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**PETITION FOR DECLARATORY ORDER
BEFORE THE AIR POLLUTION CONTROL BOARD
TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION** TDEC OGC

TENNESSEE CHAMBER OF
COMMERCE AND INDUSTRY,

Petitioner.

No. APC 15-0018

PETITION FOR DECLARATORY ORDER

WHEREAS, Petitioner is a member organization dedicated to promoting pro-business initiatives and economic development throughout the State of Tennessee. A significant number of Petitioner's members are manufacturers subject to regulation by the Tennessee Department of Environment and Conservation ("Department"). In accordance with the Tennessee Air Quality Act, many of these members require permits issued by TDEC's Division of Air Pollution Control ("Division") for construction and operation of their manufacturing facilities. A recent United States Supreme Court decision and United States Environmental Protection Agency ("EPA") guidance memorandum responding to that decision have created uncertainty about the applicability of certain regulations relied upon by the Division in issuing air permits to many of Petitioner's members. To clarify the Air Pollution Control Board's ("Board") position on this issue, Petitioner, on behalf of its members, requests a declaratory order from the Board pursuant to Tennessee Code Annotated Section 4-5-223 and Tennessee Compilation of Rules & Regulations 1360-04-01-.07 on the requested ruling and regulations set forth below.

DESCRIPTION OF REQUESTED RULING

Petitioner requests the following ruling from the Board:

The Division shall follow the United State Supreme Court's holding in *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. _____ (2014) ("*UARG*") in issuing Title V and Prevention of Significant Deterioration ("PSD") permits under the Tennessee Air Quality Act and shall (1) not require Title V or PSD permits for sources based solely on greenhouse gas ("GHG" or "GHGs") emissions; and (2) convert current Title V and PSD permits based solely on GHG emissions to minor source permits, if requested by the source.

REGULATIONS ON WHICH DECLARATORY ORDER IS SOUGHT

The Division's regulations require a PSD permit for the *construction* of all "major stationary sources" and "major modifications" to existing major stationary sources. Tenn. Comp. R. & Regs. 1200-03-09-.01(4)(a)1. A "major stationary source" under the PSD program is any source belonging to a list of twenty-eight source categories that emits or has the potential to emit 100 tons per year (tpy) or more of any pollutant subject to regulation under the federal Clean Air Act or any other source type that emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tpy. *Id.* 1200-03-09-.01(4)(b)1. A "major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant emissions increase (as defined in the Division's regulations) of one of those regulated pollutants and a significant net emissions increase of that pollutant from the major stationary source. *Id.* 1200-03-09-.01(4)(b)2.

The Division's regulations also require a Title V permit for the *operation* of all "major stationary sources" of air contaminants. *Id.* 1200-03-09-.02(11). In general, "major stationary sources" under the Title V program include those that emit 100 tpy of any pollutant subject to regulation under the federal Clean Air Act. *Id.* 1200-03-09-.02(11)(b)(14)(ii).

Whether a particular source requires a PSD construction permit or Title V operating permit hinges on the source's emission (or potential emission) of pollutants "subject to regulation" under the federal Clean Air Act, above certain thresholds. If a source does not exceed the thresholds for "subject to regulation" pollutants, it must generally obtain a minor source permit. Tenn. Comp. R. & Regs. 1200-03-09-.01(1)(a); 1200-03-09-.02(1).

Under the Division's regulations, pollutants "subject to regulation" under the federal Clean Air Act include GHGs. *Id.* 1200-03-09-.01(4)(b)(46)(i); 1200-03-09-.02(11)(b)(32)(i). By changing its definition for the term "subject to regulation" to include GHGs, Tennessee was effecting compliance with an EPA rule called the "GHG Tailoring Rule" (75 Fed. Reg. 31,514 (June 3, 2010)), which requires states to revise State Implementation Plans ("SIPs") for their PSD programs and Title V regulations to regulate GHGs. Tennessee's GHG Tailoring Rule SIP revision was approved by EPA in 2012. *See* 77 Fed. Reg. 11,744 (Feb. 28, 2012). EPA's approval of a related SIP revision adding "automatic rescission provisions" for the GHG Tailoring Rule was published the next day. *See* 77 Fed. Reg. 12,484 (March 1, 2012). These automatic rescission provisions provide:

In the event that the U.S. Court of Appeals for the D.C. Circuit or the U.S. Supreme Court issues an order which would render GHG emissions not subject to regulation under the Prevention of Significant Deterioration, New Source Review provisions and/or the Title V operating permit program of the Federal [Clean Air] Act, then GHGs shall not be subject to regulation, nor shall GHG emissions be required to be included in any construction or operating permit under this regulation 1200-03, as of the effective date of the Federal Register notice of vacatur.

See Tenn. Comp. R. & Regs. 1200-03-09-.01(4)(b)(46)(i)(I); 1200-03-09-02(11)(b)(32)(iii).

While the United States Supreme Court's *UARG* decision did affect the EPA's GHG Tailoring Rule from 2010, the case was remanded to the District of Columbia Court of Appeals

for further action, where it is now pending.¹ Based on briefs filed to date, all the parties agree--as the Supreme Court clearly stated in its opinion--that no stationary source can be classified as a major source based solely on GHGs. The remaining dispute is whether the GHG Tailoring Rule provisions addressing PSD Best Available Control Technology (“BACT”) decisions and GHG thresholds can continue to be applied for purposes of New Source Review for a source that already is a major source, the type of source the Supreme Court and the EPA have referred to as an “anyway” source.

STATEMENT OF THE FACTS

1. The Tennessee Air Quality Act, Tennessee Code Annotated Section 68-201-101 *et seq.*, creates the Board. Tenn. Code Ann. § 68-201-104.
2. The Board has the authority, among other things, to promulgate rules and regulations to be implemented by the Division. *Id.* § 68-201-105(a).
3. The Board promulgated the rules at Tennessee Compilation of Rules & Regulations 1200-03-09-.01 governing construction permits and at Tennessee Compilation of Rules & Regulations 1200-03-09-.02 governing operating permits.
4. Under the Uniform Administrative Procedures Act, Tennessee Code Annotated Section 4-5-101 *et seq.*, “[a]ny affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency.” Tenn. Code Ann. § 4-5-223(a).

¹ The D.C. Circuit consolidated many cases related to the GHG Tailoring Rule; the main case numbers are 09-1322, 10-1073, 10-1092, and 10-1167. These cases are now referred to under the name of the former lead party, *Coalition for Responsible Regulation v. USEPA*. The parties filed briefs in November 2014 addressing how the D.C. Circuit should decide the ultimate fate of the EPA GHG Tailoring Rule; that is, whether the D.C. Circuit should order vacatur or remand for EPA rulemaking consistent with the Supreme Court’s *UARG* opinion.

5. Under the Uniform Administrative Procedures Act, the Board has the authority to hold contested hearings upon a petition for declaratory order. Tenn. Code Ann. § 4-5-223(a)(1).
6. Petitioner is a nonprofit, member organization incorporated in the State of Tennessee, with its principal place of business at the following address: 611 Commerce Street, Suite 3030, Nashville, Tennessee 37203-3742.
7. Since it was founded in 1912, Petitioner has lobbied for pro-business legislation to promote economic development throughout the State of Tennessee.
8. A significant number of Petitioner's members are manufacturing companies, many of which are regulated by the Division or other divisions of the Department. Pursuant to Division regulations issued by the Board, many of these manufacturers require Title V permits, PSD permits, or both.
9. Some of Petitioner's members have received or are awaiting receipt of Title V and PSD permits based solely on the fact that their facilities emit or may emit GHGs above threshold levels provided in the Board's regulations.
10. Some of Petitioner's members must apply for Title V and PSD permits based solely on the fact that their facilities emit or may emit GHGs above threshold levels provided in the Board's regulations.
11. Obtaining a PSD or Title V permit, instead of a minor source permit, involves a costly and lengthy permitting process.
12. Petitioner and its members are "affected person[s]" under the Tennessee Uniform Administration Procedures Act. *See* Tenn. Code Ann. § 4-5-223(a).

13. In the *UARG* case, the United States Supreme Court held that, under the federal Clean Air Act, EPA may not require a stationary source to obtain a PSD construction permit or a Title V operating permit based solely on a stationary source's emissions of GHGs.
14. On July 24, 2014, EPA issued a guidance memorandum in response to the *UARG* decision. In that guidance memorandum, EPA noted that some sources may have received Title V or PSD permits based solely on GHG emissions from their applicable state regulatory agencies. In that case, EPA stated "that it may be appropriate [for the state regulatory agencies] to ultimately remove GHG[-related] limitations from such permits and to convert such permits into minor source permits." (EPA Memorandum at 4).
15. The *UARG* decision and resulting EPA memorandum have caused considerable confusion among Petitioner's members who, pursuant to Tennessee regulations, have received or applied for, are in the process of applying for, or in the future may apply for, PSD or Title V permits solely on the basis of GHG emissions.

DESCRIPTION OF HOW THE RULES AFFECT THE PETITIONER

As noted above, the Division's regulations require sources exceeding GHG emission thresholds for major stationary sources to obtain PSD or Title V permits. Tenn. Comp. R. & Regs. 1200-03-09-.01(4)(b)(46)(i); 1200-03-09-.02(11)(b)(32)(i). The ultimate decision in the D.C. Circuit may lead to the vacatur of the GHG rule and trigger Tennessee's automatic rescission provisions. However, it is clear the rules Tennessee adopted to effect the GHG Tailoring Rule cannot and will not ever be applied to a major source that is not an anyway

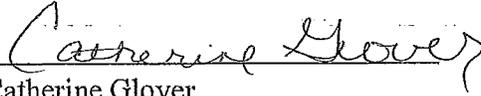
source. Because of the regulatory uncertainty and burden placed on regulated entities, the Board can and should issue a declaratory order that would exclude “GHG-only” sources from major source status for both PSD and Title V permits. *See* Tenn. Comp. R. & Regs. 1200-03-09-.01(4)(b)(46)(i)(I); 1200-03-09-.02(11)(b)(32)(iii).

The Board has the authority to interpret its regulations in accordance with the holding in the *UARG* case and instruct the Division to (1) not require Title V or PSD permits for sources based solely on GHG emissions (“GHG-only” sources); and (2) convert current Title V and PSD permits based solely on GHG emissions to minor source permits, if requested by the source. Pending final action by the D.C. Circuit, provisions of rules that could apply to an “anyway” source can be applied in PSD review. This interpretation would benefit Petitioner’s members who are subject to the PSD or Title V permitting process solely due to their GHG emissions in at least two ways: by clarifying their regulatory status and by saving them the significant costs and time associated with PSD and Title V permitting.

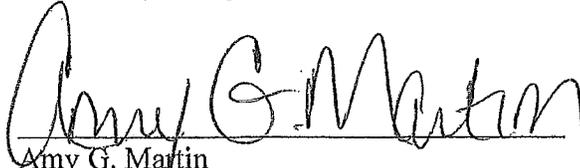
CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Board hold a contested hearing and issue the requested ruling as the proper interpretation of the law of the State of Tennessee.

Respectfully submitted this 7th day of January, 2015.



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