

EPA Releases Proposal to Regulate Greenhouse Gases Under the Clean Air Act's Title V and PSD Programs

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On September 30, the U.S. Environmental Protection Agency (EPA) issued a proposal describing how it intends to regulate greenhouse gas (GHG) emissions under the Clean Air Act's (CAA) Title V and Prevention of Significant Deterioration (PSD) permitting programs. EPA's proposal, if adopted, would establish specially tailored emission thresholds for the application of the Title V and PSD programs to sources that emit GHGs. EPA estimates that the proposed thresholds would apply to sources with nearly 70% of the national GHG emissions from stationary sources and result in GHG-related permit requirements for approximately 14,000 facilities, including approximately 3,000 sources that previously have not been subject to the Title V program.

EPA indicates that it believes that although the majority of facilities that would be subject to this rule are electric generating units and industrial facilities that already have Title V Operating Permits, additional facilities—including landfills and large commercial facilities such as large hospitals—would become subject to the Title V and PSD programs for the first time. EPA will accept comments on the rule proposal for a 60-day period following its publication in the *Federal Register*.

Background to the Rule Proposal

Since 1993 through the CAA's Acid Rain program and more recently through the Mandatory Reporting of Greenhouse Gases Rule,¹ EPA requires certain facilities to monitor and report emissions of carbon dioxide (CO₂) and other GHGs, but has not established emission limits for GHGs. In April 2009, however, EPA issued a proposed finding that six GHGs endanger human health and welfare by contributing to global climate change and therefore should be regulated as air contaminants under the CAA. The six GHGs that are the subject of this proposed endangerment finding, as well as this rule proposal under the Title V and PSD programs, are CO₂, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

EPA expects that, as a result of the proposed endangerment finding, it will soon promulgate regulations to control GHG emissions from light-duty motor vehicles, naming those GHGs as regulated air pollutants. The regulation of GHGs from mobile sources would in turn subject stationary sources that

1. For a discussion of EPA's Mandatory Greenhouse Gas Reporting Rule, see Morgan Lewis's September 24, 2009 LawFlash on the topic, available online at http://www.morganlewis.com/pubs/Environmental_GreenhouseGasesRule_LF_24sept09.pdf.

emit the same GHGs to the Title V and PSD programs, as both of those programs apply to facilities emitting any pollutant otherwise regulated under the CAA. The Title V program requires major stationary sources emitting a regulated air pollutant to obtain an Operating Permit. The PSD program requires new major sources of regulated air pollutants and existing major sources that make a change resulting in significant net increases in emissions to obtain a PSD permit that requires best available control technology (BACT).

EPA is proposing to set applicability thresholds for the Title V and PSD programs at levels that are specially tailored for GHG emissions, which are significantly greater than the applicability thresholds for other regulated pollutants. EPA explains that using existing emission thresholds under the CAA for GHG emissions would result in a very large number of small sources being subject to the financial burden of obtaining Title V Operating Permits and complying with PSD control technology requirements, and that the addition of this substantial number of new, regulated sources would create an enormous administrative burden for state permitting authorities.

EPA is also proposing that the metric for determining emissions of the six newly regulated GHGs be carbon dioxide equivalents (CO₂e), using the global warming potential of the six GHGs relative to CO₂ rather than establishing a separately tailored threshold for each of the six GHGs. Even with the “tailoring” that EPA indicates its rule would achieve, EPA estimates that the proposed rule would result in 3,000 new facilities requiring Operating Permits and would also result in approximately 100 PSD permits being required annually that had not previously been needed.

Title V Operating Permit Program

The Title V program currently requires major sources with potential emissions of at least 100 tons per year (tpy) of any regulated air pollutant to obtain an Operating Permit for the facility. Under the proposal, the applicability threshold under the Title V program for GHG emissions would be raised to 25,000 tpy of CO₂e. As such, facilities with the potential to emit at least 25,000 tpy of CO₂e would be a “major source” and would need a Title V Operating Permit.

Once GHG emissions become regulated (presumably under the upcoming light-duty motor vehicle regulations), facilities without an Operating Permit that meet or exceed the GHG threshold would have one year to submit an application for a Title V Operating Permit that would include GHG emissions. Stationary sources already possessing an Operating Permit (because they are a major source of other regulated air pollutants), with GHG emissions that meet or exceed the GHG threshold, would not be required to revise their Operating Permits to incorporate GHG requirements as a result of this proposed rule until EPA promulgates applicable GHG control requirements, or until the facility triggers the PSD program and is required to implement BACT-level control technology for GHGs.

All facilities already possessing Title V Operating Permits, however, would be required to include an estimate of their GHG emissions in their next permit renewal application, which typically are required every five years. The resulting renewed Operating Permits likely will contain requirements to measure and report GHG emissions, but the details of those requirements remain to be seen and may vary by permitting authority and industry. EPA expects that approximately 14,000 facilities will need to include GHG emissions in their Operating Permits, with about 3,000 of those facilities being newly subject to Title V Operating Permit requirements.

PSD Permitting Program

The PSD program currently requires permits and BACT-level emissions controls for new major sources

with potential emissions of at least 100 or 250 tpy² of regulated air pollutants. These requirements also apply to existing major sources, whenever they undergo a physical change or change in the method of operation that results in a significant net emissions increase of a regulated air pollutant.

EPA's proposal incorporates GHGs into the PSD program by redefining what it means to be a major source of GHGs, and by defining the amount of GHGs that constitutes a significant net emissions increase. Under the proposal, facilities that do not already qualify as major sources due to their emissions of other regulated pollutants would be considered major sources, and would therefore be subject to PSD permitting requirements if they have potential GHG emissions of at least 25,000 tpy of CO₂e. Major sources that undergo modifications that result in an increase of GHG emissions above a "significance level" would be required to obtain a PSD permit and implement BACT-level emission controls. EPA is proposing that this significance level be set at somewhere between 10,000 and 25,000 tpy of CO₂e, and is soliciting comment on the appropriate level.

As an example, EPA expects that a boiler with a heat input rating of approximately 15-20 MMBtu/hr (depending on fuel type), or an internal combustion or compression ignition engine with a rating of greater than 2,000 horsepower, would trigger the proposed PSD significance level of 10,000 tpy of CO₂e. Absent EPA setting a significance level for GHGs under the PSD program, major sources that implement changes that result in any increase in GHGs would be required to obtain a PSD permit and implement BACT, because significance levels for regulated air pollutants are set at a default level of zero, unless EPA expressly sets a particular significance level higher than zero. If required, BACT-level emission controls for GHGs would be determined on a case-by-case basis and EPA plans to develop guidance concerning BACT determinations. EPA expects that 400 new sources and modifications would be subject to PSD review each year for GHG emissions under the proposal, with fewer than 100 being newly subject to PSD.

Phased Approach to GHG Emissions Regulation

The GHG emission thresholds in this proposal are only a first step. By the end of a five-year "first phase," EPA proposes to complete a study to evaluate whether it is administratively feasible for PSD and Title V permitting authorities to adequately administer the programs at lower GHG applicability thresholds. After reviewing the study results, EPA will promulgate "second phase" thresholds, either confirming the first-phase levels or establishing different levels to better reflect the administrative capabilities of permitting authorities. Comments on the current proposal will be accepted for 60 days following publication in the *Federal Register*, which is expected to occur soon.

Morgan Lewis lawyers are at the center of the development of climate change programs. We help our clients navigate developing climate change requirements, and develop strategies to address the challenges they present. We encourage our clients to consider the GHG thresholds EPA is proposing and their potential impact on their operations. In particular, facilities should consider whether the proposed significance levels for GHGs under the PSD program would significantly impede their ability to make changes that improve the efficiency of their facilities and operations. Those who believe their operations could be substantially affected should consider submitting comments during the current comment period.

2. The applicable threshold level (i.e., 100 or 250 tons) is governed by the type of industrial facility.

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