

# New GHG Regulations for Minor Sources Create Major Regulatory Challenges

By: **Richard Alonso, Ashlie W. Alaman, Tim Wilkins and Tracy D. Hester.**

September 20, 2011

A host of industrial facilities across the country face being subject to permitting rules and other regulatory requirements under the Environmental Protection Agency's (EPA) Greenhouse Gas Tailoring Rule. The rule stands to impact facilities that were previously considered "minor" sources of air pollution – including gas processing plants, fractionating plants, compressor stations and other midstream energy assets.

## Background: The New GHG Rules

On January 2, 2011, greenhouse gases (GHG) became subject to the federal requirements of the Prevention of Significant Deterioration (PSD) permitting program, requiring states to revise their Implementation Plans (SIP) to include permitting requirements for GHGs. Disagreeing with the Environmental Protection Agency's (EPA) regulation of GHGs, Texas chose not to revise its SIP, instead filing several challenges against the regulations in both the 5th Circuit and D.C. Circuit. Although EPA effectively became the permitting authority for GHG emissions in Texas on January 12, 2011 after a previously issued stay was lifted, a Federal Implementation Plan (FIP) was issued on May 3, 2011 officially designating EPA as the permitting authority for GHG-emitting sources in Texas.

## Minor Sources Are Now Considered Major Sources

Phase II of the Tailoring Rule began on July 1, 2011 and expanded the GHG permitting requirements from "anyway" sources (sources that were already subject to New Source Review (NSR) permitting programs due to their non-GHG pollutant emissions), to include "non-anyway" sources (sources subject to permitting based solely on their GHG emissions). The Tailoring Rule's GHG permitting thresholds not only impose GHG permitting requirements but also reduce the permitting threshold for non-GHGs due to EPA's "major for one, major for all" policy, which deems a source to be major if it emits even one pollutant in major amounts. Under this policy, pollutants emitted above the significance threshold, a level which is generally much lower than the major source permitting threshold, are subject to PSD permitting requirements, even if they are emitted below the major source threshold so long as a facility will be major for another pollutant. This policy applies in all state NSR programs.

In conjunction with the "major for one, major for all" policy, the Phase II expansion will have the collateral effect of increasing the number of PSD permits required for non-GHG pollutants, as sources that have traditionally been minor sources that were quickly permitted through permit-by-rule or standard permits may now need to be permitted as major sources for NO<sub>x</sub>, VOC, SO<sub>2</sub>, PM and other traditional pollutants solely because of their "major" GHG emissions.

## New Regulatory Requirements

Being subject to the PSD program will expose many previously-minor sources to the costly and time-consuming permitting requirements associated with being a major source that they have legally avoided until now. These requirements include creating a permitting record that contains analyses of

- **Best available control technology (BACT):** a top-down BACT analysis will have to be completed for each of the non-GHG pollutants emitted above the significance threshold.
- **Air quality:** an air quality analysis, for the non-GHG pollutants, may require the completion of extensive modeling to ensure protection of the National Ambient Air Quality Standards (NAAQS).
- **Additional impacts to visibility, soils and vegetation:** Sources subject to PSD for non-GHG pollutants which are constructed within 10 kilometers of a Class I area are also subject to review by the applicable Federal Land Manager and, as such, are required to provide special protection for such areas. It also is required that the public be given an opportunity to be involved via notice, comments and hearings.

Subject to the outcome of the analyses, sources may also have to meet further requirements such as upgrading and installing expensive, state-of-the-art pollution controls or analyzing the ambient air in the area even after construction has been completed.

## Permitting By EPA

In states operating under an EPA-issued FIP, such as Texas and Florida, sources that are major solely due to their GHG emissions will be permitted through EPA for both the GHG and non-GHG pollutants; having EPA as the permitting authority exposes these "minor" sources to costly and time-consuming federal requirements. Federal law requires that actions undertaken by a federal agency, EPA, be subject to consultation and review pursuant to Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act. Section 7 consultations can be lengthy if they result in the need for a biological assessment and Section 106 reviews can be lengthy and contentious as they require consultation not only with the Advisory Council, but with the affected public as well. Additionally, EPA's strategy on environmental justice requires that an extensive analysis be prepared to identify and protect against disproportionately high and adverse human, health or environmental impacts on minority and low-income populations; this process, too, involves extensive interviews and consultation with the affected public.

In addition to the PSD requirements and the federal agency requirements, EPA-issued permits also present concerns of cost and time because they are often subject to the attention of national environmental groups and routinely end up in the labyrinth of the Environmental Appeals Board in Washington, D.C. Overall, air permitting for these projects in FIP states will now cost more and, we anticipate, take at least 18 months to complete even when done with the strictest care.

## Looking to the Future

Unless there is a radical change at EPA, litigation regarding EPA's authority to regulate GHGs will continue before the D.C. Circuit. And unless such litigation successfully sets aside or modifies the Tailoring Rule, this system of dual permitting and permitting of traditional minor sources under major source rules will continue to present major regulatory challenges for businesses nationwide.

Bracewell & Giuliani LLP makes this information available for educational purposes. This information does not offer specific legal advice or create an attorney-client relationship with the firm. Do not use this information as a substitute for specific legal advice. Attorney advertising.