

ENVIRONMENTAL ALERT

EPA ISSUES FIRST GREENHOUSE GAS PERMIT REQUIREMENTS

EPA on May 13, 2010 issued its final rule which takes the unprecedented step of regulating greenhouse gases (GHGs)¹ from new and modified sources through previously established air permitting schemes, namely the New Source Review/Prevention of Significant Deterioration (NSR/PSD) and Title V Operating Permit program. Of particular note, the final rule increases the major source threshold for GHGs while thresholds associated with criteria pollutants remain the same (i.e., 100 and 250 tons per year). Under this rule, affected large sources, such as coal-fired plants, refineries, iron and steel plants, cement and lime kilns and solid waste landfills, will have to utilize best available control technology (BACT) to minimize GHG emissions when triggering new source review.

The change in the major source threshold is not only one of the key goals of the new rule package, but is also controversial as it is likely that EPA's authority to alter the threshold for GHGs only will be challenged as unauthorized under the Clean Air Act. EPA justifies this step due to the numerous and wide-ranging facilities that would have been subject to this rule had the GHG threshold not been raised. Indeed, it is estimated that beginning in January 2011 approximately 900 facilities will be affected under this final rule in comparison to the 14,000 facilities that were estimated under the initial proposal that utilized baseline thresholds – a number that EPA and state-regulating entities found administratively overwhelming particularly in light of the number of facilities that were not otherwise subject to Clean Air Act regulations, but for the GHG rule.

The new rule sets forth two primary phases of regulation in order to reduce GHG emissions. Phase One commences on January 2, 2011 and encompasses only new and modified sources already subject to the NSR/PSD and Title V permitting programs. Such sources will be required to include GHGs in their permits and comply with GHG emissions limits, i.e., 75,000 tons per year (tpy). Phase Two begins July 1, 2011 and adds on additional layers of regulation to cover all new facilities with GHG emissions of at least 100,000 tpy and modifications of existing facilities that would increase emissions by at least 75,000 tpy. Finally, EPA has also committed itself to further rulemaking beginning in 2011, in order to review whether regulations of additional sources are needed as well as evaluate whether certain smaller sources should be permanently excluded from permitting.

The requirements of Phase One and Two of this rule are set forth in more detail below:

Phase One (January 2, 2011 – June 30, 2011) –

- New Construction/Modification – Only sources currently subject to the PSD permitting program (i.e., those that are newly-constructed or modified in a way that significantly increases emissions of a pollutant other than GHGs) are subject to permitting requirements for their GHG emissions under PSD. For these projects, only GHG increases of 75,000 tpy or more of total GHG, on a CO₂e basis, would need to determine BACT for their GHG emissions.

¹ GHGs include: 1. Carbon dioxide (CO₂), 2. Methane (CH₄), 3. Nitrous oxide (N₂O), 4. Hydrofluorocarbons (HFCs), 5. Perfluorocarbons (PFCs), and 6. Sulfur hexafluoride (SF₆).

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- Title V – Similarly for the operating permit program, only sources currently subject to the program (i.e., newly constructed or existing major sources for a pollutant other than GHGs) would be subject to Title V requirements for GHG.

Phase Two (July 1, 2011 to June 30, 2013) –

- New Construction – In this phase, PSD permitting requirements will cover for the first time 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 – 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.
- Title V – Facilities that emit at least 100,000 tpy CO₂e will be subject to Title V permitting requirements.

In light of the new and expansive regulations set forth in this rule it is important to understand the volume of GHG emissions from your facility and be particularly mindful of the deadlines and triggering events associated with this rule for facility planning purposes. For affected facilities contemplating significant projects that would be expected to trigger New Source Review for GHGs, there is only a small window left to obtain construction permits before the GHG rules will become applicable, since affected permits would need to be issued before the end of 2010 in order to escape application of the new rules. For projects that eventually trigger the new rules, the question of what constitutes BACT for GHG emissions remains in uncharted waters, and a variable that could well delay permitting while that question is sorted out.

Should you have any questions regarding this rule or its impacts on your particular facility or business please contact our environmental attorneys listed below.

The Environmental Alert is intended to keep readers current on matters affecting environmental issues and is not intended to be legal advice. For information or assistance regarding any of the information noted above, please contact Scott R. Dismukes at 412.566.1998 or sdismukes@eckertseamans.com, Richard S. Wiedman at 412.566.5967 or rwiedman@eckertseamans.com, David A. Rockman at 412.566.1999 or drockman@eckertseamans.com, Kathryn L. Clark at 412.566.6188 or kclark@eckertseamans.com, Erin W. McDowell at 412.566.6070 or emcdowell@eckertseamans.com, Jessica L. Sharrow at 412.566.5941 or jsharrow@eckertseamans.com or any other attorney with whom you have been working.

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