

## Climate Change Regulatory Update: EPA Announces Proposed Rules Establishing Greenhouse Gas Permitting Requirements for Stationary Sources

October 13, 2009

On September 28, 2009, the U.S. Environmental Protection Agency ("EPA") proposed a rule that, in concert with the agency's proposed endangerment finding, would result in the regulation of greenhouse gas ("GHG") emissions from motor vehicles. As EPA warned in its July 2008 Advanced Notice of Public Rulemaking in response to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the regulation of GHG emissions from motor vehicles would have immediate implications for "major" stationary sources of GHG emissions, potentially subjecting them to new Clean Air Act permitting requirements.

On September 30, 2009, EPA proposed two new rules intended to provide guidance on, and in large part change, when the Clean Air Act's permitting requirements apply to GHG emissions. These proposals, which according to EPA would affect sources in all sectors of the economy, including commercial and residential sources, are the latest in a series of actions by EPA to regulate GHG emissions.

### I. EPA's Proposal to Reconsider the Johnson Memorandum

Under the first proposed rule, which was published in the Federal Register on October 7, 2009, EPA seeks to reconsider a 2008 determination by then Administrator Stephen Johnson wherein the agency concluded that a pollutant, such as carbon dioxide ("CO<sub>2</sub>"), does not become "subject to regulation" for the purposes of the Clean Air Act's prevention of significant deterioration/new source review ("NSR") permitting program until that pollutant is "subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant." Pollutants "for which EPA regulations only require monitoring or reporting" were excluded. While the September 30, 2009 proposal states that EPA prefers the interpretation in the Johnson Memorandum, EPA requests comment on alternative interpretations that would make Clean Air Act permitting requirements applicable to a pollutant if: (1) EPA requires monitoring or reporting of emissions of the pollutant; (2) regulatory requirements for the pollutant are included in an EPA-approved State Implementation Plan; (3) EPA makes an "endangerment finding" or (4) EPA grants a waiver under Section 209 of the Clean Air Act (related to mobile sources). Adoption of any of these criteria would represent a greatly expanded interpretation of the phrase "subject to regulation" than historically has been taken by EPA.

## **II. EPA's Proposal to Establish NSR/Title V Applicability Thresholds for GHGs**

In addition to this proposal, recognizing the current NSR "major source" applicability thresholds established in the Clean Air Act – 100 tons per year for certain sources and 250 tons per year for the remaining sources – may be completely unworkable and overwhelming for federal, state and local permitting authorities and unduly burdensome on industry and commercial enterprises not traditionally regulated under the Clean Air Act (e.g., hospitals, residential and commercial office buildings), EPA proposed a rule that would raise the Title V and NSR applicability threshold for GHGs from 100 or 250 tons per year CO<sub>2</sub> equivalent ("CO<sub>2</sub>e") to 25,000 tons per year CO<sub>2</sub>e and would establish "major modification" applicability thresholds for GHGs of between 10,000 and 25,000 tons per year CO<sub>2</sub>e. EPA also committed to complete a study within five years that would address administrability issues associated with the regulation of GHG emissions and, within six years, to promulgate revised applicability levels and streamlining techniques, as appropriate.

Under the proposed rule, facilities that emit more than 25,000 tons of CO<sub>2</sub>e per year would be required to obtain Title V operating permits and would be subject to NSR preconstruction permitting. While Title V operating permits generally do not impose new substantive requirements, an existing source may not continue to operate unless it applies for a permit within one year of the date it becomes subject to Title V. Title V permits impose significant permit fees as well as annual/semi-annual compliance reporting. Title V permits also have been used by permitting authorities to impose new and sometimes onerous monitoring requirements to ensure compliance.

The NSR program requires that a new "major stationary source" or "major modification" obtain a permit prior to beginning actual construction and requires the applicant to install best available control technology ("BACT") to control each pollutant subject to the program. BACT is determined on a case-by-case basis and includes identification of all available control technologies, elimination of technically infeasible options, and ranking of remaining options by control and cost effectiveness. What exactly will constitute BACT for particular sources remains opaque simply because means to control the most widespread GHG, CO<sub>2</sub>, beyond energy efficiency, are not yet commercially viable. In fact, during an October 7, 2009 meeting of the Clean Air Act Advisory Committee, EPA acknowledged that it does not have a position regarding BACT for GHG and "[n]ow is the time to just be throwing things out and see what sticks."

## **III. EPA's Justification for the Changes**

EPA's proposed applicability threshold of 25,000 tons per year is orders of magnitude higher than the applicability thresholds in the Clean Air Act's Title V and NSR programs. EPA states that it is

authorized to disregard these statutory thresholds based on the doctrines of "absurd results" and "administrative necessity." According to EPA, if GHG emissions were regulated in strict compliance with the Clean Air Act, the number of sources requiring Title V permits would increase from approximately 15,000 to approximately 6,000,000 and the number of NSR applications submitted annually would increase from approximately 300 to approximately 40,000. According to EPA, Congress could not have intended to place such a significant burden on federal, state, and local permitting authorities to achieve such small reductions in GHGs. Therefore, EPA believes that it must raise the applicability thresholds established by Congress in the Clean Air Act to 25,000 tons of CO<sub>2</sub>e per year to ensure that it can continue to administer the program.

However, EPA's ability to modify the explicit requirements of the Clean Air Act is far from clear. Several recent high profile EPA initiatives have been invalidated for exceeding EPA's authority, including *Massachusetts v. EPA*, 549 U.S. 497 (2007) (failure to regulate CO<sub>2</sub> emissions); *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001); (implementation of the 8-hour ozone National Ambient Air Quality Standard); *North Carolina v. EPA*, 531 F.3d 896 (DC Cir. 2008) (Clean Air Interstate Rule); *New Jersey v. EPA*, 517 F.3d 574 (DC Cir. 2008) (Clean Air Mercury Rule) and *New York v. EPA*, 443 F.3d 880 (DC Cir. 2006) (routine maintenance, repair and replacement exclusion).

#### **IV. Potential Impacts of EPA's Move to Regulate GHG Emissions Under the Clean Air Act**

EPA's proposal has significant implications for industry, commercial enterprises and permitting authorities. Even assuming the 25,000 tons per year CO<sub>2</sub>e threshold is used as a basis for determining the applicability of NSR, EPA anticipates the proposed rule would result in a "manageable" approximately 30 percent increase in the time spent by regulatory authorities processing NSR permit applications. Without questioning whether EPA's estimate of 30 percent is reasonable, it has been our experience that federal, state and local permitting authorities currently are overwhelmed and unable to process "major source" NSR permits within the timeframes needed by industry to adapt to changing market conditions and opportunities. Adding additional burdens only will exacerbate this existing problem.

With respect to the Title V operating permit program, EPA estimates that an approximately 50 percent increase over current Title V staffing levels would be required. While EPA recognizes that this "increase would pose some challenges to permitting authorities, EPA believes that this increase would not exceed the capacity of the permitting authorities to implement the program." In fact, EPA states that increasing permitting resources by 50 percent would not "be administratively impossible to achieve, given that Title V is self-funded." Despite EPA's optimism, the history of the Title V permit

program tells a very different story. Originally adopted as part of the 1990 Amendments to the Clean Air Act, despite being self-funded, many permitting authorities took decades to issue the first round of Title V permits and have struggled in taking timely action on permit renewals. It is reasonable to expect these delays to continue even if EPA is successful in raising the applicability threshold for GHGs to 25,000 tons per year CO<sub>2</sub>e.

While EPA's proposed permitting rules are further evidence of EPA's belief that it can regulate GHG emissions without additional legislative authority and of its intent to do so, the proposal leaves many important questions unanswered, including:

- Can EPA disregard the applicability thresholds in the Clean Air Act and establish its own GHG applicability thresholds?
- If not, will all sources emitting more than 100 or 250 tons of GHGs per year, as applicable, be subject to regulation upon promulgation of EPA's endangerment finding, anticipated motor vehicle GHG emission rule and final decision on when a pollutant becomes "subject to regulation" (as EPA already has adopted a rule requiring monitoring and reporting of GHGs across a wide spectrum of industry)?
- If so, will EPA promulgate lower applicability thresholds following its planned five-year review?
- What substantive requirements will be applied to GHG emission sources regulated under the Title V and NSR programs?
- What impacts will EPA's decision have on state and local permitting programs that are adopted pursuant to both state and federal laws?

## **V. Next Steps**

In true political form, EPA released these two rules on the same day that Senators Kerry and Boxer released their discussion draft legislation addressing climate change. It is as if the Obama Administration threw out a challenge by stating, without words, *if you don't get on board with this legislation, look at what we have in store for you under the Clean Air Act*. Fair or not, the parade of horrors that is certain to follow from the actions that EPA has proposed to take in the coming months provides an incentive for Congress to adopt comprehensive legislation to control GHG emissions which also places limits on EPA's ability to regulate GHG emissions under other provisions of the Clean Air Act, such as the NSR preconstruction permitting program. With EPA moving to finalize these rules as early as March 2010, and the Senate apparently distracted by health care and financial reforms, many stakeholders are seeking to switch the focus back to climate change. Whether these efforts will result in the passage of a comprehensive climate bill in 2010 remains an open question. One thing we can count on are a number of legal challenges

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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to EPA's most recent proposals, leaving it up to the courts to decide whether EPA is acting within its discretion under the Clean Air Act.

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