



ENVIRONMENTAL PRACTICE

# ALERT

## NEW JERSEY DEP INCREASES PUBLIC OUTREACH ON AIR POLLUTION CONTROL ISSUES

By David Restaino

The New Jersey Department of Environmental Protection (NJDEP) recently provided updates and guidance concerning air pollution control issues. The NJDEP's public outreach on these issues reflects its overall effort to treat the regulated community as "customers." A summary of the recent developments follows.

### Department Revisits Its Temporary Equipment Policies

The NJDEP continues to revise and clarify the permit requirements for temporary equipment.

First, the NJDEP has revised the general conditions in Title V permits to allow for the "temporary" use of certain equipment. In this case, temporary cannot exceed 90 days. Those facilities with Title V permits that are not presently being modified, and who do not wish to wait until a future permit renewal, can now request a simple permit amendment to allow for the use of temporary equipment in this fashion.

Also, in response to industry concerns that the current program provides insufficient flexibility for emergency situations (e.g., unanticipated maintenance), the NJDEP is continuing its internal discussions about altering the permit program in two specific ways: (1) waiving certain Subchapter 8 permit requirements for temporarily used engines, and (2) expanding the temporary equipment policies to include boilers or, alternatively, addressing boilers through a general permit

or by quicker approvals of permit modification requests. Stay tuned for more developments.

In the meantime, facility operators should exercise caution when entering agreements with contractors that provide temporary equipment so that responsibility for obtaining all applicable air pollution control permits is made clear up front. Among other things, responsibility for air permitting should be confirmed in advance with equipment rental companies.

### Emission Statement Rule To Be Revised

As part of the NJDEP's "additional outreach" on rulemaking proposals, it has opened the process for revising the emission statement rule found at N.J.A.C. 7:27-21. Possible additions and/or revisions to the rule include:

- Changing the reporting requirements for PM<sub>2.5</sub> and ammonia from the "facility level" approach in the current rules to a "source level" approach, as required by federal law.
- Changing the reporting requirements for toxic air pollutants from the "facility level" approach to a "source level" approach, as may be required by future amendment to federal law.
- Changing the reporting procedures for particulate matter.
- Removing the one-month extension allowed by the current rules.

- Clarifying certain reporting thresholds.
- Adding a definition for diesel fuel to include biodiesel and expanding the definitions for (1) gasoline (to include ethanol blends), (2) PM<sub>2.5</sub> and (3) PM<sub>10</sub>.

The informal outreach process will continue through the end of 2010. In early 2011, the NJDEP expects to formally announce its proposed changes to the emission statement rule.

### Greenhouse Gas “Tailoring Rule”

The U.S. Environmental Protection Agency (EPA) recently adopted a 515-page “Greenhouse Gas Tailoring Rule” that applies only if a source’s emissions exceed certain regulatory triggers. Recently, the NJDEP opined it has the existing legal authority to oversee the Tailoring Rule (Rule).

The Rule stems from the EPA’s 2009 “endangerment finding” that carbon dioxide (CO<sub>2</sub>) is a pollutant. As a result of that finding and a subsequent focus on CO<sub>2</sub> equivalent (CO<sub>2</sub>e) emissions of six compounds, the EPA was concerned that millions of sources would suddenly be subject to the major source/Title V rules and the prevention of significant deterioration (PSD) rules. To avoid such a burdensome result – both to industry and to the government – the Rule provides a higher threshold trigger before CO<sub>2</sub>e emissions are subject to the PSD or Title V rules. The Rule is effective in stages.

**Phase 1** - The first phase of the Rule is operative as of January 2, 2011. It has been dubbed the “anyway” rule because it captures only those Title V and PSD sources that will be within the EPA’s program anyway, based on non-greenhouse gas (GHG) emissions, in three ways:

1. Existing Title V sources and those new sources triggering Title V thresholds for non-GHG emissions will need to address GHGs when applying for, renewing or modifying a Title V permit. Such sources would have to monitor and report for greenhouse gases.
2. Those sources that have triggered the PSD rules based on non-GHG emissions will need to install the best available control technology (BACT) for greenhouse gases if the project also has the potential to emit (PTE) 75,000 tons per year (tpy) or more of CO<sub>2</sub>e. The EPA is in the process of defining BACT guidance for GHGs, as such guidance does not yet exist.

3. Parenthetically, the rules actually also have a second trigger based upon the standard mass-based emissions limits of 100 tpy for Title V purposes and 250 tpy for PSD purposes (or 100 tpy for 28 specified PSD categories), but the EPA estimates any source meeting the initial triggers noted in 1 and 2 above will easily satisfy this mass-based trigger.

Some subject facilities are now considering whether to file permit applications before January 2, 2011, to avoid the Rule. In this regard, the NJDEP has stated its position firmly: if a permit is not issued in final form as of January 2, 2011, then the Tailoring Rule will apply.

**Phase 2** – This stage will be operative as of July 1, 2011. It covers new and existing sources not already subject to Title V or the PSD rules – so they cannot be considered “anyway” sources – and triggers the need to address GHG emissions as follows. First, facilities that emit at least 100,000 tpy of CO<sub>2</sub>e will be considered a major source and will require a Title V permit. Second, the PSD permitting requirement will be triggered if: (1) a new construction project has the PTE of at least 100,000 tpy of CO<sub>2</sub>e, or (2) a modification at an existing facility (with existing PTE of at least 100,000 tpy of CO<sub>2</sub>e) will have the potential to increase CO<sub>2</sub>e emissions by 75,000 tpy or more. Third, as noted above with respect to Phase 1, the mass-based trigger will also apply to all aspects of Phase 2 of the Rule. To reiterate, Phase 2 can apply **solely** on the basis of GHG emissions.

**Federal Guidance** – The NJDEP is currently awaiting federal guidance on the GHG program. Nevertheless, many facilities have started to determine whether the Rule will impact operations. Even if the Rule is not applicable at this time, facilities should exercise caution in the event any modifications are planned so that such impact can be analyzed within the context of the Rule’s triggers. For example, Title V major facilities may find it advisable to begin a specific review of the Rule’s impact in advance of any permit renewal.

**Future Phases Expected** – The Tailoring Rule merely adopted placeholders for future expected phases for rulemaking. The **Phase 3** placeholder is timed for July 1, 2013, and the EPA expects this rulemaking will trigger requirements for additional sources and also provide for certain permanent categorical exclusions. As for **Phase 4**, the EPA provided an April 30, 2016, date and stated that **no** rulemaking before that date will make the Rule apply to sources with less than the potential to emit 50,000 tpy CO<sub>2</sub>e, i.e., the EPA might consider

capturing such smaller sources, but no earlier than 2016. Additional permanent categorical exclusions also might be enacted then.

**Legal Challenges** – There have been a number of legal challenges made to the GHG rulemaking process, so it is possible that some or all of the Rule may be overturned in court.

### State of the Art Manuals

The NJDEP is in the process of revising three of its State of the Art (SOTA) manuals, which serve as guidance to facilities that have triggered a SOTA analysis, as follows:

- **Volatile Organic Compound (VOC) Storage Tanks** – A draft SOTA manual has already been made public, and formal notice of the draft manual in the N.J. Register is expected by the end of November 2010.
- **Asphalt Manufacturing Facilities** – The comment process regarding this draft SOTA manual is ongoing. Release of a draft for formal public comment is expected later this year.
- **Landfills** – This draft SOTA manual is designed to address GHG emissions from landfills, as well as emissions from closed landfills, specifically methane. The NJDEP is in the process of reviewing comments to an initial draft released in July 2010. Formal publication of the draft manual in the N.J. Register is anticipated in 2011.

### Notable Notes . . .

- **General Permits** – In 2010, the NJDEP expects to issue a draft General Operating Permit for emergency generators **and** to develop a draft General Operating Permit for combined heat and power (CHP) facilities.

- **Stack Testing** – The NJDEP has received comments that stack testing requirements are not flexible, as they may require testing for minor tune-ups (especially for equipment that can be switched to alternate fuels). In response, the NJDEP – including enforcement – has committed to producing a written “Frequently Asked Questions” response on the subject. The NJDEP is also revising the process of auditing stack text samples and expects to use “accredited audit providers.” Stay tuned.

- **Electronic Permit Filing** – The NJDEP wants, in two years, to be able to receive all permit applications via the Internet.

- **Power Plants and Air Toxics** – Under a 2010 consent decree entered in federal court pursuant to Section 112(c)(5) of the Clean Air Act, power plants will be subject to an EPA rule concerning the control of air toxics. The consent decree requires the rule to be finalized by November 16, 2011.

- **Ozone Non-Attainment** – States in ozone non-attainment areas must implement ozone-related control techniques guidelines (CTGs). The NJDEP has started the process of developing three CTGs: (1) Paper, Film and Foil Coatings; (2) Miscellaneous Metal & Plastic Parts Coatings; and (3) Fiberglass Boat Manufacturing Coatings. Stakeholder comments on each will be sought. A rule revision is expected but will likely take a few years.

For more information regarding this alert please contact David Restaino at 609.895.6701 or [drestaino@foxrothschild.com](mailto:drestaino@foxrothschild.com) or any other member of Fox Rothschild’s Environmental Practice.



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