

EPA Proposes to “Tailor” Applicability of Greenhouse Gas Emission Regulations for Stationary Sources

On September 30, 2009, EPA issued a proposed rule to limit the size (and therefore the number) of greenhouse gas emission sources that would be regulated under the Clean Air Act’s construction and operating permit programs. Without such a rule to “tailor” the scope of the rule, regulation of greenhouse gas emissions from stationary sources under the Clean Air Act could extend to millions of relatively small sources not currently subject to Clean Air Act regulation.

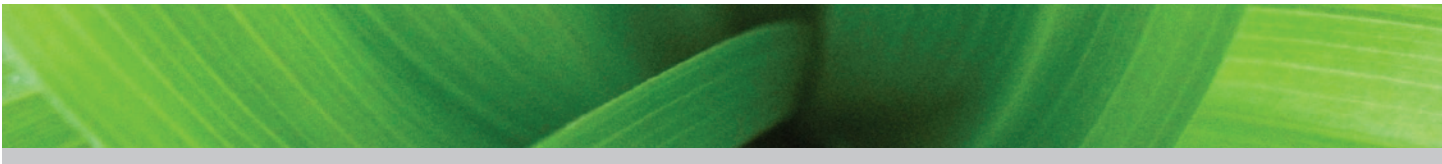
BACKGROUND

In September, EPA proposed vehicle greenhouse gas emission standards (see October 5, 2009 Issue Alert “EPA Finalizes Rule Establishing Mandatory Reporting of Greenhouse Gas Emissions”); the agency is expected to finalize those regulations by March of 2010. It is EPA’s view that once greenhouse gas standards are in place for vehicles, greenhouse gases will become a pollutant “subject to regulation” under the Clean Air Act – triggering regulation under the Prevention of Significant Deterioration program and the inclusion of applicable requirements for greenhouse gases in Title V permits.

EPA’s proposal, referred to as the “tailoring rule,” seeks to reduce the number of facilities and other sources potentially subject to regulation for greenhouse gas emissions. The Prevention of Significant Deterioration (PSD) preconstruction permitting program requires the use of Best Available Control Technology (BACT) at every new “major source” of a pollutant that is subject to regulation under the Clean Air Act, as well as the use of BACT at every major source undergoing a modification that will increase regulated pollutant emissions beyond a “significance” threshold. Under the Clean Air Act, a “major source” is an entity that emits or has the potential to emit 100 or 250 tons per year (tpy) of a pollutant, depending upon the type of source, and the default “significance” threshold is any increase of pollutant emissions post-modification. In addition, sources emitting over 100 tpy of a regulated pollutant are generally required to obtain an operating permit under Title V of the Clean Air Act.

PROPOSED TAILORING RULE

EPA projects that the application of the Clean Air Act’s statutory 100 or 250 tpy thresholds for inclusion of sources in the PSD and Title V programs would lead to the regulation of millions of small sources of greenhouse gas emissions and severe backlogs at state permitting authorities. In the proposed rule, EPA argues that these results would be contrary to the intent of Congress and the provisions of the Clean Air Act requiring prompt issuance of permits and the promotion of economic growth consistent with the preservation of clean air resources. EPA argues that the judicial doctrines of “absurd results” and “administrative necessity” justify departure from the statutory thresholds to effectuate congressional intent and facilitate the addition of requirements for greenhouse gases to the PSD and Title V permitting programs.



In the proposed tailoring rule, EPA recommends defining a major source of greenhouse gas emissions as a source producing at least 25,000 tpy of CO₂e of a class of six greenhouse gases: CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆. EPA further proposes to establish a PSD significance threshold to require PSD permits for any modifications that will lead to increased emissions of 10,000 – 25,000 tpy CO₂e of these gases. These thresholds would remain in place for five years, during which time EPA would assess the administrability of the rule and the possible need to adjust thresholds. Within six years, EPA would issue another rule with revised applicability and significance thresholds. EPA estimates that approximately 400 sources would need to apply for PSD permits annually under the proposed thresholds, less than a quarter of which would be newly subject to the PSD program. In total, EPA estimates that 14,000 sources would be required to obtain Title V operating permits under the proposed thresholds, and only approximately 3,000 of these sources (mostly municipal solid waste landfills) would be newly subject to operating permit requirements as a result of greenhouse gas regulation.

In addition, EPA proposes to use streamlining techniques to facilitate administration of the new regulations, potentially including the use of actual emissions rather than potential emissions (*i.e.*, based on the maximum capacity of the source) to determine applicability to the source or facility, the use of generally applicable permits for categories of similar source types, and the determination of standardized BACT for common types of equipment and sources.

The proposed rule raises a number of questions – foremost among them is the viability of EPA’s legal rationales for departing from the statutory thresholds for applicability and significance levels. Similar questions are likely to arise to the extent that EPA seeks to use streamlining techniques that may be inconsistent with long standing, and some times hotly contested, federal policies on implementing the requirements of the PSD and Title V programs. It is also unclear how the regulation of greenhouse gases will be implemented in the context of other Clean Air Act procedural requirements and air pollutant regulatory frameworks, such as those required for National Ambient Air Quality Standards (NAAQS), per-ton fees for permits, and state PSD program approvals.

Most importantly, the preamble discussion leaves many unanswered questions on how EPA can achieve a smooth transition for those states with fully approved PSD and Title V permit programs. Notably, the “tailoring” of applicability thresholds provided under the tailoring rule could be delayed for extended periods of time if such states – as has traditionally been the case – must go through notice and comment rulemaking in order to incorporate new federal requirements and policies into the state programs.

Although the proposed rule has not yet been published in the Federal Register, it is available at <http://www.epa.gov/nsr/documents/GHGTailoringProposal.pdf>. Comments on the proposal will be due 60 days after publication in the Federal Register.

FOR ADDITIONAL INFORMATION

Van Ness Feldman closely monitors congressional and executive branch developments on climate change and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation and regulatory activity, the surrounding policy and political debate, and the implications for your organization. If you would like more information about the proposed tailoring rule or assistance with participation in this rulemaking, please contact Kyle Danish, Stephen Fotis, Britt Fleming, Doug Smith, or any member of the firm’s Climate Change practice at (202) 298-1800. Those interested in on-going coverage of climate change policy developments may wish to subscribe to the weekly Climate Change Policy Update at <http://www.vnf.com/news-signup.html>.

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