

US EPA Accelerates Pace of Climate Change Regulations

While Congress continues to work on new US climate change legislation, the US Environmental Protection Agency (EPA or Agency) is rapidly cranking out greenhouse gas (GHG) regulations under the existing Clean Air Act (CAA). Two of the Agency's recent initiatives — a final rule requiring annual reporting of GHG emissions and proposed thresholds for GHG emissions under the CAA's Prevention of Significant Deterioration (PSD) and Title V permitting programs — are addressed below.

GHG Reporting

For the most part, EPA's final reporting rule closely follows its April 10, 2009 proposal, 74 Fed. Reg. 16,448, which we described in an earlier Alert.¹ In brief, EPA is requiring facility-based reporting for most sources (with the limited exceptions including fuel importers, local natural gas distribution companies, and motor vehicle and engine manufacturers outside of the light duty sector, who will file corporate-based reports).

Certain industrial source categories (such as primary aluminum, petrochemical production, and petroleum refineries) automatically are covered. Other facilities (such as iron and steel, pulp and paper, ferroalloys, and zinc) will report only if they emit greater than 25,000 metric tons of carbon dioxide equivalent (CO₂e) per year (where CO₂e represents the quantity of a GHG, weighted by its specific "global warming potential").

A facility that does not contain any of the designated sources, but has a boiler or other "stationary fuel combustion device" also must report if its combustion emissions are greater than 25,000 metric tons of CO₂e. If the maximum-rated heat-input capacity for all such equipment is less than 30 million Btu per hour, a facility is presumed to emit less than the reporting threshold.

As in the proposal, reporting would be required for carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, sulfur hexafluoride, perfluorocarbons, and other fluorinated compounds. For each sector, EPA has specified the covered GHGs and has prescribed methodologies for calculating emissions that combine production/process data with direct measurements of emissions (to the extent emissions monitoring systems already are in place).

Regulated entities will need to start collecting data on January 1, 2010, with the first reports due to EPA by March 31, 2011. Sources will submit annual reports; power plants will continue quarterly reporting in connection with the acid rain program as well. Reporters will self-certify and submit supporting information. Third-party verification is neither required nor encouraged. Further, revised reports are to be filed within 45 days of discovering an error.

Significant changes from the proposed rule include the following:

- Reporting has been deferred for several source categories, including electronics manufacturing, food processing, oil and natural gas systems, and industrial landfills.
- Manufacturers of light duty vehicles and passenger trucks are no longer subject to the rule.
- From January 1, 2010 until March 31, 2010, sources may use best available monitoring methods for any parameter (such as fuel use, or daily carbon content of feedstock) that cannot reasonably be measured in accordance with the prescribed methodologies. Although EPA is expecting full compliance by April 2010, it did include a process for extending use of the best available methods through the end of 2010 as long as the request is made within 30 days of the rule's

effective date (which will be 60 days after publication in the *Federal Register*).

- Reporting of non-volatile fluorocarbons, such as fluoropolymers, is not required.
- The final rule discards the proposed rule’s “once in, always in” feature. Instead, the final rule contains exit mechanisms for sources that either reduce their emissions or shut down.
- Records must be maintained only for three years; the proposed rule had required five. In addition, EPA specified what should be included in a facility’s “written GHG monitoring plan,” which the proposed rule referred to as a QAPP or quality assurance performance plan.
- R&D activities are excluded; however, this exemption does not extend to pilot plants.
- Other exemptions are available for unconventional fuels, flares, hazardous waste, and emergency equipment.
- A population threshold was added for manure management systems. This remains the only agricultural source category that the rule expressly covers.
- Finally, the Agency made adjustments for specific source categories based on the public comments.

The final rule does not preempt or replace any similar state programs. Nor is EPA delegating implementation to the states. The Agency thought that delegation would take too much time, and in any event, it expected many states to pass on an opportunity to administer the program.

As the legal authority for the rule, the Agency relied solely on sections 114 and 208 of the CAA, and not the 2008 Appropriations Act that provided funds for the rulemaking. Failure to monitor and report emissions, or otherwise comply with the rule, thus could result in CAA enforcement actions.

Thresholds for GHG Permitting

On September 30, 2009, EPA proposed new “applicability thresholds” for GHG emissions under the CAA’s PSD and Title V Operating Permit programs. This rulemaking, called the “tailoring rule,” was launched because EPA expects soon to issue regulations controlling GHG emissions from light-duty motor vehicles. Once EPA

finalizes that rule, and a related endangerment finding (required as a result of the Supreme Court’s 2007 ruling in *Massachusetts v. EPA* that GHGs are “air pollutants” under the CAA), GHGs will be “subject to regulation” under the CAA and will be automatically covered by PSD and Title V requirements.

The PSD program requires preconstruction review and permitting for “new major stationary sources” and “major modifications” of facilities in areas that either meet national air quality standards or that are unclassifiable. The CAA specifies that a major emitting facility is any stationary source included on a list of 28 categories that emits, or has the potential to emit, 100 tons per year (tpy) of any air pollutant, or any other stationary source that emits, or has the potential to emit, greater than 250 tpy of any air pollutant.

Long-standing EPA regulations interpreted the PSD requirements as covering “regulated” air pollutants. Those rules also define a “major modification” in part by whether a change results in a “significant” increase in emissions. If EPA fails to establish a specific “significance level” for a “regulated” air pollutant, any emissions increase is significant. The emissions limit for a facility subject to PSD requirements is based on the Best Available Control Technology (BACT), which is determined case by case. Moreover, PSD is an “all-in” program — once any pollutant triggers PSD, the significance of other pollutants must be considered.

In broad terms, the Title V program requires a covered stationary source to obtain an operating permit that sets forth the applicable CAA requirements. Among the sources subject to Title V are those that must obtain a PSD permit and those that are “major.” While in some cases lower thresholds may apply, the CAA specifies that a facility that emits or has the potential to emit 100 tpy of any air pollutant is major for purposes of Title V.

It is widely agreed that if GHGs are within the PSD and Title V programs, and if they are subject to the traditional statutory thresholds of 100/250 tpy, a vast number of previously unregulated air pollutant sources (including many large commercial buildings, farms, and cattle facilities) will need to obtain CAA permits. EPA estimates that permit applications would increase dramatically, perhaps greater than 140-fold for PSD and 400-fold for Title V. The Agency

fears that permitting authorities “would be paralyzed by [the] enormous numbers” of permit requests and that “multi-year backlogs” in the issuance of PSD and Title V permits would ensue.

Believing that the resulting administrative burden “in terms of staffing needs, time for processing permits, and costs” would be unmanageable, EPA is proposing that under the legal doctrines of “absurd results” and “administrative necessity” the literal statutory thresholds need not be applied. In the Agency’s view, it is appropriate to rely on those doctrines where literal application of the statutory thresholds would “produce[] results that are inconsistent with other statutory provisions, run contrary to expressed congressional intent or actually undermine congressional intent,” and go “beyond anything that Congress could reasonably have intended” when the thresholds were established. Accordingly, EPA proposes to “tailor” the thresholds to be “consistent with congressional intent” and reduce the administrative workload to a manageable level.

Specifically, EPA would, as a first phase, set a major source threshold at a “temporary level” of 25,000 tpy of CO₂e for both the Title V and PSD programs. To assess modifications under PSD, the “significance” level would be at a level between 10,000 and 25,000 tpy CO₂e, with the exact amount to be set in the final rule. Beyond that, EPA is requesting comment on ways to streamline permitting for GHGs, such as redefining “potential to emit,” presumptive BACT, general permits, permit by rule, and electronic permitting. EPA also would limit all of its prior approvals of state PSD and Title V programs to conform to the new thresholds. To the extent that state programs require permitting of GHG emissions at lower levels—and many state thresholds are phrased in terms of regulated pollutants—EPA will take no action to disapprove, and the lower thresholds would remain on the books.

In a second phase, EPA would conduct a “study to assess the administrability issues,” evaluate lower thresholds over the next five years, and then begin “another rulemaking, to be completed by the end of the sixth year,” which may suggest that EPA contemplates eventually regulating smaller sources.

Despite the many implications of this proposal, EPA is requiring comments to be submitted only 60 days after it appears in the *Federal Register*.

While EPA’s efforts to limit GHG permitting to large emitters are likely to be welcomed by numerous sources, changing statutory thresholds is clearly controversial and may be subject to legal challenge if finalized. The Agency could be trying to prod Congressional action, and it may expect lawmakers eventually to validate its actions by expressly raising the statutory thresholds for GHGs to 25,000 tpy. But at this point, it is uncertain how existing CAA authorities will be reconciled with any new climate legislation.

Endnote

- ¹ See our March 11, 2009 Client Alert, “US EPA Proposes Mandatory GHG Reporting” available at <http://www.mayerbrown.com/climatechange/article.asp?id=6316&nid=10445>.

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