

## **Legal Lookout: EPA Issues Final “Tailoring” GHG Permitting Rule**

**By**

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On June 3, 2010, the U.S. Environmental Protection Agency (EPA) issued a final rule addressing greenhouse gas (GHG) emissions from stationary sources under the Clean Air Act (CAA). This controversial rule sets thresholds for GHG emissions that define when permits under the New Source Review (NSR) Prevention of Significant Deterioration (PSD) and Title V Operating Permit programs are required for new and existing industrial facilities. This *Washington Watch* column discusses the final rule.

### **Background**

The tailoring rule is based on three CAA legal developments. In 2007, the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007) found that GHGs are CAA air pollutants, subject to CAA authority. EPA responded to the Court’s decision in 2009 by issuing two findings last December: an “endangerment finding” that the current and projected GHG emissions threaten the public health and welfare; and a “cause or contribute finding” that combined emissions of these GHGs from new motor vehicles and new motor vehicle engines contribute to the GHG pollution that threatens public health and welfare. Finally, EPA issued its Interpretation of the PSD Permit Program memorandum, establishing that a pollutant is “subject to regulation” only if it is subject to either a CAA provision or in an EPA regulation under the

CAA that requires actual control of emissions of that pollutant. The confluence of these events compelled EPA to regulate GHG emissions under the PSD and Title V programs.

### **The Final Rule**

Under the final rule, GHGs are defined to include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. Major industry sectors are impacted including agriculture, mining, utilities, manufacturing, paper manufacturing, petroleum and coal products manufacturing, chemical manufacturing, and the metals industry.

EPA is implementing the rule in two phases. The largest emitters of GHG within these sectors will be required to obtain or modify their permits to address emissions of GHG during the first phase of the rule's implementation. Permitting for smaller sources of GHG emissions will be deferred for the second phase. During the first phase -- from January 2, 2011, to June 30, 2011 -- only sources currently subject to the PSD permitting program would be subject to permitting requirements for their GHG emissions under PSD. For these projects, only GHG increases of 75,000 tpy or more of total GHG would need to determine the Best Available Control Technology (BACT) for their GHG emissions. Similarly for the Title V permit program, only sources currently subject to the program would be subject to Title V requirements for GHG. During this first phase, no sources would be subject to permitting requirements due solely to GHG emissions.

In the second phase -- July 1, 2011, to June 30, 2013 -- PSD permitting requirements will apply to new construction projects that emit GHG emissions of at least 100,000 tpy even if they do not exceed the permitting thresholds for any other pollutant. Modifications at existing facilities that increase GHG emissions by at least 75,000 tpy will be subject to permitting requirements, even if they do not significantly increase emissions of any other pollutant. During this phase, operating permit requirements will apply to sources based on their GHG emissions even if they would not apply based on emissions of any other pollutant. Facilities that emit at least 100,000 tpy carbon dioxide equivalents will be subject to Title V permitting requirements. These thresholds show that EPA increased significantly the major source and the “significance level” thresholds in the final rule.

### **Legal Challenge**

Because the major source and significance level thresholds that govern the applicability of these CAA air permitting programs are set by Congress, some contend that the tailoring rule is inconsistent with law and thus unenforceable. EPA contends that any approach to regulating GHG emissions other than the step-wise approach envisioned under the rule would invite unmanageable results. For example, EPA estimates that Title V Permits would be required for over six million sources not now subject to the program.

Not surprisingly, EPA has already been sued by, among others, the Southeastern Legal Foundation, the Industrial Minerals Association-North America, and Rosebud Mining Co. Other lawsuits are expected before the end of the judicial review period on August 2, 2010. It is

anyone's guess how the court will decide these issues. In cases where EPA has argued that Congressional intent should trump the CAA's explicit terms, as in the case here, EPA has generally lost. The Court's vacature of the Clean Air Interstate Rule is an example.

Stay tuned. Whatever the Court's decision, the result will strongly influence the regulation of GHG emissions for years to come.

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