

EPA Issues “Tailoring Rule” Outlining Clean Air Act Permitting Thresholds for Facilities that Emit Greenhouse Gases

By Kyle Danish, Tomás Carbonell, and Megan Ceronisky

On May 13, 2010, the Environmental Protection Agency (EPA) finalized a rule addressing implementation of certain Clean Air Act permitting programs for stationary sources of greenhouse gas (GHG) emissions. This so-called “Tailoring Rule” establishes emissions thresholds and a phased timetable for permitting under the New Source Review Prevention of Significant Deterioration (PSD) and title V Operating Permit programs.


BACKGROUND

The Tailoring Rule is the latest in a series of linked rulemaking actions by the EPA stemming from the Supreme Court’s 2007 decision in *Massachusetts v. EPA*. In the *Massachusetts* decision, the Court held that GHGs are “pollutants” under the Clean Air Act, and ordered EPA to make a science-based determination as to whether GHG emissions from motor vehicles contribute to an endangerment of public health and welfare – or explain why the science is too uncertain for such a determination. (For more information, see April 2, 2007 Issue Alert at: <http://www.vnf.com/news-alerts-37.html>.)

EPA responded to the Court’s mandate in December 2009, finding that mobile source GHG emissions contribute to climate change that endangers public health and welfare. (For more information, see December 9, 2009 Issue Alert at: <http://www.vnf.com/news-alerts-418.html>.) Under Section 202 of the CAA, this endangerment finding triggered an obligation for EPA to establish GHG emission standards for motor vehicles. EPA finalized the vehicle standards in April of this year; the standards first apply to 2012 model year vehicles. (For more information, see April 6, 2010 Issue Alert at: <http://www.vnf.com/news-alerts-452.html>.)

EPA’s promulgation of standards for vehicles also has implications for stationary sources. Under the structure of the Clean Air Act, when a pollutant becomes “subject to regulation,” certain facilities that emit that pollutant must obtain permits under the PSD and title V programs. Accordingly, EPA’s finalization of the vehicle standards required EPA to determine: (1) when GHGs become “subject to regulation”; and (2) which stationary sources of GHG emissions will become subject to PSD and title V requirements.

EPA addressed the first question in guidance that was finalized on March 29, 2010. Under the so-called “Johnson Memorandum” proceeding, EPA determined that GHGs would first become “subject to regulation” on January 2, 2011, reasoning that this is the earliest date that a 2012 model year vehicle meeting the new vehicle standards can be introduced into commerce. (For more information, see April 6, 2010 Issue Alert at: <http://www.vnf.com/news-alerts-452.html>.)



The Tailoring Rule addresses the second question, *i.e.*, which stationary sources are subject to the PSD and title V permitting requirements.

TAILORING THE PSD AND TITLE V PROGRAMS FOR GHGS

The PSD program requires that all new “major sources,” and all major sources undertaking modifications that result in a “significant” increase in emissions, obtain preconstruction permits and install “best available control technology” (BACT) for all pollutants subject to regulation. 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 for modifications is any increase in pollutant emissions resulting from the 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.

For conventional non-GHG pollutants, the 100 to 250 tpy threshold only captured very large facilities such as power plants and industrial installations. Because GHGs tend to be emitted in large quantities, even from smaller sources, EPA has determined that applying the Clean Air Act’s 100 or 250 tpy thresholds to GHGs would result in substantial increases in the number of required permits, potentially causing the PSD program to expand to tens of thousands permits per year, and causing millions of new title V permits to be required. According to EPA, these permitting loads would overwhelm the resources of permitting authorities – impairing their ability to manage air quality.

In the Tailoring Rule, EPA argues that these results would be contrary to the intent of Congress. EPA therefore argues that the judicial doctrines of “absurd results” and “administrative necessity” justify at least a temporary departure from the statutory thresholds. In the final version of the rule, EPA also cites a third legal rationale – the “one-step-at-a-time” doctrine – under which an administering agency, under certain circumstances, has the discretion implement a statutory provision in phased approach.

On the basis of these rationales, the final Tailoring Rule outlines a three-step schedule for application of the PSD and title V program:

Step 1 (January 2, 2011 to June 30, 2011). During this period, the PSD permitting requirements would apply only to sources that: (1) making modifications resulting increases in GHG emissions of 75,000 tons carbon dioxide-equivalent (CO₂e) per year or more; and (2) are already required to obtain PSD permits on account of emissions of pollutants other than GHGs. Sources that are already required to obtain, renew, or revise their title V permits as a result of non-GHG emissions would need to include GHG emissions in their permit applications.

Step 2 (July 1, 2011 to June 30, 2013). In this step, the PSD permitting requirements will apply to new sources emitting at least 100,000 tons CO₂e per year, and to existing sources that undertake modifications that increase emissions by at least 75,000 tons CO₂e per year. Title V permits would be required for facilities



emitting over 100,000 tons CO₂e per year.

Step 3. In the third step, EPA would commit to undertake additional rulemakings starting in 2011 to determine whether and how to phase in the PSD and title V permitting requirements for sources below the 75,000 and 100,000 ton thresholds. The third phase is expected to begin on July 1, 2013. However, the preamble declares that EPA will not apply the permitting requirements to sources with emissions below 50,000 tons prior to April 2016. In addition, EPA will consider various approaches for streamlining permit proceedings in the course of these rulemakings.

EPA asserts that, under its phased approach, “Emissions from small farms, restaurants, and all but the very largest commercial facilities will not be covered by these programs at this time.”

LOOKING AHEAD

Critical issues related to the implementation of the PSD and title V permitting programs for GHGs still lie ahead. For example, these permitting programs are carried out mostly by state agencies. Many states have codified the relevant Clean Air Act provisions into their statutes and regulations, which implies that some states may have to amend their rules to implement the phased approach in the Tailoring Rule. This process could slow the implementation of PSD and title V permitting for GHG sources.

In addition, looming over the implementation of the PSD program is the question of what will constitute BACT for GHGs at different kinds of facilities. Traditionally, BACT has taken the form of commercially available, end-of-pipe emission control technologies. However, such technologies generally are not available for controlling GHG emissions. Accordingly, EPA reportedly is considering providing guidance to state permitting authorities on alternative approaches, including approaches involving efficiency improvements.

Also, the fate of the Tailoring Rule could be affected by actions in the courts and in Congress. It seems likely that the Tailoring Rule itself will be subject to legal challenge. In addition, petitions for review of EPA’s “endangerment finding,” which is the legal basis for regulation of GHGs under the Clean Air Act, are currently pending in the United States Court of Appeals for the District of Columbia Circuit. A successful challenge to the endangerment finding would remove the basis of EPA’s authority to regulate GHG emissions under the Clean Air Act altogether – with respect to both mobile sources and stationary sources.

In Congress, the Senate is expected to take up a “Resolution of Disapproval” of the endangerment finding, which has been introduced by Sen. Lisa Murkowski (R-AK). The procedural deadline for consideration of the resolution is June 7. Sen. George Voinovich (R-OH) has circulated draft language that would remove EPA’s authority to regulate GHGs not only under the Clean Air Act, but also the National Environmental Policy Act and the Endangered Species Act. Sen. Jay Rockefeller (D-WV) has introduced a bill that would suspend EPA’s authority to regulate GHG emissions from stationary sources for two years. Similar bills are pending in the House of Representatives.



In addition, both the Waxman-Markey climate change bill passed by the House of Representatives in June 2009 (H.R. 2454, the “American Clean Energy and Security Act”), and the Kerry-Lieberman discussion draft released this week (the “American Power Act”), would preempt EPA’s authority to regulate GHG emissions under the PSD and title V programs.

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 climate change and energy being considered in Congress or related regulations being considered by federal agencies, please contact Kyle Danish, Stephen Fotis, 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>.

© 2010 Van Ness Feldman, P.C. All Rights Reserved.

This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.