule, but much of it would generally have been incurred within the first 2 to 3 years. This is because under the part 70 regulations, permitting authorities are required to act on applications within 18 months of receipt. There would also be some ongoing burden in each subsequent year due to new sources coming into the program.

TABLE IX–2—REGULATORY RELIEF PROVIDED FOR SMALL GHG SOURCES AND PERMITTING AUTHORITIES

Program/affected entities	Small GHG sources not covered during first phase < 25,000 tpy		
	Per-permit cost (2007$)	Number of permits	Total cost (millions 2007$)
Source			
Title V:			
New Industrial	46,350	195,895	9,079.7
New Commercial/Residential	4,986	5,956,513	29,699.2
Subtotal Title V Permits	.....	.....	38,778.9
PSD Permits:			
New Industrial	84,530	3,299	278.9
New Commercial/Residential	16,887	37,197	628.1
Subtotal PSD Permits	.....	.....	907.0
Total Source Costs	.....	.....	39,685.9
Permitting Authority			
Title V:			
New Industrial	19,688	195,895	3,856.8
New Commercial/Residential	1,978	5,956,513	11,781.9
Subtotal Title V Permits	.....	.....	15,638.7
PSD Permits:			
New Industrial	23,243	3,299	76.7
New Commercial/Residential	4,633	37,197	172.3
Subtotal PSD permits	.....	.....	249.0
Total Permitting Authority Costs	.....	.....	15,887.7
Total Source and Permitting Authority Costs	184.3	.....	55,573.6

Notes: (1) Costs shown in ''Sources Not Covered During First Phase'' represent estimates of the regulatory burden relief proposed by this rule. Title V operating permit costs represent one time costs, but these permits are subject to renewals every 5 years. New and modified PSD permits reflect the estimated annual number of new and modifying sources requiring permits and the associated costs.
(2) Sums may not add due to rounding.
(3) All costs are shown in 2007 dollars.

2. What are avoided burden costs associated with regulatory relief for small PSD sources?

Table IX–2 summarizes the estimated burden costs avoided by sources and permitting authorities with this tailoring rule. The estimated avoided burden or reporting and recordkeeping cost associated with requiring new industrial sources to obtain permits is estimated to be $84.5 thousand for new or modified industrial sources and $16.9 thousand for new or modified commercial or multi-family residential sources (2007$). This represents avoided annual costs of over $900 million (2007$) for new and modifying small sources of GHG. State, local, and tribal permitting authorities are expected to avoid $249 million (2007$) annually in administrative expenditures associated with postponing PSD program requirements for small GHG sources.

C. What are the economic impacts of this rulemaking?

This proposed rulemaking does not impose economic burdens or costs on any sources or permitting authorities, but should be viewed as regulatory relief for smaller GHG emission sources and for permitting authorities. Although sources above the thresholds proposed in this rule will become subject to permitting when the light-duty vehicle rule is promulgated, those impacts are not attributable to the present rulemaking. Rather they are mandated by the CAA and existing regulations and automatically take effect independent of this proposal.

In addition to considering the regulatory relief expected for affected entities as a result of this proposed rule, the EPA considered the impact of this rulemaking to small entities (small businesses, governments and non-profit organizations) as required by RFA and SBREFA. For informational purposes, the RIA includes the Small Business Administration (SBA) definition of small entities by industry categories for stationary sources of GHGs and potential regulatory relief from title V and NSR permitting programs for small sources of GHG. Since this rule does not impose regulatory requirements but rather lessens the regulatory burden of the CAA requirements to smaller sources of GHGs, no economic costs are imposed upon small sources of GHGs as a result of this proposed rule. Rather this proposal provides regulatory relief for small sources. These avoided costs or benefits accrue because small sources of GHGs are not required to obtain a title V permit and new or modifying small sources of GHGs are not required to meet PSD requirements for a period of 6 years. Some portion of the small sources may be small entities, and these entities will benefit from the regulatory relief proposed in this rule.[33]

D. What are the costs of the proposed rule for society?

EPA examined the social costs of this proposed rule. These social costs

[33] We note that some of the sources that remain subject to permitting above the proposed threshold in this rule may nonetheless be small businesses. Elsewhere in this preamble, we discuss our intent to convene a discretionary panel to examine the small business impacts of GHG regulation through PSD, although such impacts are not imposed as a result of this proposed action. The RIA provides a discussion of these impacts for informational purposes.

represent the foregone environmental benefits that would occur if regulatory relief were offered to small sources of GHG emissions as proposed. This proposal is one such regulatory relief since it increases the emissions thresholds for the title V and PSD programs, as they apply to sources of GHG emissions, to levels above those in the CAA. In this preamble section, the benefits or avoided regulatory costs of such relief are discussed, but there is also a social cost imposed by such relief because this rule may forego some of the possible benefits associated with title V and PSD programs for sources of GHG emissions below 25,000 tpy CO_2e but above the statutory 100/250 tpy levels. These benefits are those attributed to title V and PSD permitting programs in general. These benefits are based upon the relevance of these programs to policymaking, transparency issues, and market efficiency, and therefore are very difficult to quantify and monetize. For title V, they include the benefits of improved compliance with CAA requirements that stem from (1) improved clarity regarding applicability of requirements, (2) discovery and required correction of noncompliance prior to receiving a permit, (3) improving monitoring, recordkeeping, and reporting concerning compliance status, (4) self-certification of compliance with applicable requirements initially and annually, and prompt reporting of deviations from permit requirements, (5) enhanced opportunity for the public to understand and monitor sources' compliance obligations, and (6) improved ability of EPA, permitting authorities, and the public to enforce CAA requirements. However, it is important to remember that a title V permit does not add new requirements for pollution control itself, but rather collects all of a facility's applicable requirements under the CAA in one permit. Therefore, the compliance benefits above are less when title V permits contains few or no CAA applicable requirements. During the first phase under this proposal, when the title V threshold is 25,000 tpy, we expect that the vast majority of sources excluded from title V would be sources that have no CAA applicable requirements for GHG emissions and few or no requirements for other pollutants because their emissions of those pollutants are so small. For this reason while it is extremely difficult to measure the degree of improved compliance, if any, that would be foregone, or to quantify the social costs that would be imposed, we expect that they would be negligible.

For PSD, the primary social cost imposed by the tailoring rule stems from the foregone benefit of applying BACT to the tens of thousands of small new sources and modifications that will be below our proposed thresholds during the first phase. This social cost potentially weighs against the cost savings described above that stem (in part) from avoiding the administrative and control costs of applying BACT to these sources. The BACT requirement assures that new and modified sources, when they increase their emissions are using state-of-the-art emission controls and affords the public an opportunity to comment on the control decision. It does not prohibit increases but it assures that such controls are applied. Delaying the BACT requirement for numerous small sources during the first phase of this proposed rule could allow increases from these smaller sources that are greater than they would be if BACT were applied. A detailed analysis of this difference is beyond the scope of this rule because we do not have detailed information on the universe of these tens of thousands of small PSD actions, the candidate BACT technologies for each of them, how permitting authorities would make the BACT decisions, and how the BACT limit would compare to what would otherwise be installed absent BACT.

It is not possible at this time to quantify the social costs of avoided BACT. However we note that the universe of possible emissions that would be regulated by sources excluded under the tailoring rule is small compared to those that would remain subject to PSD. The sources excluded in the first phase of this proposal comprise only 7 percent of total stationary source GHG emissions, while 68 percent remain subject to regulation. Furthermore, we expect the emissions differences due to BACT controls for such sources to be relatively small due to the lack of available capture and control technologies for GHG at such sources that are akin to those that exist for conventional pollutants and sources, as well as the likelihood that even in the absence of BACT such sources would already be installing relatively efficient GHG technologies to save on fuel costs. Thus, while potential benefits would be foregone by excluding smaller sources from the permitting programs, these benefits are likely to be small. Under the tailoring rule, we will be working during the 6-year period to greatly improve our understanding of both the administrative costs of regulating and the social costs of not regulating smaller sources under PSD and title V, and we will be relying on that information to support our future threshold analyses called for under the proposal.

In reaching the decisions for this GHG tailoring rule, the EPA recognizes that GHG emissions can remain in the atmosphere for decades to centuries, meaning that their concentrations become well-mixed throughout the global atmosphere regardless of emission origin, and their effects on climate are long lasting and significant. A detailed explanation of climate change and its impact on health, society, and the environment is included in EPA's technical support document for the endangerment finding proposal (Docket ID No. EPA–HQ–OAR–2009–0171). The EPA recognizes the importance of reducing climate change emissions for all sources of GHG emissions including those sources afforded regulatory relief in this rule and plans to address potential emission reductions from these small sources using voluntary and energy efficiency approaches. Elsewhere, we have discussed EPA's interest in continuing to use regulatory and/or non-regulatory tools for reducing emissions from smaller GHG sources because we believe that these tools will likely result in more efficient and cost-effective regulation than would case-by-case permitting.

X. What implementation issues are related to this proposal?

In this action, EPA is proposing certain steps to ensure that smaller sources (meaning sources emitting GHGs at lower rates) will not become subject to PSD or title V upon EPA's completion of a rulemaking that regulates GHG emissions. Absent those steps, such a rule would trigger PSD and title V for many of these smaller sources. This is because both the CAA PSD provisions and the title V provisions are self-effectuating, that is, they each apply by their terms to require sources to undergo permitting requirements. In addition, federally approved State law provisions implement both the CAA PSD provisions and title V provisions. Those State law provisions consist of the various SIPs and State operating permit programs, respectively. In order to limit PSD and title V applicability to sources that emit at or above the thresholds proposed in this action, and to ensure that these limits apply at the time a rulemaking regulating GHG emissions is promulgated—which will trigger PSD and title V applicability—EPA is proposing to establish threshold levels on the basis that the administrative necessity doctrine overlays the CAA PSD and title V requirements, so that it

is the proposed threshold levels, and not the statutory threshold levels, that apply to sources of GHG emissions. Moreover, EPA is proposing a process, consisting of several components, for conforming the EPA-approved SIPs and title V programs to reflect those threshold levels. This section of the preamble provides a detailed description of this process, first for the SIP PSD provisions, and then for the title V State operating permit program provisions.

A. CAA Provisions Concerning SIP Requirements for PSD Programs, State Submittal Requirements, and EPA Action

Before describing EPA's proposed action for PSD SIP implementation, it is useful to review the relevant background concerning the CAA requirements for what SIPs must include, the process for State submittals of SIPs, and requirements for EPA action on SIPs and SIP revisions.

1. SIP Requirements for State PSD Programs and Adequate Resources

CAA section 110(a)(1) requires that States adopt and submit to EPA for approval SIPs that implement the national ambient air quality standards. CAA section 110(a)(2) contains a detailed list of requirements that all SIPs must include to be approvable by EPA. Of particular relevance for this action, subparagraph (J) of section 110(a)(2) of the CAA imposes the requirement that the SIP must ''meet the applicable requirements of * * * part C * * * (relating to prevention of significant deterioration of air quality * * *).'' Under this provision, States must submit SIPs or SIP revisions that meet the federally mandated requirements for PSD programs.

In addition, and also of particular relevance for this action, subparagraph (E)(i) of section 110(a)(2) of the CAA provides that SIPs must ''provide * * * necessary assurances that the State * * * will have adequate personnel * * * [and] funding * * * to carry out such implementation plan * * *.'' As applicable to PSD programs, this provision means that EPA may approve the SIP PSD provisions only if EPA is satisfied that the State will have adequate personnel and funding to administer the PSD program, including conducting the appropriate analyses for new and existing sources, issuing the permits, conducting enforcement, and taking other necessary administrative action.

2. SIP Requirements for State Submittals, EPA Action, and FIPs

As noted above, under CAA section 110(a)(1)–(2), States must submit for EPA approval SIPs that meet the requirements of section 110(a). If a State does not submit a SIP or SIP revision as required, EPA is authorized to make a finding that the State has failed to make a required SIP submittal, under CAA section 179(a), and if EPA makes such a finding, then, under CAA section 110(a)(2)(C), ''[t]he Administrator shall promulgate a Federal implementation plan [(FIP)] at any time within 2 years after'' the date of the finding, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision.

After a SIP or SIP revision has been submitted, EPA is authorized to act on it under CAA section 110(k)(3)–(4). Those provisions authorize a full approval or, if the SIP or SIP revision meets some but not all of the applicable requirements, a conditional approval, a partial approval and disapproval, or a full disapproval. If EPA disapproves a SIP or SIP revision, then EPA must promulgate a FIP at any time within 2 years after the disapproval, unless the State corrects the deficiency within that period of time by submitting an approvable SIP revision.[34]

Once EPA has approved a SIP, if EPA determines that its action in doing so was in error, then, under CAA section 110(k)(6), EPA may conduct a rulemaking to correct the error without requiring any further action, such as submission of a request or a SIP revision, from the State. Specifically, section 110(k)(6) provides:

> Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

EPA also has authority to revise its previous action on a SIP through EPA's inherent authority, under CAA section 301(a), to reconsider prior rulemaking actions, as well as under Administrative Procedure Act (APA) section 553(e), which requires EPA to give interested persons ''the right to petition for the issuance, amendment, or repeal of a rule.''

In addition, CAA section 110(k)(5) gives EPA authority to issue what is commonly called a ''SIP Call'' when EPA determines that the SIP is inadequate to meet CAA requirements. The SIP Call notifies a State of the inadequacies in its current SIP and requires that the State submit a revised SIP for EPA approval. Specifically, section 110(k)(5) provides:

> Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to [meet certain section 110 requirements] or to otherwise comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

B. What PSD-specific implementation considerations are there?

Three different requirements of the CAA PSD provisions and the PSD SIPs are at issue for this action. The SIPs vary in certain ways with respect to these requirements, so that EPA must take different actions for different SIPs.

These three requirements concern the threshold level for applicability, the significance level, and the pollutants subject to PSD. The first two—threshold and significance levels—may be treated similarly and are discussed immediately below. The third is discussed after that.

1. Requirements for Thresholds and Significance Levels in PSD Provisions and PSD SIPs

a. *EPA's proposed action:* Revision of Federal regulations and limitation of approval of SIPs.

As discussed elsewhere in this action, the CAA PSD provisions apply to new sources at or above 100/250-tpy thresholds. CAA sections 165(a), 169(1). These requirements are included in EPA regulations in 40 CFR 52.21, which indicate what States should include in their SIPs. The CAA PSD provisions apply to existing sources that modify when those modifications increase emissions by any amount, CAA section 165(a), 169(2)(C), 111(a)(4), unless EPA promulgates higher levels—which we term ''significance levels''—based on reasons of *de minimis* emissions or administrative necessity. *Alabama Power* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1980). This requirement is included in EPA regulations in 40 CFR 52.21. Until EPA acts to establish a significance level for GHG emissions, the level in effect remains at zero for any newly regulated pollutants.

[34] States are subject to sanctions for failure to submit, or for EPA disapproval of, SIPs for nonattainment areas, under CAA section 179. These sanctions provisions are not relevant for this proposal because they do not apply to PSD SIPs.

Most jurisdictions are covered by EPA-approved PSD SIPs. Based on a review of these EPA-approved PSD SIPs, virtually all of them establish the PSD permitting threshold at the 100/250-tpy level, although a few States have adopted lower permitting threshold levels. In addition, virtually all EPA-approved SIPs establish the significance level for any new pollutants that it covers—including GHG emissions, if covered—at zero. Only a few EPA approved SIPs take a slightly different approach by adopting significance levels at values other than zero and up to the permitting thresholds. Some jurisdictions are not covered by EPA-approved SIPs, and instead are covered by EPA regulations at 40 CFR 52.21 that EPA implements (in which case, the EPA regulations act as a FIP) or that the State implements through authority delegated to it by EPA. For these States, the PSD threshold level is 100/250 tpy and the significance level for new pollutants, including GHG emissions, is, in effect, zero.

As discussed elsewhere, this action proposes to establish the PSD thresholds for GHG emissions at 25,000 tpy CO_2e, and proposes to establish the PSD significance levels at [10,000–25,000] tpy CO_2e. EPA plans the following process to revise its regulations and to conform the EPA-approved SIPs to reflect these levels.

First, with respect to EPA regulations, EPA proposes to revise its regulations to establish the permitting threshold at 25,000 tpy CO_2e, at 40 CFR 52.21, and to establish the significance level at [10,000 to 25,000] tpy CO_2e, at 40 CFR 52.21, based on the administrative necessity doctrine discussed in section VI.C of this preamble.

Second, with respect to the EPA-approved SIPs, although EPA previously fully approved the permitting threshold level provisions and the significance level provisions in those SIPs, EPA proposes to limit its approval of those provisions in part. Specifically, EPA proposes to limit its approval of (i) the permitting threshold level provisions to the extent those provisions require permits for sources whose GHG emissions equal or exceed the 100/250-tpy CO_2e levels but are less than 25,000 tpy CO_2e for PSD thresholds; and (ii) of the significance level provisions to the extent those provisions apply to GHG emissions less than [10,000 to 25,000] tpy CO_2e. As discussed below, EPA's authority for these limitations of approval is based on its authority under CAA section 301(a), which incorporates the inherent authority of an agency to reconsider its actions, as well as under APA section 553. Even so, EPA is also proposing, in the alternative, to limit its approval through the error correction provisions of CAA section 110(k)(6).

EPA does not propose to take any further action on the permitting threshold or significance level provisions for which EPA is limiting its approval; that is, EPA is not proposing to disapprove those provisions. Thus, the limitation of approval for those provisions does not trigger an obligation on the part of the State to revise and resubmit for approval the affected PSD SIP provisions and does not trigger a FIP obligation.

The permitting threshold PSD SIP provisions that apply to sources with GHG emissions at 25,000 tpy CO_2e or higher, and the significance level provisions that apply to sources with GHG emissions at [10,000 to 25,000] tpy CO_2e or higher, remain fully approved.

As a drafting matter, EPA proposes to accomplish the limitations of approval by adding to the record of its action on each SIP, as found in the subparts to 40 CFR 51.21, the boilerplate statements that (i) EPA limits its approval of the PSD permitting threshold provisions to the extent those provisions require permits for sources of GHG emissions that equal or exceed 100 tpy CO_2e for sources in the 28 categories identified in CAA section 169(1), and 250 tpy CO_2e for all other sources, but that are less than 25,000 tpy CO_2e; and (ii) EPA limits its approval of the PSD significance level provisions to the extent those provisions treat as significant GHG emissions increases that are less than [10,000 to 25,000] tpy CO_2e.

b. Authority for limitation of approval.

EPA is limiting its approval through its authority under CAA section 301(a) ''to prescribe such regulations as are necessary to carry out [EPA's] functions'' under the CAA. This provision confers general regulatory authority upon the Administrator, and incorporates the Agency's inherent authority to reconsider prior rulemaking actions. Additional authority for EPA to limit its approval is found in APA section 553(e), which requires EPA to give interested persons ''the right to petition for the issuance, amendment, or repeal of a rule.''

An administrative agency has the inherent authority to reconsider its decisions, unless Congress specifically proscribes the agency's discretion to do so. The D.C. Circuit recently affirmed this authority in *New Jersey* v. *EPA*, 517 F.3d 574 (D.C. Cir. 2008), where it explained that an agency normally can change its position and reverse a prior decision but that in the case before it, Congress limited EPA's ability to remove sources from the list of HAP source categories, once listed, by requiring EPA to follow the specific delisting process at CAA section 112(c)(9). *See, e.g.*, *Gun South, Inc.* v. *Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (holding that agencies have implied authority to reconsider and rectify errors even though the applicable statute and regulations do not provide expressly for such reconsideration); *Trujillo* v. *General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (''Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider''). CAA section 307(b)(1), a judicial review provision that applies to all SIP actions, provides some confirmation because it expressly contemplates the ''filing of a petition of reconsideration by the Administrator of any otherwise final rule or action.''

EPA recently applied this approach in connection with California conformity SIPs. EPA had approved the SIPs based on a mobile source model that was current at the time of EPA's approval. EPA proceeded to update the mobile source model, but under the previous SIP approvals, conformity decisions would continue to be made on the basis of those previous SIP approvals, and would not take into account the updates to the mobile source model. To rectify this problem, EPA conducted a rulemaking that revised the previous SIP approvals so that they were limited to the period before States submitted, and EPA found adequate, the mobile source budgets in new SIPs based upon the update of the mobile source model.

Similarly, in this action, EPA is proposing to limit its previous approval to, in effect, a portion of the State PSD program, which is the permitting requirements that apply to sources of GHG emissions at or above 25,000 tpy CO_2e (for permitting thresholds) and [10,000 to 25,000] tpy CO_2e (for significance levels), respectively. The reason is that in light of the requirement under CAA section 110(a)(2)(E) that SIPs provide necessary assurances of adequate personnel and funding, the previous approvals of the PSD programs were overly broad. Specifically, EPA approved PSD programs that applied to all sources of regulated NSR pollutants above the 100/250-tpy statutory levels. At the time of the EPA approvals, the sources emitting the pollutants covered by the PSD programs, so approved, may have been in sufficiently limited numbers so that State resources were adequate to fully administer the PSD

program. However, the breadth of the applicability requirements that EPA approved meant that if new pollutants were regulated in the future, and if those new pollutants were emitted at the levels of 100/250 tpy or higher by large numbers of sources, then the States' PSD programs would become much larger and State resources accordingly will not be adequate to administer the program. The SIP failed to provide necessary assurances that the State would have sufficient personnel and funding to cover this possible expansion of the PSD program. In fact, those events are unfolding now: EPA is in the process of regulating GHG emissions and thereby triggering PSD applicability for GHG sources, and, at the applicability levels in the SIPs, State PSD programs will become too large for States to administer with their current levels of personnel and funding. For these reasons, EPA is limiting its previous approvals, as described above.

c. Proposed alternative action: Error correction.

EPA is also proposing in the alternative to revise its approval of the SIP threshold and significance level provisions through a CAA section 110(k)(6) error correction. As noted above, CAA section 110(k)(6) authorizes EPA to correct its actions concerning SIPs and certain other actions through a simplified procedure. For the reasons described immediately above, EPA believes that the SIPs did not provide the necessary assurances, as required under CAA section 110(a)(2)(E), that the permitting authorities would have personnel and funding adequate to implement the extensive SIP PSD programs that could result from the broadly applicable PSD threshold provisions and significance level provisions as approved. Therefore, under this alternative proposal, EPA erred in approving those provisions. Rather, EPA should have approved those provisions only in part, and not taken action on the rest of the provisions.

As a result, EPA proposes to correct those errors, under the authority of CAA section 110(k)(6), by limiting its approval of the PSD threshold provisions to the extent they apply PSD requirements to sources of GHG emissions between 100/250 tpy CO_2e and 25,000 tpy CO_2e, and the PSD significance level provisions to the extent they apply to sources that emit GHGs at a rate below [10,000 to 25,000] tpy CO_2e. In accordance with CAA section 110(k)(6), EPA is proposing to conduct its limitation of approval through notice-and-comment rulemaking under APA section 553, which is ''the same manner as [EPA conducted] the approval,'' and EPA is not requiring any further submission from the State.

d. State response.

For purposes of the federally approved SIP, this proposed action does not require States to submit any SIP revision. That is, if EPA finalizes this proposal, each federally approved PSD program will have a PSD threshold level for GHG emissions of 25,000 tpy CO_2e and a significance levels for GHG emissions of [10,000 to 25,000] tpy CO_2e; and although each State PSD program—as established by the State law provisions that comprise the SIP—will have a lower threshold and significance level, those lower levels will not be federally approved and therefore not federally enforceable. To reiterate, EPA is not proposing to disapprove those provisions; rather, EPA will take no further action with respect to them. As a result, no further action by the State, including no SIP revision, is necessary for Federal purposes.

Even so, it should be noted that the lower thresholds remain on the books under State law, and sources therefore remain subject to them as a matter of State law. As a result, States may wish to consider revising those State law provisions. In addition, the fact that these provisions remain on the books under State law may create some confusion as to whether they are part of the federally approved SIP (again, with this proposed action, they would not be), and for this purpose too of avoiding this confusion, States may wish to consider revising those State law provisions.

On the other hand, if a State wants to implement PSD permitting requirements at a threshold level lower than 25,000 tpy CO_2e, or implement a significance level lower than [10,000 to 25,000] tpy CO_2e, for GHG emitters, the State may submit a SIP revision that identifies the lower thresholds and provides the necessary assurances, under CAA section 110(a)(2)(E), that it has adequate personnel and funding to permit at this level. If the SIP revision meets the CAA section 110(a)(2)(E) requirement, EPA will proceed to approve it. Permitting for this State would then cover such smaller sources. For reasons described elsewhere in this notice, the EPA has determined based on its national analysis that, absent additional streamlining measures, the PSD program will initially be impossible to implement at such lower levels. A State seeking to adopt lower levels should therefore be prepared to describe in its submittal the administrative burden that will be added at the proposed lower levels, and the measures it will take to make the program implementable at those levels.

It should be noted that EPA considered, but is not proposing or soliciting comment on, issuing a SIP call under CAA section 110(k)(5) to require States to either demonstrate that they have adequate personnel and funding to administer their PSD programs at the 100/250-tpy CO_2e threshold level for GHG emitters, or to submit a SIP revision that raises the threshold to 25,000 tpy CO_2e or some other level commensurate with their personnel and funding. EPA decided against this approach for several reasons. First, a SIP call under section 110(k)(5) takes significantly more time than actions taken under EPA's other authorities. For a SIP call, EPA first undertakes a notice-and-comment process in order to make the finding that a SIP is inadequate and to set a schedule for a new SIP submission by a State (which can be up to 18 months after EPA's determination). Then, EPA must provide notice and opportunity for comment regarding whether or not the Agency should approve the SIP revision submitted by a State in response to the SIP call. By contrast, the reconsideration of a SIP approval can be undertaken in much less time. Reconsideration of a SIP approval may lead to a more speedy and efficient resolution in a situation (such as the present) where there is no need for a further SIP submission to be developed and submitted to EPA by the State.

2. PSD SIP Provisions Identifying the Pollutants

A handful of EPA-approved SIPs fail to include provisions that would subject GHG emissions to their PSD requirements when EPA promulgates regulations that regulate GHGs and thereby trigger the applicability of PSD. For these SIPs, EPA intends to take separate regulatory action, as discussed in this section of this preamble.

a. Regulatory background.

By way of background, in 1978, after Congress enacted the PSD program in the 1977 CAA Amendments, EPA promulgated a rulemaking to implement the program. 43 FR 26380 (June 19, 1978). This rulemaking required that the PSD program apply to ''each pollutant subject to regulation'' under the CAA. *Id.* at 26403, 26406 (promulgating 40 CFR 51.21(b)(1)(i)).[35] In 2002, EPA

[35] After challenges by industry and environmental organizations, parts of this rulemaking were remanded by the D.C. Circuit in

Continued

promulgated a rulemaking that revised parts of the PSD and nonattainment NSR programs, which is generally known as the ''NSR Reform'' rulemaking, and there, EPA revised this terminology so that PSD requirements apply to ''regulated NSR pollutants.'' 67 FR 80186 (Dec. 31, 2002); *see* 40 CFR 52.21(b)(50).

After the 1978 rulemaking, most States submitted SIPs with provisions that incorporated the requirement to apply PSD requirements to ''each pollutant subject to regulation,'' or used comparable terminology, and EPA approved those provisions. Following the 2002 NSR Reform rule, many, although not all, of these States submitted SIPs that EPA has approved and that have replaced that terminology with the requirement that PSD requirements apply to ''NSR regulated pollutants.''

However, a few SIPs do not have provisions that apply the PSD requirements to ''regulated NSR pollutants'' or ''pollutants subject to regulation'' under the CAA, or use comparable terminology. Rather, these SIPs specifically list the pollutants to which the PSD programs apply, and do not include GHGs.

b. EPA's plan of separate regulatory action.

It is EPA's understanding that each of the SIPs that cover either ''NSR regulated pollutants'' or ''pollutants subject to regulation'' under the CAA, or that use comparable terminology, will apply the PSD requirements to sources that emit GHGs, at the appropriate threshold levels, when EPA promulgates rules regulating GHGs and thereby triggering PSD requirements. This is because these SIP provisions employ broad enough terminology to encompass newly regulated pollutants, such as GHGs.[36] As a result, for these SIPs, no further action by EPA in this proposal is necessary.[37]

However, the story is different for the few SIPs that do not have provisions that apply the PSD requirements to ''regulated NSR pollutants'' or ''pollutants subject to regulation'' under the CAA, and that instead specifically list the pollutants to which the PSD programs apply, and do not include GHGs. Although EPA approved them, these SIPs were, and remain, deficient because by subjecting to the PSD requirements only the pollutants specifically listed, they fail to reflect the EPA's longstanding requirements that PSD requirements apply to all pollutants subject to regulation under the CAA, which necessarily includes any newly regulated pollutants beyond those specifically listed.

Importantly, for present purposes, these SIPs do not require that GHG emitters obtain PSD permits. However, CAA section 165(a), by its terms, prohibits a source that is subject to PSD from constructing or modifying without a permit. As noted elsewhere, as a result of the proposed light-duty vehicle rule, expected to be promulgated at the end of March 2010, sources of GHG emissions in those States will be subject to the requirement of CAA section 165(a) to obtain a preconstruction PSD permit.

EPA recognizes the problems that arise from this situation. Accordingly, EPA intends a separate regulatory action in the very near future that will identify the SIPs in question and address them. EPA expects this regulatory action to be completed and to take effect by the time EPA promulgates the light-duty vehicle rule at the end of March 2010.

C. What title V-specific implementation issues are there?

Some of the title V-specific implementation issues parallel the PSD SIP implementation issues. Thus, the process EPA is proposing, described below, to conform the EPA-approved title V programs to reflect the title V applicability threshold level for GHG emissions of 25,000 tpy CO_2e parallels in certain respects the process described above for conforming the EPA-approved SIP PSD programs.

1. CAA Provisions Concerning Title V Requirements for State Programs, State Submittal Requirements, and EPA Action

Before describing EPA's proposed action for title V implementation, it is useful to review the relevant background concerning the CAA requirements for title V State operating permit programs, State submittals of those programs, and EPA action on State title V programs.

a. CAA requirements under title V for State permitting programs.

CAA section 502(d)(1) requires that each State adopt and submit to EPA for approval an operating permit program under State or local law that meets the requirements of title V. CAA section 502(b) contains a detailed list of requirements that all State permit programs must include to be approvable by EPA. Of particular relevance for this action, paragraph (4) of section 502(b) provides that the permit program must include ''[r]equirements for adequate personnel and funding to administer the program.'' This provision means that EPA may approve the State permit program only if EPA is satisfied that the State will have adequate personnel and funding to administer the program, including issuing the permits, conducting enforcement, and taking other necessary administrative action.

b. State permit program submittal requirements and Federal plans.

As noted above, under CAA section 502(d), States must submit for EPA approval State permit programs that meet the requirements of CAA section 502(b). If a State does not submit a permit program as required, or if EPA disapproves a program submitted, in whole or in part, then the Administrator ''shall, 2 years after the date required for submission of such a program * * *, promulgate, administer, and enforce a [title V] program * * * for that State,'' under CAA section 502(d)(3).[38]

c. EPA action on, and revision of action for, State permit programs.

After a State permit program has been submitted, EPA must approve or disapprove it in whole or in part. CAA section 502(d)(1). Those provisions authorize EPA to approve the program to the extent that it meets the requirements of title V.

Alabama Power v. *Costle*, 636 F.2d 323 (D.C. Cir. 1980), and EPA promulgated revised requirements in 1980. 45 FR 52676 (August 7, 1980). The requirement that the PSD program apply to ''each pollutant subject to regulation'' under the Act was not at issue in *Alabama Power* and was not revised in the rule revisions that followed that decision.

[36] It should be noted that if any State with these SIP provisions interprets their provisions to cover only pollutants regulated (or subject to regulation) at the time of SIP submission or approval, so that the provisions would not cover GHG emissions, then the State should so indicate during the comment period. EPA will take steps to resolve the proper interpretation of the provision. EPA proposes in this action that if EPA agrees that the SIP provision cannot be interpreted to cover sources of GHG emissions, then EPA will treat the State in the same manner as States that specifically list pollutants as subject to PSD requirements and do not include GHGs, as discussed below.

[37] It should be noted that in this action, EPA is not addressing in any way any other issue that may arise concerning any of these States that do not have approved PSD programs incorporating all of the requirements of the NSR Reform rule.

[38] In addition, if EPA disapproves a title V program due to failures by the State concerning an area in the State and air pollutants for which that area is in nonattainment, then mandatory sanctions apply, under CAA section 502(d)(2)(B)–(C). Sanctions regarding offsets would not be relevant for purposes of this action because GHGs are not criteria air pollutants under CAA section 108(a) and no areas are designated nonattainment for them.

Once EPA has approved a permit program, EPA retains the authority to revise its action through its inherent authority to reconsider prior rulemaking actions, as well as under APA section 553(e), which requires EPA to give interested persons ''the right to petition for the issuance, amendment, or repeal of a rule.'' [39]

In addition, CAA section 502(i)(1) gives EPA authority to issue what is commonly called a ''notice of deficiency'' (NOD) when EPA determines that the permitting authority ''is not adequately administering and enforcing a program, or portion thereof.'' The NOD notifies a State of the inadequacies in its current permit program and requires that EPA promulgate, administer, and enforce a permit program under title V within 2 years after issuing the notice unless the State has corrected the deficiency, under section 502(i)(4). *See also* CAA sections 502(i)(2)–(3) regarding sanctions.

2. What title V-specific implementation considerations are there?

Two different requirements of the CAA title V permit programs are at issue for this action. The permit programs are similar with respect to these requirements, so that EPA's action is the same for each of the permit programs. These two requirements concern the threshold level for applicability and the pollutants subject to title V permitting requirements.

a. Requirements for threshold level in title V Federal regulatory provisions and title V State plans.

(i) *EPA's proposed action:* Revision of Federal regulations and limitation of approval of SIPs.

As discussed elsewhere in this action, the CAA title V requirements, as interpreted by EPA, generally apply to existing sources that emit 100 tpy or more of any air pollutant.[40] CAA sections 502(a), 501(2)(B). These requirements are included in EPA regulations in 40 CFR 70.3.

Most jurisdictions are covered by EPA-approved State title V permit programs. It appears that each EPA-approved title V permit program establishes the permitting threshold at, in general, 100 tpy. Some jurisdictions are not covered by EPA-approved State programs, and instead are covered by regulations at 40 CFR 71 that EPA implements. For these jurisdictions, the PSD threshold level is 100 tpy.

As discussed elsewhere, in this action, EPA proposes to establish the title V permitting threshold for GHG emissions at 25,000 tpy CO_2e. EPA plans the following process to revise its regulations and to conform the EPA-approved State title V programs to reflect these levels. This action parallels EPA's action to revise its PSD regulations and conform the EPA-approved State PSD programs to the revised PSD regulations, discussed above. First, with respect to its EPA regulations, EPA proposes to revise its regulations to establish the permitting threshold for GHGs at 25,000 tpy CO_2e, at 40 CFR 70.2. Second, with respect to the EPA-approved State permitting programs, although EPA previously fully approved the permitting threshold level provisions in those programs, EPA proposes to limit its approval of the permitting threshold level provisions to the extent those provisions require permits for sources whose emissions of GHGs equal or exceed 100 tpy CO_2e but are less than 25,000 tpy CO_2e. EPA's authority for this limitation of approval is based on CAA section 301(a), which incorporates the inherent authority of an agency to reconsider its actions, as well as on APA section 553.

EPA does not propose to take any further action on the permitting threshold provisions for which EPA is limiting its approval; that is, EPA is not proposing to disapprove those provisions. Thus, the limitation of approval for those provisions does not trigger an obligation on the part of the State to revise and resubmit for approval the affected permitting program provisions and does not trigger any Federal plan obligation.

The State permitting threshold provisions that apply to sources with GHG emissions at 25,000 tpy CO_2e or higher remain fully approved.

As a drafting matter, EPA proposes to accomplish the limitations of approval by adding to the record of its action on each State permit program the boilerplate statement that EPA limits its approval of the State permitting threshold provisions to the extent those provisions require permits for sources of GHG emissions that equal or exceed 100 tpy CO_2e but that are less than 25,000 tpy CO_2e.

(ii) Authority for limitation of approval.

As with its action concerning the PSD program, discussed above, EPA is limiting its approval under CAA section 301(a), which reflects its inherent authority to reconsider prior rulemaking actions, as well as under APA section 553(e). This authority is described in detail above in connection with EPA's proposed parallel action concerning PSD SIP provisions.

(iii) State response.

For purposes of the federally approved State permit program, this proposed action does not require States to submit any revision or take any further action. That is, if EPA finalizes this proposal, each federally approved title V program will have an applicability threshold level of 25,000 tpy CO_2e. Although the State permitting program—as established by the State law provisions—may have a lower threshold, that lower level will not be federally approved and will therefore not be federally enforceable. To reiterate, EPA is not proposing to disapprove those provisions; rather, EPA will take no further action with respect to them. As a result, no further action by the State, including no program revision, is necessary for Federal purposes.

Even so, the lower thresholds remain on the books under State law, and sources therefore remain subject to them as a matter of State law. As a result, States may wish to consider revising those state law provisions. In addition, the fact that these provisions remain on the books under State law may create some confusion as to whether they are part of the federally approved title V program (again, with this proposed action, they would not be), and for this purpose too of avoiding this confusion, States may wish to consider revising those state law provisions.

On the other hand, if a state wants to implement its operating permit requirements at a threshold level lower than 25,000 tpy CO_2e for GHG emitters, the state may submit an operating permit program revision that identifies the lower thresholds and provides the necessary assurances, under CAA section 502(b)(4), that it has adequate personnel and funding. If the program revision meets the CAA section 502(b)(4) requirement, EPA will proceed to approve it.

It should be noted that EPA considered, but is not proposing or soliciting comment on, issuing a NOD under CAA section 502(i)(1) to require States to either demonstrate that they have adequate personnel and funding to administer their operating permit programs at the 100-tpy CO_2e threshold level for GHG emitters, or to submit a permit program revision that raises the threshold to 25,000 tpy CO_2e or some other level commensurate with state personnel and funding. EPA decided

[39] Title V does not include a provision for an error correction that is comparable to CAA section 110(k)(6), which concerns SIPs.

[40] Title V requirements also apply to sources defined as major sources under CAA section 112 on the basis of their emissions of HAP, and these sources may be covered by title V even though they emit less than the 100-tpy threshold that generally applies.

against this approach for several reasons. First, a NOD under section 502(i)(1) takes significantly more time than actions taken under EPA's other authorities. The first step in this process is publication of a NOD in the **Federal Register** that sets forth EPA's findings as to the deficiencies in the state program. This notice requires the state to take significant action within 90 days, and identifies several actions, such as program withdrawal and implementation of a Federal permitting program, that EPA may take if significant action is not taken by the state. If the state has not corrected the deficiency within 18 months after the finding described above, EPA will promulgate, administer and enforce a Federal program within 2 years of the finding. In contrast, the reconsideration of a permit program approval can be undertaken in much less time.

Reconsideration of a permit program approval may lead to a more speedy and efficient resolution in a situation (such as the present) where there is no need for a further permit program submission to be developed and submitted to EPA by the state.

b. Requirement that title V permit programs apply to any air pollutant.

It appears that most title V-approved state permit programs apply to 100-tpy-or-more sources of any pollutant. As discussed elsewhere, EPA interprets these provisions to cover only pollutants that are actually regulated under other CAA provisions. These title V programs will include sources of GHG emissions when EPA promulgates regulations for GHG emissions, which EPA expects at the end of March 2010. For those title V programs, no further action concerning these provisions is needed.

However, EPA believes that some title V programs may apply to 100-tpy-or-more sources of only pollutants specifically identified in the program provisions and that these title V programs do not include a provision that automatically updates title V applicability to include any new pollutant for which EPA promulgates controls. Thus, these title V programs would not include GHG emitters. These programs are similar, for title V purposes, to the SIPs described above that specifically list pollutants subject to PSD that do not include a provision that automatically updates PSD applicability to include any new pollutant for which EPA promulgates controls. Thus, these title V programs carry the same deficiency that the SIPs do. As with the SIPs, EPA intends to undertake separate regulatory action in the near future to address these title V programs, which EPA intends to be completed and take effect by the end of March 2010, when EPA promulgates the light-duty vehicle rule that triggers title V applicability for sources of GHG emissions.

D. GHGs and Title V Permit Fees

Under title V, section 502(b)(3) of the Act, permitting authorities (including State and local agencies, tribes, and EPA) are required to collect fees ''sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements.'' The final part 70 rule grants States wide discretion in collecting fees from individual sources through establishment of fee schedules in their permit programs, provided the total fees collected from all sources are sufficient to cover the title V costs. *See* § 70.9(a), and § 70.9(b)(1) and (b)(3). The initial permit program submittal to EPA is required to include a demonstration that the fee schedule will be sufficient to cover the program costs and an estimate of the program cost during the early years of implementation. *See* § 70.4(b)(7) and (8). Also, at any time, EPA may require States to provide a detailed accounting of fee schedule adequacy, including when serious questions are raised about adequacy. *See* § 70.9(b)(5) and § 70.9(c). Thus, title V and part 70 place primary responsibility on the permitting authorities to raise adequate fees and on EPA to perform oversight of this responsibility.

The activities related to regulation of GHGs that would increase permitting authority workloads can be grouped into the following two categories: (1) Changing existing permits to add any necessary provisions to address GHGs, and (2) issuing new permits to sources newly subject to permitting solely because their regulated GHGs exceed the major source threshold.

Thus, we need to consider the impact of this proposal and any future regulation of GHGs on the fee requirements of the permit programs, and if any revisions are needed to parts 70 and 71 in response to ensure collection of adequate fees to fund the permit programs.

1. How are the fee rates set in the permit programs?

The part 70 rule provided a shortcut to ease the level of detail otherwise required in States' fee adequacy demonstrations by providing a ''presumptive minimum fee,'' which was specified in section 502(b)(3)(B) of the Act. The final part 70 rule provides a rebuttable presumption that the fees charged by a state are sufficient to cover program costs if they collect an amount equal to or greater than the presumptive minimum fee multiplied by the actual tons of ''regulated pollutants (for presumptive fee calculation),'' as defined in § 70.2. The part 70 presumptive fee was initially set at $25/ton. This amount is adjusted for inflation, annually. *See* § 70.9(b)(2). The current presumptive minimum fee, effective through September 2009, is $43.75. EPA calculates the inflation-adjusted part 70 presumptive minimum fee in October of each year and places a memorandum announcing the fee on a Web site it maintains for this purpose. *See http://www.epa.gov/air/oaqps/permits/fees.html.* Also, EPA notes that it believes there are currently a minority of States that base their fees on the presumptive minimum, perhaps at most 17 out of 112 State and local part 70 permits programs.

Since the use of the presumptive minimum fee is not mandatory for States, States were free to set either lower or higher fees rates, based on a more detailed fee adequacy demonstration. *See* § 70.9(b)(5). States were not required to set emissions-based fees though most did in combination with other approaches. Emissions-based fees on state fee schedules range from less than $10 per ton in a rural State to over $100 ton in a large urban area. Examples of other fee schedule approaches include processing fees, such as fees for applications, renewals and modifications, charges for time and material, and fees that vary depending on source category, equipment types, regulated air pollutant, business size, and many other factors. *See* § 71.9(b)(3).

The part 71 permit program, administered by EPA and delegate agencies, charges a ''part 71 annual fee,'' for every actual ton of ''regulated air pollutant (for fee calculation),'' as defined in § 71.2. Also *see* fee schedule at § 71.9(c). The final rule for part 71 set this rate at $32/ton. Adjusted for inflation, the part 71 annual fee through calendar year 2009 is $45.25 per ton. The final rule based the $32/ton fee on a detailed fee demonstration performed by EPA, placed in the docket prior to promulgation of the final rule, showing slightly higher costs for EPA versus state implementation of a title V program. The annual inflation adjustment is performed in October of each year and is announced on the same Web site as the part 70 presumptive minimum.

2. Which pollutants are subject to permit fees?

The terms ''regulated pollutant (for presumptive fee calculation)'' under part 70 and ''regulated pollutant (for fee

calculation)'' under part 71 are defined essentially the same in both programs. These terms are both currently defined to mean any ''regulated air pollutant'' except: (1) Carbon monoxide, (2) any pollutant that is a regulated air pollutant solely because it is a Class I or II substance subject to a standard promulgated or established under title VI of the Act, or (3) any pollutant that is a regulated air pollutant solely because it is subject to a standard or regulation under section 112(r) of the Act. The part 70 fee pollutant definition specifies which regulated air pollutants must be considered in presumptive minimum analyses, while the part 71 fee pollutant definition specifies which regulated air pollutants are the basis for fees for part 71 sources. The term ''regulated air pollutant'' in parts 70 and 71 means the following:

(1) Nitrogen oxides or any volatile organic compounds;

(2) Any pollutant for which a NAAQS has been promulgated;

(3) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(4) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(5) Any pollutant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Act, including sections 112(g), (j), and (r) of the Act, including the following: (i) Any pollutant subject to requirements under section 112(j) of the Act. If the Administrator fails to promulgate a standard by the date established in section 112(e), any pollutant for which a subject source would be major shall be considered regulated 18 months after the section 112(e) date; and (ii) Any pollutant for which the requirements of section 112(g)(2) of the Act have been met, but only with respect to the individual source subject to the requirement.

Note that GHGs are not currently included in either definition for fee purposes because they are not ''regulated air pollutants,'' but GHGs may be covered in the future.

Also note that section 502(b)(3) of the Act, upon which these fee regulations are based, does not specifically require fees for GHGs, and it does not specifically require fees for every regulated air pollutant, even those that may cause the source to be defined as a major source; it just requires adequate fees to cover costs. Thus, we believe the Act provides us with some discretion in how we treat GHGs for permit fee purposes. This discretion also would potentially include revising the part 70 and 71 rules to address workload associated with GHGs.

3. Proposal for Fees in State Part 70 Programs

The permitting of GHGs has the potential to create overwhelming resource burdens on State part 70 programs. These burdens would be significantly reduced under this proposal, through raising the title V major source thresholds for GHGs, which will reduce the number of sources subject to permitting. Nonetheless, as noted above, there will be some remaining additional activity associated with GHG permitting that will likely require States to increase revenue to cover the expected increase in level of activity. At this time, we believe that the best approach to address this situation is for States to assess their increased workload and determine whether their current fee regulations need to be amended to cover any expected revenue shortfall. If so, States have a wide variety of possible options regarding what pollutants and sources to cover, and what fee structure to adopt.

The EPA is not proposing at this time to amend its regulations to establish a presumptive fee approach that would involve specifically charging fees for GHGs. We are also not proposing at this time to calculate a new presumptive minimum fee under the existing presumptive fee approach to take GHGs into account, or to mandate revisions to fee regulations for GHGs in States that did not adopt the presumptive fee approach. We believe that the best approach at this time is to allow each State to determine how best to satisfy the fee adequacy requirement under the existing process, for EPA to monitor the situation, and be prepared to exercise oversight authority if necessary.

Due to the large quantity of GHGs emitted relative to criteria pollutants, for example at a combustion source where GHGs may be from several hundred times to over one thousand times the emissions of other combustion pollutants, EPA has decided not to propose to amend its regulations to establish a presumptive fee approach that would treat GHGs similarly to current fee pollutants. Such an approach would result in greatly excessive revenues because agency workloads are not necessarily proportional to emissions for sources and GHG emissions are orders of magnitude larger than other emissions for many source categories. Thus we have rejected that approach as an option. Similarly, we considered and rejected proposing to require a different, significantly reduced presumptive minimum fee for GHG [*e.g.*, by revising § 70.9(b)(2)]. This is not required by the Act, provided States can raise revenues in the aggregate that are adequate to cover program costs. We also believe we would need better data to establish the appropriate basis for the GHG presumptive minimum. We expect our data will improve over time as EPA and permitting authorities gain experience with GHG permitting programs, but at present there are large uncertainties in our estimates of the additional GHG workload at the 25,000 ton CO_2 level, the level of effort needed to incorporate future regulations for GHGs into permits, and the additional revenue that would come in from fees paid for emissions other than GHG from newly covered sources under existing fee schedules. Also, for similar reasons, we have decided not to issue NODs under § 70.10(b) for State failure to adequate implement and enforce their part 70 programs on the basis of failure to date to revise their fee schedules to cover any existing or anticipated workload for GHGs (for example, the workload associated with planning for future regulation, conducting emissions inventories of GHGs, and similar activities directly or indirectly related to part 70 permitting).

Although we do not believe it is necessary to revise our part 70 regulations to implement the fee requirements for GHGs, EPA intends to closely monitor State programs to ensure that incorporating GHGs into permits do not result in fee shortfalls serious enough to imperil the implementation and enforcement of the part 70 program. EPA has adequate authority under § 70.9(b)(5) to perform audits of State fees at any time, at our own initiative or whenever any serious questions are raised about fee adequacy, and we have done so in the past. During any such audit, EPA would focus its review on the program support test of § 70.9(b)(1) in order to assure that fees are adequate to support the program. There is also authority in § 70.4(i)(3) for EPA or the State to initiate a program revision when relevant Federal or State regulations are modified or supplemented, such as when EPA takes a future action to regulate GHGs or when EPA has reason to believe that a State is not adequately administering its program, which could occur if a fee audit uncovers a need to increase a State's fees. This provision specifically authorizes EPA to request additional documents or information, such as a revised fee demonstration. We also have authority to take action for a State's

failure to adequately administer and enforce a part 70 permits program under § 70.10(b). This process includes the issuance of a NOD and could result ultimately in withdrawal of the part 70 program and imposition of a Federal part 71 program in its place, if appropriate and timely part 70 program revisions are not made (*e.g.*, NODs on questions of fee adequacy: (1) 69 FR 10167, March 4, 2004, *http://edocket.access.gpo.gov/2004/04-4822.htm*; and (2) 71 FR 67061, November 20, 2006, *http://www.epa.gov/EPA-AIR/2006/November/Day-20/a19555.htm*). There are other examples where EPA has performed oversight of fee adequacy over State or local part 70 programs that did not ultimately result in the issuance of an NOD (*i.e., see* a December 13, 2001, letter from EPA Region 10 to a concerned citizen, *http://www.epa.gov/region7/programs/artd/air/title5/t5memos/aktrust.pdf*; and a September 23, 2002, letter from EPA Region 3 to a concerned citizen, *http://www.epa.gov/air/oaqps/permits/response/maryland.pdf*.

For these reasons we are proposing a recommendation that each State, local, or tribal part 70 program review its expected resource needs for implementing GHGs and its fee schedule with the aim of determining if its fee revenues will be adequate to cover the direct and indirect costs of implementing its program once GHGs are brought into the program. If they would not be adequate, States using the presumptive fee approach should be proactive in raising fees on current ''regulated pollutants (for presumptive fee calculation)'' or developing other alternative approaches to meet the shortfall. We may officially require submittal of fee analyses for GHGs at any time in the future, but we do not believe we need to do so at this time.

This approach is consistent with how we have treated past Federal regulations that could have potentially affected title V program resources and fees, including final rules that resulted in new applicable requirements in permits and that changed the number of sources required to get permits (*e.g.*, we did not require new fee demonstrations in response to promulgation of a large number of part 63 emissions standards, nor in response to part 63 standards that required title V permits for minor sources). In those situations, we did not alter the Federal fee regulations or require changes to the fee regulations in State programs, but the requirement for adequate revenues still applied.

4. GHGs and Part 71 Fees

Similar to the explanation for part 70 above, after GHGs become regulated for CAA purposes, we note that increased burdens will likely fall on part 71 permitting authorities (EPA and delegate agencies), resulting in the need for EPA to review the part 71 fee schedule to ensure there are adequate fees to cover program costs. We are also not proposing at this time to establish a presumptive fee approach that would treat GHGs similarly to current fee pollutants nor to adjust the fee schedule of § 71.9(c) with respect to these expected burdens for similar reasons we explained above for part 70. EPA has not determined that existing part 71 fee structure will be inadequate to fund the part 71 program costs in the next few years with GHG permitting included.

We will examine the increases in part 71 burden due to GHG-related permitting activity and in fees collected from part 71 sources to assess whether part 71 fees remain adequate. Section 71.9(c)(7) requires EPA to revise the fee schedule by rule if it does not reflect the costs of program administration, while § 71.9(n)(2) requires the Administrator to review the fees schedule every 2 years and to revise it if necessary.

E. Implementation Assistance and Support

In addition to the development of permit streamlining techniques during the threshold evaluation period to address administrative capacity issues, EPA also plans to compile and make available technical and background information on GHG emission factors, control technologies, strategies and measurement and monitoring methodologies for key GHG source categories. This information will be particularly helpful to permitting authorities in making BACT determinations for GHG for sources that trigger PSD during the phase-in period. We plan to make the information available at such time as necessary to support permitting agencies in their BACT determinations (*e.g.*, on or before EPA completes an action that triggers PSD for GHGs). In addition, we will pursue using this information to develop presumptive BACT levels for selected source categories.

We intend to focus our support effort on the largest emitting GHG source categories, those that would likely exceed the temporary major source GHG threshold adopted as part of this action. At this time, we believe that power plants, petroleum refineries, pulp and paper mills, iron and steel facilities and portland cement plants are some of the source categories for which such information would initially prove most useful to permitting agencies. A key objective of this support effort will be to help permitting authorities find cost effective ways to achieve GHG controls under the BACT requirement. In addition, the information may be useful to permit applicants in preparing BACT analyses as well as providing other stakeholders with an understanding of how GHG emissions may be mitigated.

As an example, the information would include EPA's industrial energy management resources for energy intensive industries available through its ENERGY STAR program (*see http://www.energystar.gov/index.cfm?c=in_focus.bus_industries_focus*). We intend to work closely with stakeholders in developing the support effort and information. This will help assure that, to the extent possible, the information developed supports consistency and certainty in BACT determinations. In planning this effort, EPA seeks comment on the following: (1) Given time and resource constraints, which specific source categories or sectors, including emission units, should EPA prioritize, (2) what specific information (*e.g.*, emission factors, control technologies, collateral impacts, cost information, *etc.*) and what format would be most helpful to permitting agencies in carrying out the provisions of the PSD and title V programs as they would apply to GHGs, and (3) what other types of support or assistance can EPA provide to initially help air pollution control agencies with the permitting of GHGs?

XI. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is provided in the docket for this action and the analysis is briefly summarized in section IX of this preamble.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Instead, this proposed action would significantly reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise the rule. Based on our GHG threshold data analysis, we estimated that over 40,000 new and modified facilities per year would be subject to PSD review based on applying a GHG emissions threshold of 250 tpy using a CO_2e metric. This is compared to 280 PSD permits currently issued per year, which is an increase of more than 140-fold. Similarly, for title V, we estimated that over six million new sources would be affected at the 100-tpy threshold for GHGs using the CO_2e metric. By increasing the volume of permits by over 400 times, the administrative burden would be unmanageable without this rule. Despite this reduction of burden, the OMB has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.*, 40 CFR 52.21) and title V (*see* 40 CFR parts 70 and 71) under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003 and OMB control number 2060–0336 respectively. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the APA or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed action on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed action on small entities, I certify that this proposed action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect, on all of the small entities subject to the rule.

We believe that this proposed action will relieve the regulatory burden associated with the major PSD and title V operating permits programs for new or modified major sources that emit GHGs, including small businesses. This is because the proposed action would raise major source applicability thresholds for these programs for sources that emit GHGs at rates below 25,000 tpy CO_2e. As a result, the program changes provided in the proposed rule are not expected to result in any increases in expenditure by any small entity.

We have therefore concluded that this proposed rule would relieve regulatory burden for a substantial number of small entities, and thus I certify that it will not have a significant economic impact on a substantial number of small entities. However, EPA recognizes that some small entities continue to be concerned about the potential impacts of the statutory imposition of PSD requirements that may occur given the various EPA rulemakings currently under consideration concerning GHG emissions. Accordingly, EPA will use the discretion afforded to it under the RFA to consult with OMB and SBA, with input from outreach to small entities, regarding the potential impacts of PSD regulatory requirements that might occur as EPA considers regulations of GHGs. EPA is not required to consult in this manner when it has certified that a rule will not have a significant economic impact on a substantial number of small entities, but we believe that engaging in such consultation before finalization of this rule will help us to better understand and address the potential PSD regulatory concerns of small entities that might experience such impacts.

D. Unfunded Mandates Reform Act

This proposed action does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. Although this proposed action would result in a small increase in the burden imposed upon permitting authorities by requiring States to revise their SIPs to incorporate the changes, the revisions would ultimately reduce the PSD and title V program administrative burden that would otherwise occur in the absence of this rulemaking. Thus, this proposed action is not subject to the requirements of sections 202 or 205 of UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. EPA has determined that this proposed action contains no regulatory requirements that may significantly or uniquely affect small governments, including tribal governments. However, in developing this proposed action, EPA consulted with small governments pursuant to a plan established under section 203 of UMRA to address impacts of regulatory requirements in the rule that might significantly or uniquely affect small governments. As stated in sections XI.E and F of this preamble, EPA consulted with State, local, and tribal officials early in the process of developing the proposed regulation to permit them to have timely and meaningful input into its development by publishing an ANPR (73 FR 44354, July 30, 2008) that included PSD GHG tailoring options for regulating GHGs under the CAA. As a result, EPA received comments from these entities and took them into consideration when developing this proposal.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. These proposed amendments would ultimately simplify and reduce the burden on State and local agencies associated with implementing the PSD and title V operating permits programs, by providing that a source whose GHG emissions are below the proposed levels will not have to obtain a PSD permit or

title V permit. Thus, Executive Order 13132 does not apply to this action.

Consistent with EPA policy, EPA nonetheless consulted with State and local officials early in the process of developing the proposed regulation to permit them to have meaningful and timely input into its development by publishing an advance notice of proposed rulemaking (ANPR) [73 FR 44354, July 30, 2008] that included PSD GHG tailoring options for regulating GHGs under the CAA. As a result of the ANPR, EPA received several comments from State and local government agencies on differing PSD GHG tailoring options presented in the ANPR which were considered in this proposal.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments nor preempt tribal law. There are no tribal authorities currently issuing major NSR permits; however, this may change in the future.

EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development by publishing an ANPR that included PSD GHG tailoring options for regulating GHGs under the CAA. [73 FR 44354, July 30, 2008]. As a result of the ANPR, EPA received several comments from tribal officials on differing PSD GHG tailoring options presented in the ANPR which were considered in this proposal.

Although Executive Order 13175 does not apply to this proposed rule, EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. We do not believe this action creates any environmental health or safety risks.

The public is invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposure to GHGs.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action will not create any new requirements for sources in the energy supply, distribution, or use sectors.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the U.S.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because any impacts that it will have will be global in nature and will not affect local communities or populations in a manner that adversely affects the level of protection provided to human health or the environment.

K. Determination Under Section 307(d)

Pursuant to sections 307(d)(1)(E) and 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to ''such other actions as the Administrator may determine.''

XII. Statutory Authority

The statutory authority for this action is provided by sections 307(d)(7)(B), 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects

40 CFR Part 51

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

40 CFR Part 52

Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

40 CFR Part 70

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons,

Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

Dated: September 30, 2009.

Lisa P. Jackson,

Administrator.

For reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 51—[AMENDED]

1. The authority citation for part 51 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart I—[Amended]

2. Section 51.166 is amended:

a. By revising paragraphs (b)(1)(i)(*a*), and (b)(1)(i)(*b*);

b. By adding paragraph (b)(1)(i)(*d*);

c. By revising paragraph (b)(23)(i); and

d. By adding paragraphs (b)(57) and (b)(58).

The revisions and additions read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(1)(i) * * *

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant (except for greenhouse gases (as defined under paragraph (b)(57) of this section), except as provided under paragraph (b)(1)(i)(*d*) of this section): Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(*a*) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated pollutant (except for greenhouse gases (as defined under paragraph (b)(57) of this section), except as provided under paragraph (b)(1)(i)(*d*) of this section); or

* * * * *

(*d*) Notwithstanding any provision to the contrary in this section, any stationary source which emits, or has the potential to emit, at least 25,000 tpy CO_2e of greenhouse gases, as defined under paragraph (b)(58) of this section.

* * * * *

(23)(i) *Significant* means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Particulate matter: 25 tpy of particulate matter emissions. 15 tpy of PM_{10} emissions.

$PM_{2.5}$: 10 tpy of direct $PM_{2.5}$ emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a $PM_{2.5}$ precursor under paragraph (b)(49) of this section

Ozone: 40 tpy of volatile organic compounds or nitrogen oxides

Lead: 0.6 tpy

Fluorides: 3 tpy

Sulfuric acid mist: 7 tpy

Hydrogen sulfide (H_2S): 10 tpy

Total reduced sulfur (including H_2S): 10 tpy

Reduced sulfur compounds (including H_2S): 10 tpy

Municipal waste combustor organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): 3.2×10^{-6} megagrams per year (3.5×10^{-6} tpy)

Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tpy)

Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tpy)

Municipal solid waste landfill emissions (measured as nonmethane organic compounds): 45 megagrams per year (50 tpy)

Greenhouse gases: [10,000 to 25,000] CO_2e

* * * * *

(57) *Greenhouse gas,* or *GHG,* means carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

(58) *Carbon dioxide equivalent,* or *CO_2e,* means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The CO_2e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy CO_2e can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

* * * * *

PART 52—[AMENDED]

3. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

4. Section 52.21 is amended:

a. By revising paragraphs (b)(1)(i)(*a*) and (b)(1)(i)(*b*);

b. By adding paragraph (b)(1)(i)(*d*);

c. By revising paragraph (b)(23)(i); and

d. By adding paragraphs (b)(59) and (b)(60).

The revisions and additions read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(1)(i) * * *

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant (except for greenhouse gases (as defined under paragraph (b)(59) of this section), except as provided under paragraph (b)(1)(i)(*d*) of this section): Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning

plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant (except for greenhouse gases (as defined under paragraph (b)(59) of this section), except as provided under paragraph (b)(1)(i)(*d*) of this section); or

* * * * *

(*d*) Notwithstanding any provision to the contrary in this section, any stationary source of air pollutants which emits, or has the potential to emit, 25,000 tpy CO_2e of greenhouse gases, as defined under paragraph (b)(60) of this section.

* * * * *

(23)(i) *Significant* means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions
PM_{10}: 15 tpy
$PM_{2.5}$: 10 tpy of direct $PM_{2.5}$ emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a $PM_{2.5}$ precursor under paragraph (b)(50) of this section
Ozone: 40 tpy of volatile organic compounds or nitrogen oxides
Lead: 0.6 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy
Municipal waste combustor organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): 3.2×10^{-6} megagrams per year (3.5×10^{-6} tpy)
Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tpy)
Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tpy)
Municipal solid waste landfill emissions (measured as nonmethane organic compounds): 45 megagrams per year (50 tpy)
Greenhouse gases: [10,000 to 25,000] CO_2e

* * * * *

(59) *Greenhouse gas,* or *GHG,* means carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

(60) *Carbon dioxide equivalent,* or *CO_2e,* means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The CO_2e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy CO_2e can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

* * * * *

5. Section 52.53 is revised to read as follows:

§ 52.53 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Alabama's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

6. Section 52.72 is revised to read as follows:

§ 52.72 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Alaska's plan for the attainment and maintenance of the national standards. The State included in the plan a regulation prohibiting idling of unattended motor vehicles. However, the plan stated that this regulation was included for informational purposes only, and was not to be considered part of the control strategy to implement the national standards for carbon monoxide. Accordingly, this regulation is not considered a part of the applicable plan.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

7. Section 52.123 is amended by adding paragraph (l) to read as follows:

§ 52.123 Approval status.

* * * * *

(l)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

8. Section 52.172 is revised to read as follows:

§ 52.172 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Arkansas' plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Further, the Administrator finds that the plan satisfies all requirements of Part D of the Clean Air Act, as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

9. Section 52.223 is amended by adding paragraph (f) to read as follows:

§ 52.223 Approval status.

* * * * *

(f)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

10. Section 52.323 is revised to read as follows:

§ 52.323 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Colorado's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

11. Section 52.373 is amended by adding paragraph (c) to read as follows:

§ 52.373 Approval status.

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

12. Section 52.422 is amended by adding paragraph (c) to read as follows:

§ 52.422 Approval status.

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

13. Section 52.472 is amended by adding paragraph (g) to read as follows:

§ 52.472 Approval status.

* * * * *

(g)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

14. Section 52.522 is revised to read as follows:

§ 52.522 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Florida's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D, for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for those sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

15. Section 52.572 is revised to read as follows:

§ 52.572 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Georgia's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

16. Section 52.623 is revised to read as follows:

§ 52.623 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Hawaii's plan for attainment and maintenance of the national standards. The State included various provisions in its plan to provide for the attainment of State ambient air quality standards. As described in the Governor's letters of January 28, May 8, and May 22, 1972, these provisions were included for information purposes only and were not to be considered a part of the plan to implement national standards. Accordingly, these additional provisions are not considered a part of the applicable plan.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

17. Section 52.673 is revised to read as follows:

§ 52.673 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Idaho's plan for the attainment and maintenance of the national standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

18. Section 52.722 is amended by adding paragraph (d) to read as follows:

§ 52.722 Approval status.

* * * * *

(d)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

19. Section 52.773 is amended by adding paragraph (k) to read as follows:

§ 52.773 Approval status.

* * * * *

(k)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as

significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

20. Section 52.822 is amended by adding paragraph (b) to read as follows:

§ 52.822 Approval status.

* * * * *

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

21. Section 52.873 is amended by adding paragraph (d) to read as follows:

§ 52.873 Approval status.

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(d)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

22. Section 52.923 is amended by adding paragraph (c) to read as follows:

§ 52.923 Approval status.

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

23. Section 52.986 is amended by adding paragraph (c) to read as follows:

§ 52.986 Significant deterioration of air quality.

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

24. Section 52.1022 is revised to read as follows:

§ 52.1022 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Maine's plan, as identified in § 52.1020, for the attainment and maintenance of the national standards under section 110 of the Clean Air Act.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

25. Section 52.1073 is amended by adding paragraph (h) to read as follows:

§ 52.1073 Approval status.

* * * * *

(h)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

26. Section 52.1123 is amended by adding paragraph (c) to read as follows:

§ 52.1123 Approval status.

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

27. Section 52.1172 is revised to read as follows:

§ 52.1172 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Michigan's plan for the attainment and maintenance of the National Ambient Air Quality Standards under section 110 of the Clean Air Act. Furthermore, the

Administrator finds the plan satisfies all requirements of Part D, Title I of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

28. Section 52.1223 is revised to read as follows:

§ 52.1223 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Minnesota's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

29. Section 52.1272 is revised to read as follows:

§ 52.1272 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Mississippi's plan for the attainment and maintenance of national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

30. Section 52.1323 is amended by adding paragraph (n) to read as follows:

§ 52.1323 Approval status.

* * * * *

(n)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

31. Section 52.1372 is revised to read as follows:

§ 52.1372 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Montana's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

32. Section 52.1422 is revised to read as follows:

§ 52.1422 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Nebraska's plan for the attainment and maintenance of the national standards. No action is taken on the new source review regulations to comply with section 172(b)(6) and section 173 of the Clean Air Act as amended in 1977, and 40 CFR 51.18(j).

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

33. Section 52.1472 is amended by adding paragraph (d) to read as follows:

§ 52.1472 Approval status.

* * * * *

(d)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

34. Section 52.1522 is amended by adding paragraph (c) to read as follows:

§ 52.1522 Approval status.

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

35. Section 52.1573 is revised to read as follows:

§ 52.1573 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves New Jersey's plans for attainment and maintenance of the national ambient air quality standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977, except as noted below in § 52.1581. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

36. Section 52.1622 is revised to read as follows:

§ 52.1622 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves New Mexico's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Further, the Administrator finds that the plan satisfies all requirements of Part D of the Clean Air Act, as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

37. Section 52.1673 is amended by adding paragraph (b) to read as follows:

§ 52.1673 Approval status.

* * * * *

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

38. Section 52.1772 is amended by adding paragraph (c) to read as follows:

§ 52.1772 Approval status.

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

39. Section 52.1822 is revised to read as follows:

§ 52.1822 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves the North Dakota plan for the attainment and maintenance of the national standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed

25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

40. Section 52.1873 is revised to read as follows:

§ 52.1873 Approval status.

(a) With the exceptions set forth in this subpart the Administrator approves Ohio's plan for the attainment and maintenance of the National Ambient Air Quality Standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plan satisfies all the requirements of Part D, Title 1 of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by January 1, 1981 for the sources covered by CTGs between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

41. Section 52.1922 is revised to read as follows:

§ 52.1922 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Oklahoma's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

42. Section 52.1972 is revised to read as follows:

§ 52.1972 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Oregon's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

43. Section 52.2023 is amended by adding paragraph (l) to read as follows:

§ 52.2023 Approval status.

* * * * *

(l)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

44. Section 52.2072 is revised to read as follows:

§ 52.2072 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Rhode Island's plan, as identified in § 52.2070 of this subpart, for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plan satisfies all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by January 1, 1981 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January as additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

45. Section 52.2122 is amended by adding paragraph (c) to read as follows:

§ 52.2122 Approval status.

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

46. Section 52.2172 is revised to read as follows:

§ 52.2172 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves South Dakota's plan as meeting the requirements of section 110 of the Clean Air Act, as amended in 1977. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D of the Clean Air Act, as amended in 1977.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

47. Section 52.2222 is amended by adding paragraph (d) to read as follows:

§ 52.2222 Approval status.

* * * * *

(d)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

48. Section 52.2273 is revised to read as follows:

§ 52.2273 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Texas' plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

49. Section 52.2323 is revised to read as follows:

§ 52.2323 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Utah's plan as meeting the requirements of section 110 of the Clean Air Act as amended in 1977. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

50. Section 52.2372 is revised to read as follows:

§ 52.2372 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Vermont's plan as identified in § 52.2370 for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January, 1978 and January, 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

51. Section 52.2423 is amended by adding paragraph (t) to read as follows:

§ 52.2423 Approval status.

* * * * *

(t)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

52. Section 52.2473 is revised to read as follows:

§ 52.2473 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Washington's plan for the attainment and maintenance of National Standards under section 110 of the Clean Air Act. The regulations included in the SIP (see Table 52.2479) are applicable statewide unless otherwise noted in the regulation itself. Furthermore, the Administrator finds that the plan as identified in § 52.2470 satisfies requirements of Part D, Title 1, of the Clean Air act as amended in 1977, except as noted in the following sections. Continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January. New source review permits pursuant to section 173 of CAA will not be deemed valid by EPA unless the provisions of section V of the emission offset interpretive rule published on January 16, 1979 (44 FR 3274) are met.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

53. Section 52.2522 is amended by adding paragraph (j) to read as follows:

§ 52.2522 Approval status.

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(j)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

54. Section 52.2572 is revised to read as follows:

§ 52.2572 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Wisconsin's plans for the attainment and maintenance of the National Ambient Air Quality Standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the Ozone portion of the State Implementation Plan depends on the adoption and submittal of RACT requirements on:

(1) Group III Control Techniques Guideline sources within 1 year after January 1st following the issuance of each Group III control technique guideline; and

(2) Major (actual emissions equal or greater than 100 tons VOC per year) non-control technique guideline sources in accordance with the State's schedule contained in the 1982 Ozone SIP revision for Southeastern Wisconsin.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

55. Section 52.2622 is revised to read as follows:

§ 52.2622 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Wyoming's plans as meeting the requirements of section 110 of the Clean Air Act, as amended in 1977. Furthermore, the Administrator finds that the plans satisfy the requirements of Part D, Title I, of the Clean Air Act.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

56. Section 52.2672 is revised to read as follows:

§ 52.2672 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Guam's plan for the attainment and maintenance of the National Standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of

GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

57. Section 52.2722 is revised to read as follows:

§ 52.2722 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Puerto Rico's plans for the attainment and maintenance of national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

58. Section 52.2772 is revised to read as follows:

§ 52.2772 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves the U.S. Virgin Islands plan for attainment and maintenance of the national standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

59. Section 52.2822 is revised to read as follows:

§ 52.2822 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves American Samoa's plan for the attainment and maintenance of the national standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy CO_2e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy CO_2e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy CO_2e.

PART 70—[AMENDED]

60. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

61. Section 70.2 is amended to read as follows:

a. By adding definitions in alphabetical order for *carbon dioxide equivalent* and *greenhouse gas;*

b. By revising paragraph (2) of the definition for *major source;* and

c. By adding paragraph (4) to the definition for *major source.*

§ 70.2 Definitions.

* * * * *

Carbon dioxide equivalent, or *CO_2e,* means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The CO_2e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy CO_2e can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

* * * * *

Greenhouse gas, or *GHG,* means carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

* * * * *

Major source * * *

(2) A major stationary source of air pollutants (except for greenhouse gases, except as otherwise provided in this section) as defined in section 302 of the Act, that directly emits, or has the potential to emit, 100 tpy or more of any air pollutant (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

* * * * *

(4) A stationary source that directly emits, or has the potential to emit, 25,000 tpy CO_2e or more of greenhouse gases that are subject to regulation under the Act.

* * * * *

62. Appendix A to Part 70 is amended as follows:

a. By revising the introductory text;

b. By adding paragraph (d) under Alabama;

c. By adding paragraph (c) under Alaska;

d. By adding paragraph (e) under Arizona;

e. By adding paragraph (d) under Arkansas;

f. By adding paragraph (jj) under California;

g. By adding paragraph (c) under Colorado;

h. By adding paragraph (c) under Connecticut;

i. By adding paragraph (d) under Delaware;

j. By adding paragraph (d) under District of Columbia;

k. By adding paragraph (c) under Florida;

l. By adding paragraph (c) under Georgia;

m. By adding paragraph (d) under Hawaii;

n. By adding paragraph (c) under Idaho;

o. By adding paragraph (c) under Illinois;

p. By adding paragraph (d) under Indiana;

q. By adding paragraph (k) under Iowa;

r. By adding paragraph (e) under Kansas;

s. By adding paragraph (c) under Kentucky;

t. By adding paragraph (c) under Louisiana;

u. By adding paragraph (c) under Maine;

v. By adding paragraph (d) under Maryland;

w. By adding paragraph (c) under Massachusetts;

x. By adding paragraph (c) under Michigan;

y. By adding paragraph (d) under Minnesota;

z. By adding paragraph (c) under Mississippi;

aa. By adding paragraph (x) under Missouri;

bb. By adding paragraph (c) under Montana;

cc. By adding paragraph (j) under Nebraska, City of Omaha, Lincoln-Lancaster County Health Department;

dd. By adding paragraph (d) under Nevada;

ee. By adding paragraph (c) under New Hampshire;

ff. By adding paragraph (e) under New Jersey;

gg. By adding paragraph (g) under New Mexico;

hh. By adding paragraph (e) under New York;

ii. By adding paragraph (e) under North Carolina;

jj. By adding paragraph (d) under North Dakota;

kk. By adding paragraph (d) under Ohio;

ll. By adding paragraph (c) under Oklahoma;

mm. By adding paragraph (c) under Oregon;

nn. By adding paragraph (c) under Pennsylvania;

oo. By adding paragraph (c) under Puerto Rico;

pp. By adding paragraph (c) under South Carolina;

qq. By adding paragraph (c) under Rhode Island;

rr. By adding paragraph (c) under South Dakota;

ss. By adding paragraph (f) under Tennessee;

tt. By adding paragraph (d) under Texas;

uu. By adding paragraph (c) under Utah;

vv. By adding paragraph (c) under Vermont;

ww. By adding paragraph (c) under the Virgin Islands;

xx. By adding paragraph (c) under Virginia;

yy. By adding paragraph (j) under Washington;

zz. By adding paragraph (f) under West Virginia;

aaa. By adding paragraph (c) under Wisconsin; and

bbb. By adding paragraph (c) under Wyoming.

Appendix A to Part 70—Approval of State and Local Operating Permits

This appendix provides information on the approval status of State and Local operating Permit Programs. An approved State part 70 program applies to all part 70 sources, as defined in that approved program, within such State, except for any source of air pollution over which a federally recognized Indian Tribe has jurisdiction. EPA limits its approval of the State permitting threshold provisions to the extent those provisions require permits for sources of GHG emissions that equal or exceed 100 tpy CO_2e.

Alabama

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Alaska

* * * * *

(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Arizona

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(e) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Arkansas

* * * * *

(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

California

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(jj) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Colorado

* * * * *

(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Connecticut

* * * * *

(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Delaware

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

District of Columbia

* * * * *

(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Florida

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Georgia

* * * * *

(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits

for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Hawaii

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Idaho

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Illinois

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Indiana

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Iowa

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(k) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Kansas

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(e) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Kentucky

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Louisiana

* * * * *

(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Maine

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Maryland

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Massachusetts

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Michigan

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Minnesota

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Mississippi

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Missouri

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(x) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Montana

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Nebraska; City of Omaha; Lincoln-Lancaster County Health Department

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(j) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Nevada

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

New Hampshire

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

New Jersey

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(e) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

New Mexico

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(g) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

New York

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(e) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

North Carolina

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(e) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

North Dakota

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Ohio

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Oklahoma

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Oregon

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Pennsylvania

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Puerto Rico

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Rhode Island

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

South Carolina

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

South Dakota

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Tennessee

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(f) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Texas

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Utah

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Vermont

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Virgin Islands

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Virginia

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Washington

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(j) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits

for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

West Virginia

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(f) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Wisconsin

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e.

Wyoming

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy CO_2e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy CO_2e

PART 71—[AMENDED]

63. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

64. Section 71.2 is amended to follows:

a. By adding definitions in alphabetical order for *carbon dioxide equivalent* and *greenhouse gas;*

b. By revising paragraph (2) of the definition for *major source;* and

c. By adding paragraph (4) to the definition for *major source.*

§ 71.2 Definitions.

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Carbon dioxide equivalent, or *CO_2*e, means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The CO_2e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy CO_2e can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

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Greenhouse gas, or *GHG,* means carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

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Major source * * *

(2) A major stationary source of air pollutants (except for greenhouse gases, except as otherwise provided in this section), as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

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(4) A stationary source that directly emits, or has the potential to emit, 25,000 tpy CO_2e or more of greenhouse gases that are subject to regulation under the Act.

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