

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**PROPOSED RULEMAKING TO ESTABLISH LIGHT-DUTY VEHICLE  
GREENHOUSE GAS EMISSION STANDARDS AND CORPORATE AVERAGE FUEL  
ECONOMY STANDARDS  
DOCKET NO. EPA-HQ-2009-0472**

**COMMENTS OF PEABODY ENERGY COMPANY**

**Via Electronic Mail To: a-and-r-Docket@epa.gov**

:

**I. Introduction**

Peabody appreciates the opportunity to submit these comments on the proposal of the Environmental Protection Agency (EPA or the Agency) to regulate greenhouse gas (GHG) emissions from light-duty motor vehicles.<sup>1</sup> Peabody does not take a position on the motor vehicle standards in and of themselves. Instead, Peabody's comments address the fact that the motor vehicle rules will automatically trigger regulation of major stationary source emissions of GHGs under the Prevention of Significant Deterioration (PSD) program.

In particular, Peabody believes that EPA has failed, as a part of the motor vehicle GHG rulemaking, to conduct a number of analyses required by Executive Orders and statutes of the highly significant economic and regulatory effects that will result from PSD regulation of major source GHG emissions. Unless these analyses are produced and made subject to comment before the motor vehicle rule is finalized, the legal status of that rule will be in jeopardy. Moreover, apart from legal requirements and as a matter of sound regulatory policy, EPA should take the necessary steps to understand the consequences that will necessarily flow when the motor vehicle rule is finalized and numerous stationary sources become subject to GHG regulation under the PSD program.

Peabody understands that EPA has proposed the tailoring rule<sup>2</sup> in order to defer PSD and Title V regulation for what that rule defines as small (non-major) GHG emitters – those whose potential to emit (PTE) CO<sub>2</sub>e emissions is less than 25,000 tons per year (tpy). Peabody further understands that the motor vehicle rule preamble asks that “concerned small entities” address their comments about PSD and Title V to the tailoring rule docket.<sup>3</sup> Except as relevant to our comments here, Peabody will withhold its detailed comments on the small source issue for that docket.

---

<sup>1</sup> *Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 74 Fed. Reg. 49454 (Sept. 28, 2009).

<sup>2</sup> *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55292 (Oct. 27, 2009).

<sup>3</sup> 74 Fed. Reg. at 49629/3.

However, Peabody's concern as to PSD impacts in the present docket relates not to the small-source emitters but to the major-source emitters. Except for defining the major source threshold at 25,000 tpy CO<sub>2</sub>e, the tailoring rule does not affect PSD regulation of major stationary sources of GHGs and indeed specifically states that normal PSD requirements will apply to such major sources. Thus, the motor vehicle rule is the EPA regulatory decision point that triggers PSD regulation of major-source emissions of GHGs and therefore, as a matter of law, EPA's responsibility to examine the PSD consequences of that decision on major sources arises here. Accordingly, Peabody directs its comments on the major source PSD issue to the present docket and urges EPA to re-notice the rule for further comment when it has produced the necessary studies.

PSD regulation will have two types of consequences for major-source GHG-emitters: it will result in significant Best Available Control Technology (BACT) requirements, and, at least in the near term, will make it very difficult to obtain needed PSD permits or permit modifications. Peabody's comments address each of these subjects and then examine the Executive Order and statutory analyses that EPA has failed to produce.

## **II. Peabody**

Peabody is the world's largest private-sector coal company. Our products fuel approximately 10 percent of America's and 2 percent of the world's electricity. Last year Peabody shipped 238 million tons of coal. The company has 340 electricity generating and industrial customers in nearly 40 states and 19 countries. In the United States, Peabody companies operate three large surface mines in the Powder River Basin of Wyoming that produce about 150 million tons per year; three surface mines in the Southwest that produce about 14 million tons per year; an underground mine in Colorado that produces about 8.6 million tons per year; and a number of surface and underground mines in the Illinois Basin that collectively produce about 32 million tons per year. Peabody's 2007 domestic coal production of about 200 million tons per year equaled about 17.4 percent of total domestic production.<sup>4</sup>

## **III. Regulating light-duty motor vehicle GHG emissions will have far-reaching economic and regulatory consequences by subjecting most of the nation's industrial production to GHG regulation under the PSD program**

As the tailoring rule preamble explains, EPA's motor vehicle rule will make GHGs a regulated pollutant under the Clean Air Act (CAA) and will therefore trigger PSD regulation of major source GHG-emitters. According to the tailoring rule Technical Support Document (TSD), at the 25,000 tpy CO<sub>2</sub>e threshold, some 13,600 sources are major sources of GHG emissions throughout the economy.<sup>5</sup> This represents the large majority of the nation's fossil fuel-fired industrial base and accounts for 87 percent of the CO<sub>2</sub> emitted by every stationary source of any size in America.<sup>6</sup>

---

<sup>4</sup> Technical Support Document, *The Coal Sectors, Proposed Rule for Mandatory Reporting of Greenhouse Gases* (Jan. 28, 2009), EPA-HQ-OAR-2008-0037, Ex. 10.

<sup>5</sup> *Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation* ("Tailoring Rule TSD"), Docket No. EPA-HQ-OAR-2009-0517 (Jul., 2009) at 7, Table 2.

<sup>6</sup> 74 Fed. Reg. at 55332/3-55333/1.

For instance, according to the TSD, in the electric generation sector, the motor vehicle rule will trigger PSD regulation for 2,076 of 2,237 total sources, accounting for 99.9 percent of the sector's total CO<sub>2</sub>e emissions. All 15 domestic aluminum smelters, all 107 cement production facilities, all 14 phosphoric acid production facilities, all 145 pulp and paper manufacturing facilities, all 5 soda production facilities, all 8 titanium dioxide production facilities, and all 9 ferroalloy production units will be regulated. Regulation will also extend to 123 of 130 total iron and steel production facilities, 13 of 17 lead production facilities, 11 of 13 magnesium production facilities, 86 of 89 lime production facilities, 44 of 45 nitric acid production facilities, 96 of 98 petrochemical production facilities, 146 of 150 petroleum refineries, and 74 of 75 municipal solid waste combustors.<sup>7</sup>

PSD regulation will have far-ranging effects for these major industrial sources. None of these sources will be able to make a physical or operational change in a way that increases CO<sub>2</sub>e emissions by 10,000-25,000 tpy (whichever level is chosen in the tailoring rule) without first obtaining a PSD permit (or permit modification) and without installing Best Available Control Technology (BACT) to reduce GHG emissions. Moreover, no new major source can be constructed without also obtaining a permit and installing BACT.

EPA expects that PSD regulation will result in new existing major stationary sources installing significant amounts of emission controls. According to the Agency:

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.<sup>8</sup>

EPA has done a great deal of analysis as to the control technologies that may be imposed on large stationary sources as a result of GHG regulation. In a TSD prepared in June 2008 in connection with the GHG Advanced Notice of Proposed Rulemaking,<sup>9</sup> EPA examined emission levels, potential GHG control measures, and regulatory options for a number of industrial sectors, including industrial boilers, the electric power sector, refineries, Portland cement facilities, the iron and steel sector, petroleum production and natural gas systems, and landfills.<sup>10</sup> Referring to industrial boilers, EPA stated that “significant potential GHG reductions are available from existing as well as new sources.”<sup>11</sup> Of course, obtaining significant reductions from industrial facilities will entail the expenditure of a significant amount of money.

Although, as discussed below, EPA has failed to comply with its statutory obligations to examine the cost of these future-required BACT controls, the magnitude of those potential costs can be seen in the cost impact to industry of complying with requirements to reduce emissions of traditional pollutants under the PSD and its sister nonattainment New Source Review (NSR)

---

<sup>7</sup> Tailoring Rule TSD at 9-60.

<sup>8</sup> 74 Fed. Reg. at 55340/2.

<sup>9</sup> *Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule*, 73 Fed. Reg. 44354 (Jul. 30, 2008).

<sup>10</sup> *Technical Support Document for the Advanced Notice of Proposed Rulemaking for Greenhouse Gases; Stationary Sources, Section VII*, EPA-HQ-OAR-2008-0318 (June 5, 2008) at 13-36.

<sup>11</sup> *Id.* at 15

programs. For instance, just the settlements that EPA has entered into with owners of coal-fired electric generating stations and petroleum refineries for alleged failures to comply with NSR requirements have resulted in literally billions of dollars in pollution control expenditures.<sup>12</sup>

Finally, EPA has formed an advisory committee to examine BACT options and evidently intends to issue guidance on this subject by March. This means that EPA has already gathered a significant amount of information on the type of BACT controls that it expects will be imposed on various industrial source categories. None of this information, however, was made available as a part of the motor vehicle rulemaking docket.

#### **IV. Despite the tailoring rule, regulating light-duty motor vehicle GHG emissions will have the further consequence for major sources of essentially making it impossible for them to obtain needed permits, at least in the near term**

According to EPA, without the tailoring rule, regulation of GHGs triggered by the motor vehicle rule will result in sustained regulatory gridlock in the PSD and Title V programs. EPA says that “the number of [PSD] permit applications would increase by 150-fold, an unprecedented increase that would far exceed administrative resources.”<sup>13</sup> Moreover, “[p]ermitting authorities have estimated that it would take 10 years to process a PSD application, on average, and the resulting backlog would affect the permit applications for all sources, not just GHG emitters. This backlog would grow by tens of thousands each year following the triggering of PSD applicability.”<sup>14</sup> EPA estimates that there would be “some 6.1 million” Title V permit applications, a number that is “almost 100 times greater than what Congress expected,” which would lead to “multi-year delays in permit issuance.”<sup>15</sup>

EPA also states that this regulatory gridlock would not be confined to just small sources. As EPA states, “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 of time.”<sup>16</sup>

EPA says that the tailoring rule will prevent these dire consequences from occurring, but that is not the case, at least in the near term. The tailoring rule preamble frankly recognizes that most states have adopted their own PSD programs. Although these programs are submitted to and approved by EPA as a part of the State Implementation Plan (SIP) process, these programs retain independent legal force under state law. According to EPA, “virtually all of [these state permit programs] establish the PSD permitting threshold at the 100/250-tpy level,” and in fact “a few states have adopted lower permitting threshold levels.”<sup>17</sup> Similarly, “virtually all EPA-approved SIPs establish the significance level for any new pollutant that it covers – including

---

<sup>12</sup> See <http://www.epa.gov/compliance/civil/caa/caaenfpriority.html>.

<sup>13</sup> 74 Fed. Reg. at 55304/1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 55304/2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 55342/1.

GHG emissions, if covered – at zero.”<sup>18</sup> This means that, under state law in most states, once GHGs become regulated pollutants, any major-source modification that increases GHG emissions by any amount will trigger PSD applicability.

Under the tailoring rule, these state PSD provisions will no longer be enforceable as a matter of federal law. But, as EPA specifically states, the 100/250 tpy state thresholds and the zero state significance levels for CO<sub>2</sub> will remain in effect as a matter of state law.<sup>19</sup> Moreover, EPA says it will not issue a SIP Call, impose a Federal Implementation Plan, or take any other action that will require states to change their current thresholds and significance levels.<sup>20</sup> Thus, absent state action to revise their PSD regulations, the regulatory gridlock that EPA predicts without the tailoring rule will occur anyway.

EPA seems to be counting on the states’ unilaterally revising their PSD regulations, but EPA does not allow them any time to do so before GHGs become regulated pollutants triggering PSD and Title V requirements. Many states could take a year or more to change their regulations, and many require either legislative approval or legislative review of some kind. In the meantime, the regulatory gridlock that EPA predicts – for both large and small sources – will be a reality. Of course, EPA could defer the effectiveness of the motor vehicle rule until states have taken the necessary action, but that is not what EPA proposed in the tailoring rule. Under the regulatory structure EPA proposes to implement, a very large number of sources, both large and small, will become subject to PSD GHG requirements when the motor vehicle rule goes into effect, with the resulting regulatory quagmire, and that quagmire will abate only if and when most states amend their PSD rules. And indeed, since EPA will not compel states to change their rules, and instead takes the position that states can set any thresholds and significance levels below 25,000 tpy CO<sub>2</sub>e that they want,<sup>21</sup> there is no assurance that states will in fact make the necessary changes.

The impact of this state of affairs will ripple through the economy. As permitting comes to a stop because of an overwhelmed permit system, or because of uncertainty as to applicable regulatory requirements, construction activity for new projects and for a variety of building and facility expansions and upgrades will be forced to cease. This may not be the result that EPA intends, but it is a direct result of EPA’s decision to regulate GHGs in its motor vehicle rule.

**V. EPA failed to address the economic and regulatory effects of making major sources subject to PSD regulation for their GHG emissions under a number of Executive Orders and statutes**

**A. In General**

Despite the large economic and regulatory consequences that the motor vehicle rule will have on major stationary sources, EPA unaccountably failed to produce the necessary studies of these effects in conformance with the relevant Executive Orders and statutes. The motor vehicle rule docket contains an RIA and certain other regulatory reviews, but these analyses are all

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 55343/2.

<sup>20</sup> *Id.* at 55342/2, 55343/3.

<sup>21</sup> *Id.* at 55343/2.

confined to the direct benefits and effects of motor vehicle GHG regulation and do not address the PSD effects that motor vehicle regulation will automatically trigger.

EPA seems to have been of the view when it promulgated the motor vehicle rule that it would address the PSD effects of that rule when it undertook the tailoring rulemaking. EPA did, in fact, produce analyses in the tailoring rule docket of PSD impacts of regulating GHG emissions under the CAA but only for small sources, not major sources. Indeed, EPA's RIA and other Executive Order and statutory reviews in the tailoring rule docket were all premised on the notion that the tailoring rule reduces costs associated with PSD, on the theory that the tailoring rule defers PSD and Title V regulation of small sources that would otherwise occur absent the rule.

Peabody will comment on that premise in its tailoring rule comments, but for purposes here EPA completely missed the point that the tailoring rule did not reduce or otherwise affect PSD regulation of major source GHG emitters (other than to define the major source threshold). As a result, none of the Executive Order and statutory reviews in the tailoring rule or motor vehicle dockets addressed the effect on *major* sources of making GHGs regulated CAA air pollutants through promulgation of the motor vehicle rule.

That failure is plain legal error. By regulating motor vehicle GHG emissions, EPA is automatically initiating PSD regulation of major source GHG emissions. EPA therefore has a responsibility under the Executive Orders and statutes discussed below to examine the economic and regulatory impacts of that decision.

Moreover, EPA's error is so fundamental that it can only be cured by EPA producing the necessary studies as a part of a re-noticed proposed motor vehicle rule. Each of the Executive Order and statutory reviews discussed below is required to be prepared at the time of the notice of proposed rulemaking and is intended to inform the public comment process. Particularly given the potentially very large costs that the motor vehicle rule will impose on major stationary sources and the economy in general, the public is entitled to have the benefit of EPA's analysis of these costs when it files comments on the motor vehicle rule.

Finally, it would be no defense for EPA to respond that it cannot at this time precisely monetize the cost of GHG BACT for large sources. In the first place, EPA did not take this position in its motor vehicle proposal. EPA's reason for not assessing PSD impacts in the motor vehicle rulemaking docket was not because of its inability to estimate BACT costs; it was because EPA evidently did not think of it. Moreover, the Executive Orders and statutes discussed below do not require precise monetization, only estimation to the best of EPA's ability. For instance, under Section 3(d) of Executive Order 12291, agencies are required to describe potential benefits and costs of the rule and to determine potential net benefits, including any benefits, effects, and net benefits that "cannot be quantified in monetary terms."<sup>22</sup>

---

<sup>22</sup> As discussed below, EPA produced analyses under Executive Orders 12291 and 12866 and the Unfunded Mandates Reform Act (as to impacts on private entities), but these analyses did not include PSD effects. It is Peabody's position that these PSD effects, separate and apart from the direct effects of motor vehicle regulation, are sufficient to render that regulation a "major rule" under Executive Order 12291, a "significant regulatory action" under Executive Order 12866, and a Federal mandate under UMRA, thereby triggering the requirement to prepare

## **B. The Required Analyses**

1. **Executive Order 12291 – Federal Regulation.** Executive Order 12291 provides that an agency promulgating a “major rule” must prepare, at the time of the notice of proposed rulemaking, an RIA setting forth essentially a cost-benefit analysis of the rule. EPA agrees that the motor vehicle rule is a major rule and prepared an RIA setting forth the costs and benefits of the rule.<sup>23</sup> That analysis, however, did not discuss the costs and benefits of the PSD regulation that would be triggered automatically by the rule. Among the purposes of the RIA requirement is to ensure that “[a]dministrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action.”<sup>24</sup> Since one of the main consequences of regulating motor vehicle GHG emissions is PSD regulation of large source GHG emissions, EPA should have included those costs in its motor vehicle RIA.

2. **Executive Order 12866 – Regulatory Planning and Review.** Under Executive Order 12866, agencies are required to specify to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget any actions that the agency believes are “significant regulatory actions.” If the agency or OIRA concludes that an action is a “significant regulatory action,” the agency is required to submit to OIRA the analysis set forth in Section 6(a)(3)(B). If the agency action is a “significant regulatory action” because it will “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities,” the agency is required to submit the more detailed analysis under Section 6(a)(3)(C). EPA concluded that the motor vehicle rule is a significant regulatory action under Executive Order 12866,<sup>25</sup> but the analysis was legally deficient because it did not examine PSD impacts on large sources.

3. **Executive Order 13211 – Energy Effects.** Executive Order 13211 requires that agencies produce a Statement of Energy Effects whenever they take a “significant energy action,” defined as one that is a significant regulatory action under Executive Order 12866 and is “likely to have a significant adverse effect on the supply, distribution, or use of energy.” The motor vehicle preamble says that a Statement of Energy Effects was not required because the rule will not adversely affect the supply, distribution or use of energy, and will in fact have a positive effect through improved automobile fuel economy.<sup>26</sup> Again, however, this conclusion was reached without consideration of PSD effects on major sources. As set forth above, EPA states that, even with the tailoring rule limitations, almost all of the nation’s electric generating and oil refining fleets will become subject to PSD regulation for their GHG emissions. It is inarguable that this regulation will impose costs and therefore potentially affect the supply, distribution or use of energy. At least EPA must examine the issue.

---

the applicable regulatory analyses. Indeed, the motor vehicle rule is, in effect, two rules, one under Section 202 that regulates motor vehicle emissions, and one that amends EPA’s PSD regulations by making GHGs regulated air pollutants for PSD purposes. Considering just the PSD portion of the overall rule, EPA was required to prepare the necessary analyses.

<sup>23</sup> 74 Fed. Reg. at 49628/1.

<sup>24</sup> Executive Order 12291, § 2(a).

<sup>25</sup> 74 Fed. Reg. at 49628/1.

<sup>26</sup> *Id.* at 49630/3.

**4. Unfunded Mandates Reform Act (UMRA).** UMRA<sup>27</sup> applies to any Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector of \$100,000,000 or more. An agency proposing such a mandate must produce the analysis required by Section 202(a).

The motor vehicle preamble states that UMRA does not apply to the motor vehicle rule as to possible impacts to state, local or tribal governments but that it does apply as to impacts to the private sector.<sup>28</sup> It states that impacts to the private sector are analyzed in its RIA,<sup>29</sup> but as noted above, that RIA is deficient because it does not consider PSD impacts.

Additionally, EPA's conclusion that UMRA does not apply as to impacts on state governments is incorrect. For the reasons discussed above, the tailoring rule does not automatically prevent small sources from being subject to PSD regulation in "most states," that is, those that administer their own PSD programs subject to EPA approval. In order for small sources not to be subject to PSD regulation for their GHG emissions in those states, the states must amend their laws and regulations setting forth the 100/250 tpy and zero significance levels.

As a result, under the tailoring rule standing alone, state permitting agencies will be overwhelmed with new PSD permit applications. Although states may change those laws, those that wish to do so will require some time to amend their PSD rules through rulemaking and/or legislation. Thus, notwithstanding the tailoring rule, making GHGs regulated air pollutants through adoption of the motor vehicle rule could have very large and immediate consequences for state governments in overwhelming their permit systems before they can make the necessary rule changes. These consequences must be examined under UMRA.

**5. Executive Order 13132 – Federalism.** Executive Order 13132 applies to "policies that have federalism implications," defined as regulations and other agency actions that 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." Agencies may not promulgate regulations that have federalism implications unless the federal government funds the States' costs or the agency consults with the States and provides, in the notice of proposed rulemaking, the statement set forth in Section 6(b)(2)(B).

The motor vehicle rule preamble states that EPA does not have to provide this statement because the motor vehicle rule does not impose mandates on any States.<sup>30</sup> However, for the reasons just discussed, the motor vehicle rule does impose significant PSD permit burdens on states. EPA therefore should have provided the relevant statement under Executive Order 13132.

**6. CAA § 317.** Section 317 provides that EPA must prepare an economic impact assessment before publishing a notice of proposed rulemaking in the federal register for certain specified types of rules. Under Section 317(a)(4), such a statement is required for "any

---

<sup>27</sup> Pub. L. 104-4 (1995).

<sup>28</sup> 74 Fed. Reg. at 49630/1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*



regulation under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality).”

Because the motor vehicle rule makes GHGs subject to CAA regulation for the first time, and therefore triggers PSD regulation of GHGs for the first time, there is no question that the rule is both a Section 202(a) rule and a PSD rule under part C. Accordingly, EPA was required to but failed to produce the necessary economic impact assessment.

**7. Regulatory Flexibility Act (RFA).** The RFA<sup>31</sup> generally requires that an agency prepare a regulatory flexibility analysis for any rulemaking unless it certifies that the rule will not have a significant economic impact on a substantial number of small entities. The motor vehicle preamble concluded that the rule would not cause such an impact because the rule was only targeted at large automakers.<sup>32</sup> EPA, however, did not examine how many small entities within the meaning of the RFA are major sources of GHG emissions that would be subject to PSD regulation. Until that analysis is performed, EPA has no basis to conclude that it is not required to prepare a regulatory flexibility analysis.

#### **VI. EPA cannot validly argue that it is not responsible for analyzing the costs of BACT controls for major source GHG emissions because of the state role in developing BACT requirements**

States that administer their own PSD programs undoubtedly play a significant role in determining BACT controls for major source emitters. But that fact does not relieve EPA of the obligation to examine the likely costs of GHG BACT controls that will be made necessary as a result of EPA’s decision to regulate GHG emissions from motor vehicles.

As confirmed by the Supreme Court, although states have discretion in making BACT determinations, that discretion is ultimately controlled and circumscribed by EPA. As required by the CAA, the Agency promulgated regulations requiring states that administer their own PSD programs to submit those programs to EPA for approval as a part of their SIPs. EPA may disapprove a state’s PSD SIP and/or prevent construction of a project subject to PSD if a state, in EPA’s view, incorrectly applies BACT requirements. According to the Court, EPA’s authority “extends to ensuring that a state permitting authority’s BACT determination is reasonable in light of the statutory guides.”<sup>33</sup>

Thus, since it is EPA that is triggering the GHG BACT requirement by promulgating the motor vehicle GHG rule, and since it is EPA’s responsibility to ensure that states are conforming to the statutory BACT requirements that EPA is triggering, it is EPA’s obligation to assess the resulting economic consequences. Although EPA at this time perhaps cannot know exactly how stringent state BACT determinations will be, it can make reasonable assumptions both as to its own minimum requirements and as to likely states requirements.

---

<sup>31</sup> P. L. 96-354, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121.

<sup>32</sup> 74 Fed. Reg. at 49628-29.

<sup>33</sup> *Alaska Dep’t of Environmental Conservation v. EPA*, 540 U.S. 461, 484 (2004).

## **VII. Conclusion**

EPA has failed to conduct various Executive Order and statutory reviews of the PSD economic and regulatory impacts that will result from EPA's decision to regulate motor vehicle GHG emissions. Peabody urges EPA to prepare the required studies and to include them in a re-proposed rule for comment. Peabody appreciates the opportunity to submit these comments.

Dated: November 25, 2009

Respectfully submitted

PEABODY ENERGY COMPANY