

EPA Issues Final Rule Tailoring Greenhouse Gas Permitting Requirements Under the Clean Air Act

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On May 13, the Environmental Protection Agency (EPA) issued a final rule (Tailoring Rule) that addresses Clean Air Act (CAA) permitting requirements for greenhouse gas (GHG) emissions. EPA's Tailoring Rule—the fourth action in an ongoing EPA effort to regulate GHG emissions—establishes GHG emission level thresholds that determine when stationary source facilities must seek and obtain permits under the CAA's New Source Review Prevention of Significant Deterioration (PSD) and Title V Operating Permit programs. The Tailoring Rule is, in part, the product of the complicated interaction under the CAA between EPA's decision to regulate GHG emissions from automobiles, and the related effect that decision has on the permitting and regulation of GHGs from stationary sources, such as manufacturing and industrial facilities.

Background of EPA's GHG Regulatory Efforts

EPA's GHG regulations are rooted in a 2007 U.S. Supreme Court decision holding that GHGs, such as carbon dioxide, are air pollutants as that term is used in the CAA.¹ As a result of the Supreme Court's decision, EPA was required to analyze GHG emissions from motor vehicles (light-duty vehicles) and determine whether such emissions may reasonably be anticipated to cause or contribute to air pollution that endangers public health or welfare. Under the CAA, an affirmative "endangerment" finding would then obligate EPA to regulate GHG emissions from motor vehicles.

On December 7, 2009, EPA's Administrator completed the first action in EPA's effort to regulate GHG emissions when the Administrator determined that motor vehicle GHG emissions may reasonably be expected to endanger public health and welfare. On April 1, 2010, the EPA completed its effort to regulate motor vehicle GHGs when it followed the endangerment finding with a final rule establishing standards for GHG emissions from light-duty vehicles, beginning with model year 2012.

This action on motor vehicles also had implications for regulation of GHGs from stationary sources. Thus, on March 29, 2010, EPA addressed the circumstances under which a pollutant is "subject to regulation" for purposes of the CAA. In EPA's view, a pollutant that is "subject to regulation"—even if that regulation is directed at controlling the pollutant from mobile sources such as autos—is covered under the CAA's, PSD, and Title V permitting programs for stationary sources. This is often called the

¹ See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

“triggering effect” of the light-duty vehicle rule.

Under EPA’s interpretation, announced in March, a CAA pollutant is “subject to regulation,” and thus subject to PSD and Title V permitting requirements that stationary sources must secure, when a federal regulatory requirement to control emissions of that pollutant “takes effect.” Although the light-duty vehicle rule was made final in April 2010, in an interpretive memo issued in late March, EPA announced its view that the light-duty vehicle rule “takes effect” January 2, 2011, the first date on which model year 2012 autos may be sold. As a consequence of these actions and interpretations, in EPA’s view, GHG regulation will become part of the CAA’s PSD and Title V permitting programs on January 2, 2011. The Tailoring Rule, the fourth action in its GHG regulatory efforts, is an effort to “phase in” application of the PSD and Title V Operating Permit programs to stationary source facilities that emit GHGs.

Scope of Tailoring Rule

The CAA provides that major stationary sources are subject to the CAA’s PSD and Title V permitting program. The PSD permitting program applies to certain new sources or certain modifications of existing sources. In the absence of a Tailoring Rule, the emission thresholds that would trigger a facility needing to secure permits for GHG emissions would be either 100 or 250 tons per year, depending on the facility type. Applying those thresholds would result in tens of thousands of facilities requiring PSD permits and millions requiring Title V operating permits. By comparison, currently permitting agencies issue only several hundred PSD permits per year. Thus, absent adjustments in the permitting thresholds, the permitting system faced a major crisis. EPA’s Tailoring Rule is an effort to address this problem, by phasing in the CAA’s PSD and Title V requirements in several steps.

Step One of the Tailoring Rule covers the period between January 2, 2011 and June 30, 2011. During the Step One period:

- Only sources currently subject to the PSD permitting program because of emissions related to pollutants traditionally regulated under the PSD program will also be subject to PSD permitting requirements for their GHG emissions. For such projects, GHG increases of 75,000 tons per year or more require the project to determine and incorporate the Best Available Control Technology.
- Similarly, only sources currently subject to the Title V permitting program will be subject to Title V permitting requirements for their GHG emissions.
- No sources would be subject to CAA permitting requirements due solely to GHG emissions.

For example, a stationary source that is not presently subject to PSD or Title V permitting requirements during the Step One period would not be subject to the PSD permitting program even if the stationary source’s GHG emissions increased by 75,000 tons per year or more.

Step Two of the Tailoring Rule covers the period between July 1, 2011 and June 30, 2013. During the Step Two period:

- PSD permitting requirements will apply to new sources that result in GHG emissions of at least 100,000 tons per year, even if the new source does not exceed the permitting thresholds for other pollutants. Modifications of existing facilities that increase GHG emissions by at least 75,000 tons

per year will be subject to the permitting requirements, even if the modifications will not exceed the permitting thresholds for other pollutants.

- Title V permitting requirements will cover sources that emit GHGs of at least 100,000 tons per year, even if the permitting requirements would not apply based on emissions of other pollutants.

Step Three of the Tailoring Rule will involve a new rulemaking undertaken by EPA, to begin in 2011 and conclude no later than July 1, 2012. The rulemaking will consider phasing in additional GHG permitting, and will also address whether certain small sources that would otherwise be regulated by the CAA can be permanently excluded from CAA permitting. EPA also explains that if a new rule results from Step 3, CAA permitting will not be required for sources with GHG emissions below 50,000 tons per year, and EPA will not require permits for smaller sources until at least April 30, 2016.

Outstanding Issues

Each of EPA's actions relating to GHGs will be challenged in the federal D.C. Circuit Court of Appeals. Legal challenges are already pending against EPA's December 2009 endangerment finding, March 2010 interpretive memorandum, and April 2010 light-duty vehicle rule. Legal challenges are also certain to be filed with regard to EPA's Tailoring Rule.

Additionally, federal legislation is pending that, if enacted, would remove the EPA's authority to regulate GHGs in the manner in which EPA is presently proceeding. For example, the American Clean Energy and Security Act of 2009, which was passed by the House of Representatives in June 2009, would establish a different GHG regulatory scheme (a scheme commonly called "cap and trade") and would significantly limit EPA's authority to regulate GHG emissions using traditional permitting authorities.

Similarly, the American Power Act introduced by Senators Kerry (D-Mass.) and Lieberman (I-Conn.) in May 2010 proposes to amend the CAA so that GHGs would not be regulated using traditional CAA permitting requirements. For now, however, facility managers must evaluate new facility construction and facility modifications, taking into account these new regulatory requirements and the additional cost and delay that the new permitting rules will impose.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

Ronald J. Tenpas	202.739.5435	rtenpas@morganlewis.com
William H. Lewis, Jr.	202.739.5145	wlewis@morganlewis.com
Levi McAllister	202.739.5837	lmcallister@morganlewis.com

Philadelphia

Jeffrey N. Hurwitz	215.963.5700	jhurwitz@morganlewis.com
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Princeton

Christopher J. McAuliffe	609.919.6619	cmcauliffe@morganlewis.com
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