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EPA Claims Authority for GHG Permitting in Texas

By **Mike Nasi** and **Pinar Dogru**

On December 21, 2010, EPA Assistant Administrator Gina McCarthy issued a letter to Texas Commission on Environmental Quality (TCEQ) Chairman, Dr. Bryan Shaw, stating that the EPA intends to take over permitting for greenhouse gas (GHG) sources as of January 2nd, 2011. The letter states that the "EPA [has] no choice but to resume its role as the permitting authority, in order to assure that businesses in Texas are not subject to delays or potential legal challenges and are able to move forward with planned construction and expansion projects that will create jobs and otherwise benefit the state's and nation's economy...EPA intends to promulgate a partial disapproval of Texas' PSD program and a Federal Implementation Plan (FIP) to take effect by January 2nd, 2011."

Background: EPA issued a final State Implementation Plan (SIP) Call for 13 states, including Texas, on December 13, 2010. The SIP Call required that these states submit a corrective SIP revision, or risk the EPA taking over permitting authority for GHG sources by issuing a FIP. Texas had a SIP revision due date of December 1st, 2011, but EPA had cautioned that the EPA was also "planning additional actions to ensure that GHG sources in Texas can be issued permits as of January 2nd, 2011."¹

In response to the final SIP Call, Texas filed a Petition for Review on December 15, 2010, in the United States Court of Appeals for the Fifth Circuit on the final SIP Call.² The petition states that the GHG SIP Call is arbitrary and capricious, contrary to the CAA, causes direct harm to Texas' permitting authority, and imposes a construction moratorium on GHG sources.

Impacted GHG Sources in 2011:

According to EPA's announcement, sources in Texas meeting the Tailoring Rule emission thresholds will require GHG permits from the EPA beginning as soon as January 2, 2011. The tailoring rule requires GHG permits in phases: **Phase I:** The first phase is from January 2, 2011, through June 30, 2011, and requires the "anyway sources" to obtain GHG permitting. "Anyway sources" are sources already subject to PSD permitting for other pollutants (i.e. major sources). "Anyway sources" subject to Phase I include new or existing sources seeking major modifications, that do not already have a permit in hand by January 2nd, 2011, and emit at least 75,000 tons per year (tpy) of CO₂ equivalent (CO₂e). The first phase impacts new and existing facilities undergoing modifications that do not already have their permits in hand by January 2, 2011 and that emit 75,000 tpy or greater of CO₂e. **Phase II:** The second phase begins July 1, 2011, and continues through June 30, 2013, requiring permitting for new GHG sources emitting 100,000 tpy or greater of CO₂e, irrespective of whether the sources are major for other PSD pollutants. Existing GHG sources will be subject to the Phase II GHG permitting if, as a result of a modification, their GHG

emissions increase by 75,000 tpy or greater of CO₂e. *Additional Phases:* GHG sources emitting below these thresholds may also require permitting, but the EPA will address lower thresholds in supplemental rulemaking on July 1, 2012.

If you have any questions about EPA's Greenhouse Gas Permitting program and its impact to Texas facilities, please feel free to contact any of the following Jackson Walker attorneys:

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¹ See 75 FR 77698, Rule Docket No. EPA-HQ-OAR-2010-0107.

² *State of Texas v. EPA*, Case No. 10-60961 (U.S. Court of Appeals for the Fifth Circuit, Dec. 15, 2010).

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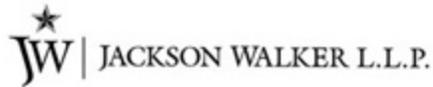
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