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
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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" (CO2e) basis, and a temporary PSD significance level for GHG emissions of between 10,000 and 25,000 tpy CO2e. 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.

As Ann noted below, EPA announced on Wednesday a new proposed rule addressing greenhouse gas emissions from new major industrial sources and major modifications of those sources under the Clean Air Act's New Source Review/Prevention of Significant Deterioration program. According to the EPA media release:

New EPA Rule Will Require Use of Best Technologies to Reduce Greenhouse Gases from Large Facilities/Small businesses and farms exempt

LOS ANGELES– U.S. EPA Administrator Lisa P. Jackson announced today in a keynote address at the California Governor's Global Climate Summit thatthe Agency has taken a significant step to address greenhouse gas (GHG) emissions under the Clean Air Act. The Administrator announced a proposal requiring large industrial facilities that emit at least 25,000 tons of GHGs a year to obtain construction and operating permits covering these emissions. These permits must demonstrate the use of best available control technologies and energy efficiency measures to minimize GHG emissions when facilities are constructed or significantly modified.

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Oddly, however, the proposed rule itself doesn't actually accomplish exactly what EPA says it does here, although the New York Times and other major news sources seem to have assumed it does. In particular, the rule doesn't appear to apply any new permitting requirement to any facilities — yet. Instead, it is designed to shape and limit the scope of future permitting actions.

Once EPA takes certain other regulatory actions that it plans to take — such as finalizing rules that would regulate GHG emissions from automobiles — those actions would ordinarily trigger requirements that thousands of sources, large and small, apply for permits and demonstrate that they are using the best available technology to control GHG emissions. The new proposed rule says, in effect, that when these requirements take effect, they will be limited to cover only the large emitters of greenhouse gases.

The requirements at issue stem from the Clean Air Act's New Source Review/Prevention of Significant Deterioration (PSD) program. This program requires potential new sources of pollution, and significant modifications of facilities that already exist, to obtain permits in advance in order to operate lawfully. Each permit is designed to ensure that the permitted facility implements the best available technology to control pollution. The program's quantitative "thresholds" establishing which facilities have to comply with the program, are written into the Clean Air Act itself, in what has turned out to be a startling demonstration of why it's often better for Congress to leave the details to administrative agencies.

Any facility that emits more than 100 tons per year (for some categories of facilities) or 250 tons per year (for others) of any pollutant "subject to regulation" under the Clean Air Act is

considered a "major emitting facility" and required to apply for a PSD permit and to demonstrate that it is applying the best available technology to control its pollutants. For most pollutants, these numbers, though arbitrary, roughly track most people's idea of a "large" source of pollution. Unfortunately, for carbon dioxide in particular, these thresholds make little sense as part of a program to regulate major sources. Because burning of any fossil fuel releases carbon dioxide in quantities orders of magnitude higher than any other pollutant, many smaller generators of carbon dioxide might be required to be regulated under the program. (It is noteworthy, however, that carbon dioxide isn't necessarily generated in significant quantities by every small business or household; CO2 emissions from electricity generation, for example, would presumably be regulated at the power plant. But it's likely that consumption of natural gas or fuel oil would have to be seen as creating CO2 emissions at the point of combustion.)

Up until now, greenhouse gases haven't been considered "subject to regulation" under the Clean Air Act, so GHGs haven't been part of the PSD program. EPA wants to regulate GHGs, and indeed is compelled to do so based on the U.S. Supreme Court's Mass. v. EPA decision and the current state of the science. But the last thing the agency, or the Obama administration, wants is to have to implement a regulatory program that will both confirm the political right's narrative that regulation of greenhouse gases will impose burdens on small businesses, and at the same time impose an unmanageable administrative burden on EPA itself, by requiring that thousands of small sources apply for permits. So EPA, which is poised to start regulating GHGs in other contexts, is in a conundrum, given the very low regulatory thresholds written into the law.

EPA's answer? In a word, "tailoring." The rule's official summary (right at the beginning) says:

> 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.

The summary accurately characterizes the proposed rule, as far as I can tell. The PSD program applies to any pollutant that is "subject to regulation" under the Clean Air Act. EPA is worried that once GHGs are officially subject to regulation, the agency will have to regulate GHG emissions from small businesses, and at the same time impose an unmanageable administrative burden on EPA itself. In this rule, EPA doesn't decide that GHGs are "subject to regulation" under the CAA yet. So this rule appears to be designed simply to make sure that once there is another EPA action that makes GHGs "subject to regulation" under the CAA (such as the light-duty vehicles GHG regulation, or an official reinterpretation of a now-vacated "interpretive memorandum" from the Bush EPA that said GHGs aren't "subject to regulation" yet under existing rules), that action doesn't automatically trigger regulation of all sources under PSD as would otherwise be required. Until there is some rulemaking that makes GHGs "subject to regulation," EPA is not yet requiring the use of best available technology to control GHGs from any stationary source under this program.

So, absent today's rule, the PSD program – with its requirement that regulated facilities under the best available technology to control GHGs – would be triggered for a wider range of sources as soon GHGs are made "subject to regulation" – all those that emit at levels over the tiny PSD thresholds in the CAA itself. Thus, EPA's characterization of the rule as "requiring large industrial facilities that emit at least 25,000 tons of GHGs a year to obtain construction and operating permits covering these emissions" seems wrong to me.

So what's the purpose of issuing the proposed rule and accompanying media release now? The EPA seems to want to send several messages to the public, to regulated industries, to Congress, and to the international community. First, as mentioned above, the EPA wants to create a framework within which it can realistically use its Clean Air Act authority to

regulate GHGs, rather than face an unmanageable task. Second, based on the media release, the agency wants to make clear that it's serious about using the Clean Air Act to regulate GHG emissions, and is using this rulemaking as an opportunity to assert that publicly. Third, it's trying to blunt criticism from regulated entities that it's trying to regulate the entire economy, including small businesses (these criticisms surfaced most recently in the proposed Murkowski Amendment, which would have withheld funding to EPA relating to regulation of GHGs from stationary sources). Fourth, it's trying to convince Congress that the EPA has a legitimate role in regulating GHGs from stationary sources, to stave off attempts to replace all its Clean Air Act authority through a new climate bill. (See this letter from the U.S. Chamber of Commerce, explaining its view of the dangers of application of the current PSD program to GHGs, noting EPA's work on administrative solutions, but asking Congress to enact a "pure legislative fix"). And finally, if no climate bill passes this fall, it's possible that this regulatory initiative will help to send the message internationally that the U.S. is nonetheless serious about GHG regulation, strengthening our negotiating hand with China and other less-developed nations at the U.N. talks in Copenhagen in December.

The downside of this regulation? It opens the agency to legal challenges, possibly before the agency has even begun to regulate GHGs from stationary sources. Jonathan Adler and others have questioned the logic and legal rationale behind the proposed rule, which, as noted above, would allow EPA to avoid a clear Congressional directive to regulate far more sources than the rule contemplates. It would be odd for industry to seriously challenge a rule for not being strict enough; truly, only operators of oil refineries, coal-fired power plants, and other very large facilities would seem to have a serious interest in holding up this rule, the whole purpose of which is to exempt most everyone else from regulation. Even the U.S. Chamber of Commerce seems to agree in principle that the EPA's approach here is correct as a policy matter. But based on initial industry reaction to this decision (as quoted in this New York Times article, for example), it seems virtually certain there may indeed be a legal fight over this rulemaking.