

ENVIRONMENTAL AND ENERGY LAW ALERT

GREENHOUSE GAS ALERT

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Businesses that emit more than 50,000 tons per year of Greenhouse Gases should be aware of a new Clean Air Act ("CAA") regulation. If brought within the Rule, beginning in January 2011, new air emissions sources or modifications to existing sources could trigger pre-permitting reviews and substantive compliance requirements. Potentially covered businesses should conduct assessments of the potential impacts of this new Rule now and plan accordingly.

The US Environmental Protection Agency ("EPA") has issued its Greenhouse Gas "Tailoring" Rule in final form. The Rule implements regulation of Greenhouse Gases ("GHG") from stationary sources (as opposed to motor vehicles or "mobile sources") and initially limits that application to certain situations within the Prevention of Significant Deterioration ("PSD") (new and modified source review, "NSR") and Title V (operating) permit programs. GHGs are: CO₂, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (summed and considered to constitute one regulated pollutant under the CAA and EPA rules). Regulation is based upon a calculation of CO₂ emissions equivalent ("CO₂e").

Here is how the Rule developed: Over the last several years, there was great pressure (including petitions, permit appeals, interpretive memorandum, and lawsuits) on the EPA to regulate GHG as a CAA pollutant. In 2007, the US Supreme Court weighed in on the issue ruling that GHG was a pollutant under the CAA and remanding a case to EPA for a GHG regulatory determination within the mobile source program. The Supreme Court finding spawned further legal machinations, over when GHG becomes a covered pollutant under the CAA. In December 2009, the Obama Administration took control of the issue, declaring that GHG was an air pollutant in vehicle emissions. This was known as the "Endangerment Finding;" triggering regulation of GHG from mobile sources. Because of the mobile and stationary source regulatory linkages in the CAA, this placed GHG emissions in play for PSD and Title V permitting. Since the mobile source regulation does not become effective until January 2011 (the 2012 vehicle model year), EPA reasoned that January 2011 was the appropriate effective date for stationary source GHG regulation.

One big glitch for regulating GHG from stationary sources, was that the PSD program applies to "major" stationary sources at emissions thresholds of 100 or 250 tons per year ("tpy"). This threshold level may make sense for existing CAA regulated air pollutants (like SO₂), but it did not work for GHG, which is emitted in orders of magnitude greater quantities. To address this issue, EPA developed this GHG Tailoring Rule, that set the threshold levels at 75,000 or 100,000 tpy of GHG per year and "tailors" the GHG sources "subject to regulation." By tailoring the rule, EPA reduces the potential initially covered sources for Title V permits from approximately 6 Million to 15,500 (approximately 550 more than are already covered) and, for PSD from approximately 82,000 per year to 1,600 (approximately 900 more each year). EPA believes that states can tailor their permit programs similarly, via the definition of "subject to regulation" to avoid coverage at the 100/250 tpy threshold; but, EPA urges states that cannot implement this tailoring under

their existing program rules to notify EPA so that EPA can immediately narrow those States' PSD and Title V permit program approvals, so that the federal PSD and Title V GHG programs do not apply to these sources until after the State receives a specific program EPA approval. EPA will promulgate a federal rule to provide regulation during the interim.

Regulatory Coverage Dates – PSD and Title V Permit requirements

	PSD – modified sources (BACT) Program	PSD - new sources (BACT) Program	Title V Operating Permits Program
January 1, 2011	If already covered for another pollutant, then covered at 75,000 tpy	If already covered for another pollutant, then covered at 75,000 tpy	75,000 tpy, if covered for another pollutant
July 1, 2011	75,000 tpy increase at existing 100,000 tpy GHG sources	100,000 tpy	100,000 tpy
July 1, 2012	EPA committed to additional Rules, will look at sources >50,000 tpy and streamlining permits		
After 2016	Earliest EPA might consider regulating sources < 50,000 tpy		

The initial phase is effective January 2, 2011 and applies to sources already subject to PSD (without regard to GHG), if these sources emit more than 75,000 tpy of GHG, then they must include GHG in the PSD analysis, effectively incorporating Best Available Control Technology ("BACT") for their GHG emissions. (Sources with Title V Operating Permits are subject to regulation, too, but the Rule's new operating permit requirement already applies, that is to report their GHG emissions (if over 25,000 tpy), so there is no great burden there.) In general, BACT is determined under EPA's top-down protocol, on a case-by-case basis, taking into account, among other factors, the cost effectiveness of the control and energy and environmental impacts.

Beginning July 1, 2011, the second phase ignites, requiring stationary sources to consider GHG emissions independently under the PSD and Title V permitting programs. New sources trigger PSD at 100,000 tpy GHG and modifications to existing 100,000 tpy sources trigger PSD at a 75,000 tpy increase over existing levels. Once this portion of the program is effective, a source that triggers PSD only for GHG, will, under the way PSD rules work, need to screen for significance levels (lower tpy triggers) for all regulated NSR pollutants and, in this fashion, the Rule could serve as a back-door way for a source to be caught up in substantive controls for non-GHG pollutants. For the Title V Operating Permit program, the coverage threshold is set at 100,000 tpy. This portion of the rule in particular is expected to impact as many as 550 industrial facilities (including some landfills).

As a practical matter, the substantive portion of the rule, BACT, is expected to focus on energy efficiency, as opposed to combustion or stack pipe controls. EPA intends to issue tools in mid-2010 and guidance by the end of 2010 for sources to use in applying the Rule.

EPA has committed to further rulemaking on GHG beginning in 2011, to be completed by July 1, 2012. As part of future rulemaking, EPA will consider streamlining permitting requirements and, in conjunction will consider expanding the coverage to smaller sources. In any case, EPA has committed that it will not regulate sources under 50,000 tpy (new or modified increases) before 2016, at the earliest.

Businesses should carefully review their existing GHG emissions and any planned modifications to combustion equipment to evaluate the impact of this Rule. If you have questions regarding Greenhouse Gas and air emission regulation, or Energy matters, please call [Rick Friedman](#) (717.237.5469) in our Environmental Law and Toxic Tort Group, or [Bob Weishaar](#) (202.898.5700) in our Energy Law Group.

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