

Climate Alert

Significant Climate Change-Related News and Updates from the LLB&L Climate Change Practice Team

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EPA's Proposed Climate Change Regulations Could Spell Hot Water for Industry

Background

On September 30, 2009, the United States Environmental Protection Agency ("EPA") proposed "tailoring regulations" which are intended to establish stationary source permitting thresholds for greenhouse gas ("GHG") emissions under the Clean Air Act ("CAA"). Specifically, these proposed rules establish applicability thresholds for permitting programs arising under the CAA's prevention of significant deterioration ("PSD") and Title V permitting programs. If finalized, the proposed rules would be a precursor to direct regulation limiting GHG emissions from stationary sources. The thresholds proposed by EPA differ from those currently established under the CAA for major sources of air pollutants. The rules are considered tailoring regulations because they address the inconsistency between the proposed rules and the statutory authority under which they would be promulgated.

The catalyst for EPA's proposed tailoring rules was the *Massachusetts v. EPA* decision of April 2007, in which the United States Supreme Court held that GHGs were air pollutants and required EPA to make a determination as to whether GHGs from motor vehicles caused or contributed to air pollution that could endanger public health or welfare. EPA proposed in April of this year to make that determination and is expected to issue its final determination later this month. Following on that determination, EPA has announced it will soon promulgate regulations controlling GHG emissions from those mobile sources. That will mark the first time the CAA has been used to control GHGs. EPA takes the position that when a pollutant is subject to control under the CAA, it is deemed to be a regulated pollutant. Once a pollutant is "regulated," stationary source emissions of that pollutant will generally be subject to permitting.

Under this proposed rulemaking, thresholds for permitting GHGs would be increased from those that currently trigger permitting requirements under the CAA. Major source status for GHGs would be 25,000 tons per year ("TPY") and the significance level for triggering permitting review

based upon facility modifications would be deemed to be 10,000-25,000 TPY.

EPA structured the proposed rule to serve as the first phase of permitting GHG major sources. This first phase will last six years. During the first phase, EPA will conduct a study to determine the program's effectiveness and ways it could be streamlined. EPA states that in the last year of Phase 1, EPA will conduct Phase 2 rulemaking to incorporate revised "applicability" and "significance" thresholds. Thus, EPA is not foreclosing regulating "smaller" GHG sources.

Finally, the proposed rule addresses potential inconsistencies which could arise as a result of the manner in which state implementation plans ("SIPs") were drafted.

Covered GHGs

GHGs covered by the proposed rule are consistent with those subject to EPA's final reporting rule promulgated on September 29, 2009. Specifically, GHGs addressed include carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons ("HFCs"), perfluorocarbons ("PFCs"), and sulfur hexafluoride (SF₆). For the purposes of the rule, EPA will regulate the group as a single air pollutant. Emissions of all GHGs are aggregated and measured in CO₂ equivalents ("CO₂e"). The CO₂e metric is intended to take into account the different global warming potentials of the six primary greenhouse gases. For example, because CH₄ has heightened heat trapping capabilities, 1 ton of CH₄ equals 21 tons of CO₂e.

Programs Covered

Programs addressed by the proposed rule are the PSD and Title V permitting programs. The proposed rulemaking does not apply to nonattainment New Source Review ("NSR") because GHGs are not criteria pollutants and no part of the country has been deemed nonattainment for GHGs. The proposed regulations only address major source status under the CAA's PSD and Title V programs.

PSD Program

PSD permitting is applicable to new major stationary sources and major modifications to them. Currently, major stationary sources are those that have the potential to emit either 100 or 250 TPY of pollutants regulated under the CAA depending upon the nature of the source. Under the PSD program, a permit must be obtained before the construction of a major source commences. Under the program, sources in 28 identified categories are deemed major if they emit 100 TPY of a regulated air pollutant. All other sources within non-listed categories are major if they emit 250 TPY of a regulated pollutant. Further, PSD permitting is triggered if a major source is modified such that it increases emissions above a specific threshold called the significance level. This threshold is zero, unless EPA establishes a rule to the contrary. GHGs have neither been regulated as pollutants under the CAA, nor has any significance threshold been established for them. Absent the proposed tailoring regulations, the CAA calls for permitting of any source of GHGs which has the potential to emit either 100 or 250 TPY depending upon the nature of the source. The tailoring rule increases the major source threshold to 25,000 TPY of CO₂e. Further, absent the tailoring rule, "additional permitting" would be required for any modification that would result in any increase of GHGs because currently there is no significance threshold for GHGs. The rules establish a significance level for GHG emissions under the PSD program of 10,000-25,000 TPY of CO₂e. GHGs regulated under PSD permitting would be subject to best available control technology ("BACT") to control emissions. Whether specific controls satisfy BACT requirements has historically been a focal point of litigation by citizen's groups challenging permits.

Title V Permitting

The Title V program generally requires all major sources¹ to obtain an operating permit that consolidates the CAA requirements applicable to the facility

into a single document. Major sources under Title V are generally those emitting 100 TPY of regulated pollutants. The tailoring rule establishes major source status under Title V as 25,000 TPY CO₂e. Like the PSD program, Title V is triggered for GHG emissions when they are subject to control under another CAA program. Thus, once EPA regulates or controls emissions from motor vehicles, it will trigger Title V applicability. Moreover, under Title V, new and existing major sources for regulated GHGs would need to submit a Title V application or amendment application within one year after GHGs are regulated. Title V permits generally contain five core elements: (i) emission standards; (ii) monitoring, recordkeeping, and reporting requirements; (iii) permit fees; (iv) annual compliance certification; and (v) expiry with renewal periods, not to exceed five years. Because of the pervasive nature of GHGs, absent the tailoring rules, millions of sources including small industrial facilities, many office buildings, hotels, and apartment complexes would be drawn into CAA Title V permitting and be subject to the aforementioned requirements.

SIP Compliance

EPA's proposed tailoring rule recognizes that if it is implemented, SIP revisions will be required. EPA's review of existing SIPs identified that the overwhelming majority establish permitting thresholds at the 100/250 TPY level for all regulated pollutants and establish significance levels for new pollutants including GHG emissions, if regulated, at zero. EPA sought to address the issue of consistency of approved SIPs with the newly proposed rules by including generic language within the tailoring rule to establish higher permitting thresholds and significance levels for GHGs, and then limiting its approval of existing SIPs with lower permitting thresholds and significance levels to those pollutants other than GHGs. This approach does not affect state compliance issues, so states would need to revisit their permitting process or sub-

ject facilities to more stringent state regulation. Regarding SIPs that do not apply PSD and Title V requirements to all "pollutants subject to regulation," but rather to specific pollutants, EPA recognized that a separate regulatory action will be necessary to conform those SIP approvals to the tailoring rule.

Practical Effect

The tailoring rule does not directly establish GHG limitations on affected sources. Rather, it establishes a means where EPA can regulate GHGs under the existing CAA regime. Absent the tailoring provisions, EPA believes that approximately 41,000 new or modified source facilities would be drawn into PSD review, and approximately 6,000,000 facilities would become subject to Title V permitting. While EPA makes clear in the proposed rule's preamble that its coverage affects industrial, commercial, and residential sources, the tailoring provisions would have the effect of carving out many commercial, residential, and small industrial sources that would be impacted by currently existing major source thresholds. EPA estimates that 97 percent of new sources would be commercial and residential sources.

The preamble to the tailoring rules stakes out EPA's position that once EPA regulates GHG emissions from motor vehicles, it will consider GHGs to be regulated under the CAA, thereby triggering PSD and Title V permitting. Thus, any PSD permit application pending at the time the motor vehicle rules are promulgated would potentially be subject to challenge based on GHG emissions and BACT applicability. Because there is scant history on BACT for GHGs, permit challenges could create heightened uncertainty of outcome. Similarly, an existing Title V facility could be subject to enforcement or citizen suits if application for coverage is not made within the year after GHGs are regulated.

If finalized, the rule will most likely be challenged judicially. EPA relies upon the doctrines of "absurd results" and

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"administrative necessity," to establish permitting levels less stringent than those authorized by Congress in the CAA. Those doctrines are not generally embraced by the judiciary. Further, the specific touchstones of the rules may also be subject to challenge, including the specific emissions thresholds proposed by EPA.

Taking these issues into account, this is an area warranting close scrutiny by the regulated community, as rulemaking and pervasive litigation will likely shape the timing and outcome of GHG regulation.

Comments are due on this rule's package within 60 days after its publication in the Federal Register.

Feel free to contact one of the listed authors or any member of LLB&L's Climate Change Practice Team for further information or for assistance in preparing comments on this proposed rule.

Endnotes

- 1 In addition to "major sources," other sources subject to Title V requirements are (i) sources subject to the acid rain program; (ii) sources subject to the PSD/non-attainment NSR permitting programs; (iii) any source subject to New Source Performance Standards or National Emissions Standards for Hazardous Air Pollutants; and (iv) other sources designated per EPA rulemaking.

About the Authors

Gerald J. Pels is a partner in the Environmental Section of LLB&L. He focuses in the area of multimedia environmental compliance, counseling, and litigation support and provides strategic guidance on corporate compliance strategies, environmental investigations, sustainability initiatives and stakeholder relations and management. His 26 years of wide range experience includes agency negotiations, assessing and counseling air, water, stormwater, and waste permit compliance, representing clients at permit and other hearings, and providing comprehensive representation to potentially responsible parties and steering committees at both state and federal superfund sites.

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