

Articles

EPA Issues Final “Tailoring” Rule for Greenhouse Gas Emissions

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The U.S. EPA released its final “tailoring” rule on May 13, 2010, which marks the imposition of strict greenhouse gas limits for new and modified facilities under the federal Clean Air Act.¹

The Tailoring Rule sets out a tiered phase-in of permitting requirements under EPA’s New Source Review program. Beginning January 2, 2011 (the date new automobile emissions standards take effect), larger factories, power plants and other facilities that are considered major sources under the Clean Air Act on the basis of conventional pollutants (such as nitrogen oxides or particulates), will be required to include greenhouse gases in Prevention of Significant Deterioration (PSD) pre-construction permits and Title V operating permits, if such greenhouse gas emissions equal or exceed 75,000 tons of carbon dioxide equivalent (CO₂e) annually. Beginning in July 2011, new construction projects that emit 100,000 tons of greenhouse gases or undertake modifications increasing emissions by more than 75,000 tons per year will also be subject to the new greenhouse gas requirements and may have to install best available control technology (BACT) and account for emissions in their operating permits. EPA has stated that these thresholds will be lowered over time; however, under the Final Rule, no facility emitting less than 50,000 tons of CO₂e annually will be subject to permitting requirements prior to 2016.

EPA anticipates that approximately 1600 facilities will need PSD permits, addressing greenhouse gas, each year and that about 550 additional facilities will need Title V permits covered by this rule. It is uncertain how much greenhouse gas control technology will cost, but current methods of avoiding or capturing greenhouse gases can range from \$20 - \$150 per ton. EPA is expected to issue guidance by the end of the year on the technology and cost issues.

The new 100,000, 75,000 and 50,000 ton thresholds are somewhat higher than the initial thresholds included in EPA’s draft rulemaking in October 2009, which proposed to set the threshold at 25,000 tons of CO₂e. See Andrews Kurth Client Alert September 25, 2009. The reason for the increase, according to EPA Administrator Lisa Jackson, was to address concerns expressed by state regulators that permitting smaller facilities would overwhelm the permitting process, and that Congress never intended smaller facilities, such as schools and apartment buildings, to be covered under the rule. EPA is expected to initiate additional rulemaking by July 2012 regarding whether certain small businesses should be permanently exempt from these regulations and whether additional sources should be phased in. Even with the higher threshold, the rule will cover facilities that are responsible for a majority (70%) of greenhouse gas emissions from stationary sources in the U.S., which includes sources such as power plants and refineries.

Over the last several months, EPA has been aggressively deploying its Clean Air Act authority to impose regulations on greenhouse gases in a variety of contexts. See Andrews Kurth Client Alert March 31, 2010. The final Tailoring Rule was published in the *Federal Register* on June 3, 2010. Challenges to the rule must be brought within 60 days of publication in the *Federal Register*, or in other words, by August 2, 2010.

1. “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule,” 70 Fed. Reg. 31,514 (June 3, 2010).