

Clean Air Act new source review: BACT for greenhouse gases

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As a thumbnail summary of EPA greenhouse gas (GHG) activity, in the wake of the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), on December 7, 2009, EPA issued an Endangerment Finding, and a Cause or Contribute Finding pursuant to the Clean Air Act (CAA) 202(a), to support EPA's promulgation of its GHG Emission Standards for Light-Duty Vehicles, which was finalized on April 1, 2010.

This new mobile source standard is the first standard subjecting GHG emissions to regulation pursuant to the CAA. Therefore, this mobile source standard actually triggers stationary source standards. As confusing as it may be, the CAA, as written, causes this new mobile source standard to automatically trigger application of the Prevention of Significant Deterioration (PSD) requirement for stationary source GHG emissions pursuant to CAA 165 and 169. These CAA provisions apply the Best Available Control Technology (BACT) emissions control requirement to stationary sources for "each pollutant subject to regulation" under the CAA. EPA implements these statutory provisions through 40 CFR 52.21(b)(50), which applies BACT to all "regulated NSR pollutants."

Due to the PSD thresholds of 100 and 250 tons per year, and Title V permitting threshold of 100 tons per year, EPA proposed a "Tailoring Rule," to raise the PSD and Title V thresholds to levels recognizing the higher emission rates of greenhouse gases, 25,000 short tons of carbon dioxide equivalent (CO₂e) greenhouse gas emissions per year. The 25,000 ton CO₂e threshold is consistent with EPA's Mandatory Greenhouse Gas Reporting Rule, promulgated on December 30, 2009, which utilizes a threshold of 25,000 metric tons of carbon dioxide equivalents from some source categories. 74 Fed. Reg. 56260 (Oct. 30, 2009) (adopted in response to the FY2008 Consolidated Appropriations Act (H.R. 2764; Public Law 110-161)) and [available here](#).

However, more recently, EPA has announced that it expects to raise this PSD threshold to a level "substantially higher" than 25,000 short tons of carbon dioxide equivalent. This direction seems to provide relief at the outset, however, CAA sources realize that CAA permitting utilizes a "potential-to-emit" approach, rather than the actual emissions targeted by EPA's Mandatory GHG Reporting Rule. Also, EPA announced that it will delay permitting of stationary source GHG emissions until 2011, and consider GHGs "subject to regulation" only when the mobile source mission standards mandate compliance, rather than the effective date of the [mobile source rule](#).

With respect to PSD implementation, BACT is one of the most litigious aspects of the CAA permitting process, and it can be most costly. Industry is waiting to see EPA's approach, which EPA indicates may rely heavily upon energy efficiency concepts.

LINKS

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