

KIRKLAND ALERT

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EPA's Greenhouse Gas Rules Overcome Major Obstacle to Implementation

The Environmental Protection Agency ("EPA") recently provided its final rule¹ to implement its regulation of greenhouse gas ("GHG") emissions for stationary sources under the Clean Air Act ("CAA")². The final rule includes the so-called "tailoring rules" because they focus the regulations on a subset of all emissions sources that are considered problematic. These tailoring rules are generally consistent with the rules and timeline proposed by the EPA in its February 22, 2010 letter to several Senators (see *Kirkland Alert*, "EPA Provides Initial Roadmap for Greenhouse Gas Regulation Under the Clean Air Act", http://www.kirkland.com/files/alerts/EPA_Provides_Roadmap_for_GHG_Regulation.pdf). The final rule sets a significantly higher threshold for the amount of GHG emissions from a source that will initially trigger regulation than the proposed rules (75,000 tons/year v. 25,000 tons/year). Unfortunately, there is still no clear guidance or standard for the technology that regulated GHG emissions sources will need to utilize to control GHG emissions.

The rule addresses six different GHGs.³ Sources of these GHGs will be regulated on two criteria: (i) the potential to emit an amount of such GHGs above a threshold and (ii) such GHG's potential affect on global warming. The first criterion, a GHG emission source's potential to emit GHGs, will be measured on a net basis. The second criterion is a specific GHG's global warming potential ("GWP"). To address differences in GWPs among the gases, emissions of GHGs other than carbon dioxide are translated into carbon dioxide equivalents ("CO₂e") based on each gas' GWP. A source's GWP total will be calculated by summing the CO₂e of all GHGs emitted by that source. If, for example, a modification to a facility has the potential to lead to a large increase in one of the GHGs, but a net decrease in the emissions of all six GHGs, the facility may not be subject to regulation, even if the potential CO₂e emissions would be above the thresholds discussed below.

The rule also addresses the "potential" of a source to emit an amount of GHGs. Pursuant to its stated goal of tailoring the regulations to apply to major GHG sources, the final rule states that the EPA is considering limiting "potential" emissions to reflect those generated by the actual operating hours of a source. The alternative (consistent with some historical practice) would be to define "potential" emissions as those that would result from continuous operation of a source.

Unless Congress enacts legislation to overturn or supercede the final rule, in approximately one year, large sources of GHG emissions will be regulated, whether they are currently regulated under the CAA or not.

Implementation of Final Rules

The final rule, issued on May 13, 2010, sets thresholds for GHG emissions that define when permits under the CAA's PSD⁴ and title V permit programs are required for new and existing industrial facilities. The rule establishes a schedule that will initially focus CAA permitting programs on the largest sources of GHG emissions, and then expands to cover sources of GHGs that may not have been previously covered by the CAA for other pollutants.

The EPA intends to begin regulation of GHG emissions in January, 2011. Regulation will take place in two primary phases for large sources, with a longer third phase of study and implementation of follow on rules for smaller sources of GHG emissions.

Phase I - January 2, 2011 to June 30, 2011

- Sources of emissions currently subject to the PSD and title V permitting program⁵ would be subject to GHG emission regulation. All PSD permits for sources which have the potential to increase (i) net GHG emissions and (ii) GHG emissions by 75,000 tons/year CO₂e would need to address GHGs in their permitting process. All sources of emissions that are subject to the title V program will need to address GHGs in their permits, regardless of the amount of such emissions.
- For the PSD program, new and modified sources of GHG emissions which have the potential to increase by 75,000 tons/year CO₂e or more would need to determine the Best Available Control Technology (“BACT”) for their GHG emissions.
- During this time, no sources would be subject to CAA permitting requirements due solely to GHG emissions.

Phase II - July 1, 2011 to June 30, 2013

- For the first time, PSD and title V permitting programs will cover sources based solely on their emissions or potential emissions of GHGs. Thus, a source may be subject to PSD and title V permitting requirements even if its level of non-GHG emissions would not trigger these requirements.
- Thresholds for PSD regulation are (regardless of the amounts non-GHG emissions): (i) for new sources, the potential to emit 100 or 250 tons/year GHGs (as applicable) and 100,000 tons/year CO₂e and (ii) for modified sources, any net increases in the emissions of GHGs and increases of 75,000 tons/year CO₂e for modified sources. Thresholds for title V regulation are (regardless of the amounts of non-GHG emissions) the potential for emissions of (i) 100 tons/year of GHGs and (ii) 100,000 tons/year CO₂e.

Phase III Follow-on Provisions

- Notwithstanding the Phase I and II thresh-

olds for regulation of GHG emissions, smaller sources of GHG emissions (less than 75,000 tons/year CO₂e) will become regulated. The final rule notes that certain smaller sources may be excluded from the PSD and title V programs. The primary questions remaining are which GHG emissions sources will be excluded from regulation and what the ultimate threshold for GHG emissions will be.

- The EPA has committed to provide an additional rulemaking regarding smaller sources of GHG emissions by July 1, 2012. This rule will take effect on July 1, 2013. GHG emissions sources of 50,000 tons/year CO₂e or more will become subject to the PSD and title V programs.
- The EPA has also committed to exempting GHG emissions sources of less than 50,000 tons/year CO₂e from the PSD and title V programs until at least April 30, 2016.

BACT Implementation

The EPA acknowledges in its final rule that it will need to provide information and guidance on what constitutes BACT for GHG emissions. The EPA anticipates providing “technical guidance and database tools” by June 2010, and “policy guidance” by the end of 2010.

The EPA has convened a Climate Change Workgroup (“WG”) to address issues relating to BACT for GHG emissions. The WG released its Interim Phase I Report on February 3, 2010, which summarizes its discussions on several issues related to BACT analysis.⁶ While identifying some general areas of agreement, the report also highlights the many questions EPA will face in applying the PSD permitting process to GHGs. The WG also reviewed a case study involving a voluntary GHG BACT analysis conducted for Calpine Corporation’s 612 MW natural gas-fired power plant in Hayward, California. The analysis concluded that high-efficiency power generation technology was the only available and feasible BACT for GHGs.

Congressional Opposition to the Final Rules

Yesterday, June 10, the US Senate defeated a resolution that, if it had passed, would have prevented the final rules from taking effect and would have prevented the EPA from proposing further regulations of GHGs under the CAA. The Senate vote was 53 against to 47 in support, largely along party lines. A simple majority of 51 votes was needed for passage of the resolution. Although the House of Representatives still has similar resolutions pending, it appears unlikely that the resolution will be enacted due to yesterday's Senate vote.

The resolutions of disapproval were introduced under the provisions of the Congressional Review Act of 1996 ("CRA")⁷. The CRA provides a fast track and reconciliation process for resolutions of disapproval of agency rulemakings to enable the resolution to bypass some of the standard roadblocks to the enactment of legislation. The three House versions of the resolution have been referred to committee, but no further action has taken place on them.

If the House approves the resolution, the version approved will be sent to the Senate for a vote. If both the House and Senate pass the resolution, it will be submitted to the President for consideration. If the President vetoes it, the final rule will become effective unless Congress can override the veto within 30 ses-

sion days after receiving the President's veto. There is no expedited procedure for committee or floor consideration of disapproval resolutions in the House. If the House does not pass the resolution before the end of the current session, it will terminate, and will not be able to be revived.

Other Challenges to Regulation of GHGs under the CAA

There are other legal challenges to the EPA's regulation of GHGs under the CAA. The EPA's basis for the regulation of GHGs under the CAA, its endangerment finding,⁸ has been challenged by seventeen petitions for review involving more than 70 petitioning parties. The petitioners include the Attorney Generals of Texas, Virginia, and Alabama, as well as a wide range of companies and trade groups. The petitions have been consolidated into one case before the D.C. Circuit.⁹

Some of the same groups have challenged the EPA's so called "Johnson Memo."¹⁰ Among other things, the Johnson Memo has been interpreted by the current EPA to provide that EPA's authority to regulate stationary GHG emissions sources is triggered by the EPA's issuance of regulations governing automobiles.¹¹ The Johnson Memo has been challenged in the D.C. Circuit by eighteen different groups.¹²

¹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31513 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71).

² 42 U.S.C. § 7401 et.seq. (2006).

³ Carbon dioxide ("CO₂"), Methane ("CH₄"), Nitrous oxide ("N₂O"), Hydrofluorocarbons ("HFCs"), Perfluorocarbons ("PFCs") and Sulfur hexafluoride ("SF₆").

⁴ New Source Review Prevention of Significant Deterioration ("PSD").

⁵ PSD: construction related permit program; title V: operating permit program.

⁶ Available at http://www.epa.gov/air/caaac/climate/2010_02_InterimPhaseIReport.pdf

⁷ 5 U.S.C. § 801 et. seq. (2006).

⁸ See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66495 (December 15, 2009) (to be codified at 40 C.F.R. ch. 1).

⁹ *Coalition for Responsible Regulation, Inc. et al. v. Environmental Protection Agency*, No. 09-1322 (D.C. Cir. February 18, 2010) (order for consolidation of cases).

- ¹⁰ Memorandum from Stephen L. Johnson, Administrator, on EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program, at 1 (Dec. 18, 2008) (*available at* http://www.epa.gov/nsr/documents/psd_interpretive_memo_12.18.08.pdf).
- ¹¹ *See Agency Completes Reconsideration of GHG Permitting Policy* (Mar. 29, 2010), *available at* <http://www.epa.gov/nsr/guidance.html>.
- ¹² *See, e.g., Coalition for Responsible Regulation v. EPA*, No. 10-1073, (D.C. Cir. filed April 2, 2010); *Southeastern Legal Foundation v. EPA*, No. 10-1083 (D.C. Cir. filed April 15, 2010); *Clean Air Implementation Project v. EPA*, No. 10-1099 (D.C. Cir. petition filed May 17, 2010).

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