



APRIL 2010

EPA Sets Schedule For GHG Permitting

The U. S. Environmental Protection Agency (EPA) announced March 29, 2010 that greenhouse gas (GHG) emissions from larger stationary sources will become subject to Clean Air Act (CAA) permitting as of January 2, 2011. At the same time, recent informal statements by EPA head Lisa Jackson signal a phased-in schedule for permitting GHG emission over the next few years.

Basis and Implications of the January 2, 2011 Date

EPA's March 29, 2010 decision is the latest of several key interlocking steps that the agency has taken or is expected to take to address GHG emissions under the CAA pursuant to the U. S. Supreme Court's 2007 decision in Massachusetts v. EPA. In this latest step, which follows the January 2010 debut of GHG monitoring and reporting requirements for various types of stationary sources, EPA has now determined that stationary sources of GHG will be subject to the Prevention of Significant Deterioration (PSD) and Title V permitting programs of the CAA as of January 2, 2011. This date is based on EPA's concurrent adoption of GHG emission standards for certain motor vehicles under other sections of the CAA. These standards will apply as of January 2, 2011. Because the CAA requires PSD and Title V programs to address any pollutant "subject to regulation" under the CAA, EPA has concluded that PSD and Title V coverage of GHGs will be triggered once the motor vehicle standards take effect.

In setting January 2, 2011 as the date for PSD/Title V to begin regulating GHG emissions, EPA rejected requests by environmentalist groups for immediate applicability upon adoption of the motor vehicle standards, as well as industry appeals for "grandfathering" to enable PSD applications pending on January 2, 2011 to avoid the new GHG requirements. EPA has acknowledged "significant implementation challenges" arising from the January 2, 2011 schedule for EPA and the many states delegated to implement PSD and Title V programs. However, EPA stated that the CAA provides no authority to proceed otherwise. Therefore, regulated sources and permitting authorities have approximately nine months to conclude any new or pending PSD and related Title V permitting proceedings without the need to address GHG emissions.

Implementing GHG Permitting: Anticipated Scope and Schedule

Other recent steps by EPA indicate how the agency intends to incorporate GHG requirements into PSD and Title V permitting. First, EPA's "tailoring rule" (proposed September 2009, final rule expected shortly) is expected to limit applicability of GHG permitting, at least initially, to only those sources with actual GHG emissions well above the 100 TPY and 250 TPY triggers that the CAA provides for PSD and Title V. Jackson has informally indicated that the final "tailoring rule" will set the threshold at 75,000 TPY.

Second, in recent communications with Congress, Jackson has projected that (1) in the first half of 2011, only sources that exceed the final "tailoring rule" threshold and have pending PSD or Title V permit applications would need to address GHG emissions permitting; and (2) in the latter

half of 2011, GHG permitting would be phased in for other sources above the "tailoring rule" threshold. Jackson also stated that EPA does not intend to extend GHG permitting to sources below the threshold before 2016. Jackson and other EPA officials have elsew expressed hope that before that time arrives, Congress will develop a GHG control program to move beyond the current CAA framework.

What Controls Will Be Required?

Still unresolved is the key issue of what GHG controls PSD and Title V permits will require. PSD permitting requires "Best Available Control Technology" (BACT) for each regulated pollutant, as determined in case-by-case reviews that consider feasibility, cost, energy efficiency, and other factors. Building on prior informal statements by EPA, EPA's March 29, 2010, decision suggests an indirect approach to GHG controls, at least initially: given the lack of commercially available technology for direct control of GHG emissions, these emissions may be best controlled indirectly through emphasizing the energy efficiency factor in BACT reviews. EPA is expected to release more guidance on this issue in the near future.

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