

December 28, 2009

EPA Docket Center (EPA/DC)  
1200 Pennsylvania Ave., NW.  
Washington, DC 20460

Attention: Docket ID [EPA–HQ–OAR–2009–0517; FRL–8966–7]

Subject: Prevention of Significant Deterioration and Title V Greenhouse Gas  
Tailoring Rule

These comments are filed on behalf of the Kansas Independent Oil & Gas Association. In addition to the specific comments made herein, we support those comments submitted by the Independent Petroleum Association of America and the American Petroleum Institute.

The Environmental Protection Agency (EPA) accurately characterizes the rationale for this regulatory proposal in its preamble: 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. EPA subsequently released its endangerment determination and created the scenario it projects will cause the “absurd results” that it must now concoct a regulatory framework to address. Fundamentally, EPA’s flawed interpretation of the CAA causes its catastrophic results – results that run counter to its own assessments of congressional intent in crafting the CAA. As EPA observes in the Proposed Rule: ...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. As EPA regularly restates in its justification for its proposal, these consequences were not anticipated by Congress. A good example is: 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<sub>2</sub> 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. The clear and overwhelmingly obvious reality that EPA does not want to address is that these issues arise because Congress never intended to use the CAA to address GHG. EPA's own actions – taken for reasons beyond any legal requirement – create the “absurd results” it now seeks to address. Much like the apocryphal boy who murders his parents and then seeks leniency from the courts because he is an orphan, EPA plays the victimized agency that must deal with a regulatory crisis – a crisis of its own making. These consequences were not unanticipated. We raised many of them during the comments that were submitted with regard to the endangerment proposal. We restate them here: In its Advanced Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act (GHG ANPR), the Environmental Protection Agency (EPA) presented wide ranging information and suggestions regarding the potential use of the Clean Air Act (CAA) to regulate greenhouse gases (GHG) and the consequences of those possibilities. In this proposal, “...the Administrator proposes to find that atmospheric concentrations of greenhouse gases endanger public health and welfare within the meaning of Section 202(a) of the Clean Air Act.” While this proposed action gives the appearance of a narrowly focused action, it disguises the reality that will lead to broad application of the CAA. While we produce American oil that becomes the fuel for America's vehicles, our primary interest is in this broader application. These comments will broadly discuss several issues including: broad policy considerations of using the CAA for GHG regulations, more specific issues regarding several of the approaches in the context of stationary sources that were raised in the GHG ANPR and the particular implications on American oil and natural gas exploration and production.

### **Broad Policy Implications of Using the Clean Air Act**

The GHG ANPR and this proposal are driven almost exclusively by the United States (US) Supreme Court decision in *Massachusetts v. EPA*. While the Supreme Court seemed fascinated with the capaciousness of the definition of “air pollutant” under the CAA, it ultimately concluded that EPA “...must ground its reasons for action or inaction in the statute.” To make such a decision it is essential that EPA consider the legislative history of the CAA to determine intent and scope. Clearly, when the CAA was enacted in 1970, Congress was focused on addressing air pollution in the US. Its concept of these pollutants consistently shows its interest focused on industrial and vehicle-specific emissions. It did not

view the common compounds in the atmosphere – nitrogen, oxygen and carbon dioxide – as air pollutants. The role of carbon dioxide was viewed as beneficial – essential for plant growth and oxygen generation – a role that is largely ignored in the GHG ANPR. The issues of the time are reflected in the early criteria pollutants – sulfur oxides, nitrogen oxides, particulates, carbon monoxide and ozone. These were the areas where Congress sought to change the nature of American society. While international interest in addressing air pollution was growing in 1970, its focus was on national actions needed to address local pollution. Global climate concerns were too vague and too uncertain to suggest that Congress had any intent to address it in the structure of the CAA. Moreover, if it had, the likely concern would have been threats of global cooling. Roughly a decade before CAA enactment, scientists largely feared that the world was heading toward a new ice age, a concern so broadly held that it was reflected in publications as diverse as the elementary school newspaper, *The Weekly Reader*. Similarly significant, when Congress did have an opportunity to consider using the CAA to address a global climate issue, it chose not to. By 1977, when the first major amendments to the CAA were enacted, stratospheric ozone threats were significant policy issues. However, rather than assert active policy provisions in the CAA, Congress chose to explicitly limit the CAA to analysis while addressing regulation through other laws. Only after international agreements on stratospheric ozone protection were developed did Congress provide the specific authorities of Title VI in the CAA to address them. This history affirms that Congress oriented the CAA to address US-limited issues. EPA needs to recognize that Congress' actions with regard to the authorities within the CAA show a level of detail not found in many laws. Congress set limits on the size of facilities to be regulated. It created entire programs to detail how nonattainment should be addressed for ozone and carbon monoxide. It defined the nature of the Prevention of Significant Deterioration (PSD) program. It reached into structuring the composition of gasoline and other vehicle fuels. To suggest that GHG regulation should fall out of these complex sections of the CAA in the ad hoc fashion that EPA presents in the GHG ANPR and would create by adopting this proposal is simply inconsistent with the history of the CAA. Global climate management is an enormously complex challenge, one that can only be addressed on an international stage. In contrast to the national air pollution programs in the CAA, global GHG emissions do not present a risk to public health at anything approaching current ambient levels. In fact, despite the public perspective that environmental advocates have encouraged, the environmental consequences are based on unsettled science. Data suggest that climate change is occurring, but determining the role of anthropogenic emissions remains elusive. Even the determination of environmental effects must be based on the results of complex and ever-changing computer models – not on clear evidence like those used to judge the effects of criteria pollutants. As EPA observes in the GHG ANPR, local actions – even national actions – will not produce measurable changes in the ambient concentrations of GHG. Realistically, only widespread action by all of the major GHG emitting nations can hope to produce significant results. Failure to develop international action with

broad commitment by all key GHG emitting nations could be catastrophic to the US if EPA pursues national regulation under the CAA. The policies EPA suggested in the GHG ANPR will do little to affect ambient GHG. However, they would define American industrial structure for the next half century. The GHG ANPR referenced the underlying challenge in its discussion of “leakage” – the movement of GHG emissions from the US to other countries. The past decade demonstrates the reality of this consequence. Largely unfettered industrial development in key countries, like China and India, has drawn enormous international investment – including shifting significant manufacturing capacity from the US. A US-only regulatory effort under the CAA would dramatically exacerbate this shift. It would be a change with no environmental benefit but produce substantial damage to the US economy and national security. One area particularly affected would be energy and national energy security. Given the unstable energy world, these are consequences that cannot be endured. When the CAA was enacted in 1970, America’s oil production had just then peaked. The 1973 Arab Oil Embargo had yet to occur. The US imported 1.3 million barrels/day of crude oil compared to 11.3 million barrels/day of American production. By 2009, over 66 percent of America’s oil demand came from imports. Nevertheless, the US continues to be a large producer of petroleum – the third largest in the world. Oil accounts for about 40 percent of America’s energy supply; natural gas provides approximately 23 percent. These fuels and coal – which provides another roughly 23 percent of American energy – would be the most significantly affected by CAA regulation of GHG. America’s economy hinges on energy. Today, the US consumes about 22 percent of the world’s energy. This energy produces 30 percent of the world’s Gross Domestic Product. This link is undeniable. Future economic success means that more energy will be needed. The Energy Information Administration estimates that US energy demand will need to increase by about 30 percent over the next 25 years. Certainly, growth in new energy alternatives will meet some of this need while conservation and efficiency will be essential as well. However, oil, natural gas and coal will continue to be the primary sources of American energy. A GHG regulatory program needs to recognize this reality. Equally significant, it needs to recognize that constraining the development of American resources will result in greater risk to US security – a consequence that is unacceptable in the current state of the world. For these reasons, we believe that the CAA is not an appropriate law to regulate GHG nor was it ever intended to be. Nevertheless, EPA chose to follow the path of pulling GHG under the scope of the CAA. Now, it must deal with the consequences. This tailoring proposal demonstrates how serious those consequences can be. At the heart of the issue EPA tries to address in the tailoring proposal is clear statutory language defining the size of stationary sources subject to regulation under the CAA PSD and Title V programs. EPA asks us to believe that it can ignore the fundamental structure of the CAA under two legal theories – “absurd results” and “administrative necessity”. The tailoring proposal explanation tries to weave a path through these concepts, but the justifications are not compelling. They rely on stretching relatively narrow instances in cases where consequences fall on agencies

without the agencies' complicity. Here, EPA's situation differs dramatically. In the instant case, EPA's actions create the consequences it must now address. While it is obvious that – if Congress had intended to address GHG under the CAA – Congress would not have set stationary source thresholds at 100 or 250 tons/year, the standard in the law is, in fact, what it is. Inescapably, one must conclude that Congress did not intend to regulate GHG under the CAA. But, despite pages of explanations about the disastrous consequences of the direct application of the CAA stationary source definitions to GHG, EPA concludes that the solution is to contort little used regulatory theories to save the agency from its own actions. While we believe that the application of the CAA thresholds to GHG sources would be disastrous, we cannot be comforted that EPA can sustain the thresholds described in the tailoring proposal based on the thin justification it presents. However, we must also question why – even in light of the endangerment determination – EPA believes it must pursue the course it set forth in the tailoring proposal. An endangerment finding under Title II of the CAA does not necessarily translate into direct regulation of stationary sources. The PSD program may be more easily explainable. PSD does not relate to health based concerns. The PSD legislative history, in fact, is clearly built upon non-health based air quality issues. It specifically applies in areas that meet federal health based National Ambient Air Quality Standards (NAAQS). If EPA were to recognize this distinction, it could reasonably conclude that PSD stationary source permitting is not subject to action based on the GHG endangerment determination. Consideration of Title V applicability follows a similar path. All of the stationary sources subject to Title V permitting are triggered by other elements of the CAA that make determinations regarding the applicability of that section to the sources required to get permits. The Title II endangerment determination is not one of the processes that trigger Title V. This perception of the CAA is reflected in EPA's statement on the consequences of the endangerment determination. EPA states: Moreover, EPA does not believe that the impact of regulation under the CAA as a whole, let alone that which will result from this particular endangerment finding, will lead to the panoply of adverse consequences that commenters predict. EPA has the ability to fashion a reasonable and common-sense approach to address greenhouse gas emissions and climate change. The Administrator thinks that EPA has and will continue to take a measured approach to address greenhouse gas emissions. EPA would be far better positioned if it concluded that the PSD and Title V portions of the CAA are not triggered by the Title II endangerment determination than to follow the rationale of the tailoring proposal relying on tenuous legal theories of "absurd results" and "administrative necessity". We further question EPA's sleight-of-hand approach on the regulatory costs of its actions. In the initial endangerment proposal, EPA argues that nothing the finding would result in new regulatory burdens for PSD stationary sources. In this tailoring proposal, it justifies its actions on the disastrous consequences of the program on stationary sources under the PSD and Title V programs because of the endangerment determination. It, in fact, argues that the tailoring proposal will alleviate the otherwise severe burdens that would be imposed. We believe that the nation

deserves to understand the consequences of the endangerment determination if EPA concludes that its conclusion compels this broad expansion of these stationary source programs. As we have suggested earlier – and at least some at EPA seem to suggest as well – the Title II endangerment determination does not have to create the consequences set forth in the tailoring proposal. But, clearly, under the vast confusion that EPA has created by being on both sides of the issue, the nation needs to understand the consequences. Similarly, we must question the agency’s motives with regard to natural gas systems and oil systems that explore for and produce America’s natural gas and oil. EPA argues that Congress never intended to extend the regulatory requirements to the statutory stationary source sizes in the CAA. While we agree for different reasons, we oppose efforts underway within EPA for both GHG emissions and criteria pollutants to effectively revise the definition of stationary sources for natural gas and oil production operations. When EPA proposed reporting requirements under the Mandatory Reporting for Greenhouse Gases rule, it suggested that it was evaluating different facility definitions for onshore petroleum and natural gas production. EPA stated in part: One approach we are considering for including onshore petroleum and natural gas production fugitive emissions in this reporting rule is to require corporations to report emissions from all onshore petroleum and natural gas production assets at the basin level. In such a case, all operators in a basin would have to report their fugitive emissions from their operations at the basin-level. For such a basin-level facility definition, we may propose reporting of only the major fugitive emissions sources; i.e., natural gas driven pneumatic valve and pump devices, well completion releases and flaring, well blowdowns, well workovers, crude oil and condensate storage tanks, dehydrator vent stacks, and reciprocating compressor rod packing. Under this scenario, we might suggest that all operators would be subject to reporting, perhaps exempting small businesses, as defined by the Small Business Administration. So, while EPA argues that it needs to tailor the definition of stationary sources to reduce its burden in this proposal, elsewhere, it is devising artificial approaches to alter the definitions of stationary source facilities solely for natural gas and petroleum production operations to increase the regulatory burden. Congress clearly spoke to the question of aggregating natural gas and petroleum production facilities under the CAA when it prohibited aggregation in the 1990 CAA Amendments. EPA should listen.

## **Conclusion**

We appreciate the opportunity to provide these comments. The global climate debate remains a critical challenge for America. But, in this proposal EPA is desperately trying to unravel the overwhelming consequences of an ill-founded interpretation of the CAA. The CAA was never written with GHG emissions management as a part of its structure. EPA cannot twist the structure of the Act to create a sound regulatory approach. The options EPA presents would result in litigation that it will not be able to withstand; its legal rationale is too fragile. Instead, EPA needs to revisit the fundamental basis for including stationary

sources within the consequences of its Title II endangerment determination. More than that, EPA owes the country a clear explanation of the costs its actions will impose. Finally, we cannot accept the idea that for other stationary sources, EPA seeks to reduce the regulatory burden while it devises plans to increase the burden on American natural gas and oil production. We urge EPA to reject the use of the CAA as a GHG regulatory approach, to seek effective international agreements and to seek Congressional action on global climate policy that will provide America with the energy security and the industrial development it needs to provide for future jobs and economic growth. If there are questions regarding these comments or if additional information is required, please contact Edward Cross at the Kansas Independent Oil & Gas Association at 785-232-7772.