



May 2010

## ENVIRONMENTAL UPDATE

**EPA Issues Rule Regulating Larger Sources of CO<sub>2</sub> Emissions**

On May 13, the U.S. EPA published the final version of its “Tailoring Rule,” setting higher greenhouse gas (GHG) emission thresholds for triggering applicability of the federal Clean Air Act’s Prevention of Significant Deterioration (PSD) pre-construction permit and Title V operating permit programs. The Tailoring Rule establishes a three-phase approach to permitting major sources of GHGs, with a potential for additional phases. Thresholds for the traditional Clean Air Act pollutants (generally 100 tons per year, or 10 tpy for “Hazardous Air Pollutants”) would have subjected huge numbers of facilities, including schools, commercial businesses and small farms to the PSD and Title V programs by virtue of their GHG emissions.

**PHASE 1: JANUARY 2, 2011 TO JUNE 30, 2011**

Only sources otherwise subject to PSD due to their emission levels of non-GHG regulated pollutants and that have the potential to emit 75,000 tpy of GHG emissions (new or increased emissions, expressed as “CO<sub>2</sub> equivalents” or “CO<sub>2</sub>e”) must undergo PSD review and incorporate PSD controls (i.e., Best Available Control Technology (BACT)) for GHGs. Moreover, any existing major source of regulated non-GHG pollutants that applies for, renews or revises a Title V permit must account for GHG emissions in its permit application.

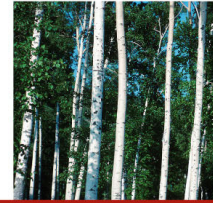
**PHASE 2: JULY 1, 2011 TO JUNE 30, 2013**

New sources that emit or have the potential to emit at least 100,000 tpy of GHG must satisfy PSD review and incorporate BACT. Furthermore, any physical change or change in method of operation at a major stationary source that results in a net increase of at least 75,000 tpy of GHG will trigger PSD review and require PSD controls. Sources that emit at least 100,000 tpy of GHG will be required to obtain a Title V permit if the source does not already have one.

**PHASE 3: EFFECTIVE JULY 1, 2013**

Threshold GHG emission levels have not yet been established for July 1, 2013 and beyond. The EPA will begin a rulemaking in 2011 to set future thresholds; the thresholds may be reduced to 50,000 tpy.

Throughout these three phases, the EPA commits to exploring streamlining mechanisms, for example, by establishing emission limits for source categories that constitute “presumptive BACT,” developing general permits and implementing electronic permitting procedures.



The EPA also plans to conduct a study, to be completed by April 30, 2015, of the implementation and effectiveness of Phases 1 through 3, which will determine whether the EPA will establish lower thresholds to permit smaller sources (i.e., less than 50,000 tpy). Any additional rulemaking that will occur as a result of the study will be issued by April 30, 2016.

Alternatively, the EPA indicates that its study may lead to the promulgation of a permanent exclusion for small sources, if it has not already done so in Phase 3. Consistent with its approach in the proposed Tailoring Rule, the EPA is unwilling to commit to ever reducing CO<sub>2</sub>e thresholds down to the statutory thresholds in the Clean Air Act for permitting under PSD or Title V.

The May 13 final rule is significantly different than the Tailoring Rule proposed on September 30, 2009. The EPA proposed immediately applicable thresholds ranging between 10,000 tpy and 25,000 tpy of GHG (depending on whether it was a new source or a modification to an existing source), based on two judicial doctrines for statutory interpretation by agencies: “absurd results” and “administrative necessity.” In the final phased approach, the EPA uses the “absurd results” and “administrative necessity” doctrines, as well as the “one-step-at-a-time” doctrine to avoid addressing smaller sources. The EPA asserts that each doctrine separately justifies the phased approach in order to avoid untenable permitting volume at the federal and state levels and the heavy cost burden upon smaller sources that would result if the PSD and Title V statutory thresholds of 100 tpy and 250 tpy immediately applied to GHGs.

The EPA estimates that the imposition of BACT on the large CO<sub>2</sub> emitters will capture up to 67 percent of the nation’s GHG emissions, but nevertheless states that the burden of this rule will be virtually non-existent, because it views the “Tailoring Rule” in Orwellian logic, as constituting regulatory relief, as opposed to new regulatory requirements. During the first two phases, the EPA estimates that over 6 million sources of GHGs that otherwise would require Title V permits and “tens of thousands” of sources that otherwise would require PSD permits will continue to be operated or constructed without a Title V or PSD permit. According to the EPA, this will result in billions of dollars in avoided costs in each of the first two phases.

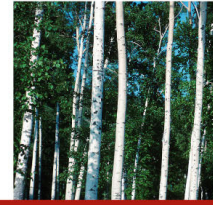
While the rule becomes final in the next 60 days, it is expected to be appealed by both environmental groups, which argue that it does not go far enough, and regulated entities. Therefore, there is a possibility that the rule, and its associated deadlines, may be postponed for years while litigation ensues.

#### **FOR MORE INFORMATION**

For more information, please contact:

Chris Wiest	513.352.6660	<a href="mailto:Chris.Wiest@ThompsonHine.com">Chris.Wiest@ThompsonHine.com</a>
Wray Blattner	937.443.6539	<a href="mailto:Wray.Blattner@ThompsonHine.com">Wray.Blattner@ThompsonHine.com</a>

or any member of our **Environmental** practice group.



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