

## **Are We There Yet? Motor Vehicle Greenhouse Gas Rule Just a Pit-Stop, But Don't Ask for Directions.**

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On April 1, 2010, the Environmental Protection Agency and DOT's National Highway Traffic Safety Administration (NHTSA) set national greenhouse gas (GHG) emissions standards for 2012 through 2016 model-year cars and light trucks. This action represents the first-ever rule to regulate GHG emissions under the Clean Air Act. While the public may focus on the anticipated fuel economy savings (35.5 mpg by model year 2016), these standards will trigger emissions limits on new and modified stationary sources, like power plants and refineries. Whether (or when) the motor vehicle rule will impact even smaller stationary emitters (i.e., a large commercial apartment complex) is difficult to predict. Tricky intersections remain on the road towards a low-carbon future.

The motor vehicle rule was a response to the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*, which found that GHGs were air pollutants for purposes of the Clean Air Act. Two years later, the EPA Administrator issued two proposed findings under section 202(a) of the Clean Air Act: (1) GHGs in the atmosphere endanger the public health and welfare, and (2) carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons from new motor vehicles cause or contribute to those GHGs in the atmosphere and to the threat of climate change. Both the endangerment finding and cause or contribute finding allowed EPA to advance and finalize the regulation of GHGs in cars and light trucks.

Broadly speaking, the final EPA/NHTSA motor vehicle rule does, among many other things, the following:

- introduces fleet-wide CO<sub>2</sub>-equivalent emission standards for CO<sub>2</sub> on a gram per mile (g/mile) basis that would apply to a manufacturer's fleet of cars, and a separate standard that would apply to a manufacturer's fleet of trucks (decreasing from 263 in model year 2012 to 225 g/mile in model year 2016 for cars, and 346 to 298 g/mile for light trucks)
- provides auto manufacturers with opportunity to earn credits toward fleet-wide average CO<sub>2</sub> standards for improvements to A/C systems, including both HFC refrigerant losses and indirect CO<sub>2</sub> emissions related to the increased load on the engine
- introduces separate emissions standards for two other GHG pollutants - methane and nitrous oxide
- incorporates a system of averaging, banking, and trading credits integral to the fleet-averaging approach, based on manufacturer fleet average CO<sub>2</sub> performance
- offers several additional credit provisions that apply only in the initial model years of the program (i.e., flex fuel vehicle credits, credits based on the use of advanced technologies)

With the passage of the motor vehicle rule, GHGs have now become pollutants "subject to regulation" under the CAA's Prevention of Significant Deterioration (PSD) preconstruction permit program and Title V operating permit program. Succinctly, if a source proposed for construction or modification has the potential to emit 250 tons per year (tpy) or more of pollutants "subject to regulation," it needs a PSD permit. For new or existing facilities, a Title V permit is required if a source has the potential to emit at least 100 tpy. GHGs such as carbon dioxide are emitted in far greater quantities than any other regulated pollutant. A typical

kitchen in a restaurant or heating system in a large commercial building can easily generate 100 tpy of carbon dioxide.

The EPA had planned to issue a "tailoring rule" at the same time it issued the motor vehicle rule to prevent the motor vehicle rule from triggering PSD and Title V for thousands of small sources not currently subject to the CAA requirements. The "tailoring rule" proposed to change the statutory major source threshold for GHGs from more than 100 tpy of carbon dioxide equivalent to 25,000 tpy for a period of 6 years. As of this writing, the tailoring rule has yet to be finalized. As a consolation prize, the EPA finalized a rule on March 29, 2010, that would delay the application of PSD requirements until January 2011 for new and modified sources to control GHG emissions (the earliest date that 2012 model year vehicles can be sold in the U.S.). EPA has also promised to increase the proposed tailoring rule's 25,000-ton threshold above 75,000 tpy to limit the number of small sources subject to the permitting requirements even further. While this may buy the EPA time to finalize the tailoring rule, it offers little direction to stationary emitters - both large and small.

So where do we go from here? While the motor vehicle rule is being touted as a cost-savings measure for consumers at the pump, it will impose new compliance costs on the automobile industry. Still fragile from the recent economic downturn, automobile manufacturers must now adopt technologies (which are hopefully commercially proven) to filter or capture tailpipe CO2 emissions. With the momentum generated from these historic standards, it is not hard to imagine that the Obama administration will soon begin tackling post-2016 standards. The auto industry will then have to invest in more advanced technologies in order to maintain (or restore) productivity and profitability in the future. Tailpipe emissions may continue to decline, but costs to consumers may increase. In the end, the motor vehicle rule may result in more bang and less buck for the consumer.

For companies with stationary source emissions, the road is even more uncertain. While emissions control requirements will not apply until 2011, the tailoring rule remains missing in action (and will likely face legal challenges if/when it re-emerges). The EPA Administrator has suggested that in 2011 and 2012, stationary source emissions limits will only apply to sources with emissions more than 75,000 tpy. But what about post-2012? Will the threshold remain at 75,000 tpy? There are significant compliance costs and technological investments associated with GHG reporting, monitoring, and reduction that stationary sources may need to prepare for (depending on what the threshold is, and whether it will be lowered in the future). And how will carbon offsets fit into the regulatory picture? Can a stationary source seeking a PSD permit rely on offsets to satisfy the GHG threshold? For how long?

The forecast does not get any clearer for companies when looking to Washington, D.C. for guidance. Senator Lisa Murkowski introduced legislation in the U.S. Senate to overturn the EPA endangerment finding. Her resolution would prevent EPA from implementing both the motor vehicle GHG regulation and GHG regulation of stationary emitters under the PSD program. Further, 13 U.S. Representatives and 17 associates and companies filed a lawsuit in federal appeals court challenging the EPA endangerment finding (*Lindner v. EPA*, D.C. Cir.). And as of the Easter recess, a cap-and-trade bill is still mired in the U.S. Senate.

Given the stakes, it is important for all U.S. companies to stay abreast of the constant evolution of GHG regulations. To quote the Grateful Dead's climactic refrain - "What a long strange trip it's been." Truth is, we've barely pulled out of the driveway.