Legal Lookout: EPA Issues Final "Tailoring" GHG Permitting Rule

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On June 3, 2010, EPA issued a final rule addressing greenhouse gas (GHG) emissions from stationary sources under the Clean Air Act (CAA). This controversial rule set thresholds for GHG emissions that define when permits under the New Source Review Prevention of Significant Deterioration (PSD) and Title V operating permit programs are required for new and existing industrial facilities.

The tailoring rule is based on three CAA legal developments. In 2007, the Supreme Court in Massachusetts v. EPA, 549 U.S. 497 (2007) found that GHGs are CAA air pollutants, subject to CAA authority. EPA responded in 2009 by issuing two findings last December: an "endangerment finding" that the current and projected GHG emissions threaten the public health and welfare; and a "cause or contribute finding" that combined emissions of these GHGs from new motor vehicles and new motor vehicle engines contribute to the GHG pollution that threatens public health and welfare. Finally, the agency issued its Interpretation of the PSD permit program memorandum, establishing that a pollutant is "subject to regulation" only if it is subject to either a CAA provision or in an EPA regulation under the CAA that requires actual control of emissions of that pollutant. The confluence of these events compelled the agency to regulate GHG emissions under the PSD and Title V programs.

The final rule

Under the final rule, GHGs are defined to include CO2, CH4, N2O, HFCs, PFCs, and SF6.

EPA is implementing the rule in two phases. The largest emitters of GHG within these sectors will be required to obtain or modify their permits to address GHG emissions during the first phase of the rule's implementation. Permitting smaller sources of GHG emissions will be deferred until the second phase. During the first phase – from Jan. 2, 2011, to June 30, 2011 – only sources currently subject to the PSD permitting program would be subject to permitting requirements for their GHG emissions under PSD. For these projects, only GHG increases of 75,000 tpy or more would need to determine the Best Available Control Technology for their GHG emissions. Similarly for the Title V permit program, only sources currently subject to the program would be subject to Title V requirements for GHG. During this first phase, no sources would be subject to permitting requirements due solely to GHG emissions.

In the second phase – July 1, 2011, to June 30, 2013 – PSD permitting requirements will apply to new construction projects that emit GHG emissions of at least 100,000 tpy, even if they do not exceed the permitting thresholds for any other pollutant. Modifications at existing facilities that increase GHG emissions by at least 75,000 tpy will be subject to permitting requirements, even if

they do not significantly increase emissions of any other pollutant. During this phase, operating permit requirements will apply to sources based on their GHG emissions even if they would not apply based on emissions of any other pollutant. Facilities that emit at least 100,000 tpy CO2 equivalents will be subject to Title V permitting requirements.

Legal challenge

Because the major source and significance level thresholds that govern the applicability of these CAA permitting programs are set by Congress, some contend that the tailoring rule is inconsistent with law and thus unenforceable. EPA contends that any approach to regulating GHG emissions other than the step-wise approach envisioned under the rule would invite unmanageable results. For example, EPA estimates that Title V permits would be required for over six million sources not now subject to the program.

Lawsuits are expected before the end of the judicial review period on Aug. 2, 2010. It is anyone's guess how the Court will decide these issues. In cases where EPA has argued that Congressional intent should trump the CAA's explicit terms, as in the case here, EPA has generally lost. The Court's vacature of the Clean Air Intestate Rule is an example. PE

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