



# Environmental Newsletter

April 2, 2010

## EPA Issues National Greenhouse Gas Standards on Autos

*Despite legal uncertainty, EPA's action sets in motion imminent regulation on broad sectors of the economy, apart from any legislation Congress may enact.*

By David C. Weber

On April 1, 2010, the U.S. Environmental Protection Agency ("EPA") and the Department of Transportation's National Highway Safety Administration promulgated a final joint rule establishing corporate average fuel economy ("CAFE") standards and greenhouse gas ("GHG") emissions limits for new light-duty cars and trucks sold in the U.S. The joint rule is the product of a White House-brokered agreement announced last May, in which the major automakers, infused with federal bailout money, acquiesced to the imposition of new nationwide mileage standards. The joint rule is significant, as it could mean an estimated 40 percent improvement in fuel economy by virtue of fleet average requirements of 35.5 miles a gallon by 2016. Because GHG emissions will be "subject to regulation" after the effective date of **the joint rule for light-duty cars and trucks, the joint rule will effectively trigger EPA to regulate GHG emissions from stationary sources**. The potential impacts of such regulation on stationary sources are discussed below.

**The Fallout--Paving the Way for Regulation on Broad Sectors of the Economy.** Under the joint rule, EPA will finalize the first-ever national GHG emissions standards pursuant to the Clean Air Act ("CAA"). These standards will take effect on January 2, 2011. According to EPA, this will automatically trigger CAA permitting requirements for new and modified "major" stationary sources of GHGs, such as power and chemical plants, natural gas transmission facilities, and larger commercial buildings. Once these requirements are triggered, affected sources are then required to obtain at least two types of permits--a Prevention of Significant Deterioration ("PSD") preconstruction permit that will establish GHG emissions limits, and a Title V operating permit. On March 29, 2010, EPA attempted to clarify the timing of this process when it issued a final interpretive memorandum entitled "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs" ("Interpretative Memorandum"). The memorandum addresses when a pollutant, in this case, a GHG, becomes "subject to regulation" under the CAA.

**Background.** In 2007, the U.S. Supreme Court in Massachusetts v. EPA, 549 U.S. 497 (2007), ruled that GHGs were "air pollutants" within the plain meaning of the CAA. After the decision in Massachusetts, environmental groups sought to immediately require EPA to set GHG emission limits on PSD permits. They argued that GHGs are "air pollutants" under the CAA, and since the PSD program includes a definition of "best available control technology" ("BACT") which applies to all "pollutants subject to regulation" under the CAA, GHGs must also be covered. See, e.g., In re Deseret Power Electric Cooperative, PSD Appeal No. 07-03 (EAB Nov. 13, 2008). In Deseret Power, the Environmental Appeals Board found that EPA had not sufficiently explained the basis for its decision that GHGs were not "pollutants subject to regulation."

In response, EPA issued the "Johnson Memorandum." Memorandum from Stephen Johnson, EPA Administrator, Re: EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal PSD Permit Program (Dec. 18, 2008). In the Johnson Memorandum, EPA clarified that if a pollutant is not yet subject to control through compliance mandates, then the pollutant is not yet "subject to regulation" under the CAA.

**Interpretative Memorandum.** On February 17, 2009, the new administration granted a petition to conduct a rulemaking on the Johnson Memorandum to allow for public comment. This process concluded on March 29th when EPA issued the Interpretative Memorandum, which upheld EPA's prior interpretation. In so doing, EPA affirmed the position that GHG emissions are not currently "subject to regulation," even despite EPA's recent GHG rulemakings, which includes its Endangerment Finding and mandatory reporting requirements. EPA confirmed that GHG emissions would be "subject to regulation" when actual compliance mandates become effective, i.e., when the light-duty car and truck rule goes into effect on January 2, 2011. It is important to note that EPA's interpretation goes beyond issues of GHG regulation under the CAA, and applies equally to any new pollutant that EPA seeks to regulate in the future. Other noteworthy issues raised by EPA in its Interpretative Memorandum included:

- **Energy Efficiency Requirements.** EPA urged state regulators who issue PSD permits before January 2, 2011 to utilize the BACT permitting process to promote technology choices for control of criteria pollutants that will also facilitate the reduction of GHG emissions. Here, regulated sources should expect an increase in proposed "energy efficiency" requirements in PSD preconstruction permits as an indirect means to regulate GHG emissions. Smaller sources that are unlikely to face GHG emission requirements in the first go-around, should nonetheless expect agencies to try to impose new energy efficiency requirements as a surrogate for GHG emission limits. This is especially true given the absence of any clear guidance regarding what constitutes BACT for purposes of GHG emissions.
- **Pending Permits Will Not be Grandfathered.** EPA stated that it will not grandfather permit applications pending on January 2, 2011. Thus, sources that have applied for PSD preconstruction permits, but have not obtained final approval, must go back and apply for permit conditions that contain GHG emission limits. The permitting process can take several months, and even years, which will undoubtedly cause delay for many projects currently being proposed.

**Potential Challenges.** EPA's Interpretative Memorandum conflates two separate Titles of the CAA--Title I establishes the PSD program, whereas Title II establishes the mobile source enforcement program. Industry representatives have argued that EPA's utilization of Title II to regulate Title I sources ignores the CAA's plain language that the PSD program only applies to emissions of a pollutant for which there is National Ambient Air Quality Standard ("NAAQS"). See 42 U.S.C. §§ 7471 and 7475(a). EPA has not proposed to establish NAAQs for GHG emissions. EPA sidesteps these provisions of the CAA, and instead, focuses on the the PSD program's requirement to implement BACT, in which, in defining and requiring BACT, the PSD program imposes requirements on pollutants "subject to regulation." We should expect litigation regarding EPA's Interpretative Memorandum.

**Next Up--EPA's Tailoring Rule.** On September 30, 2009, EPA issued the "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," ("Tailoring Rule"), that would "tailor" the CAA's existing permit programs, the PSD program and the Title V permit program. Under both programs, the CAA is unambiguous: The PSD applicability threshold is set at either 100 tons per year ("tpy") or 250 tpy of "any air pollutant." The Title V applicability threshold is set at 100 tpy of "any pollutant." 42 U.S.C. § 7479(1). EPA's proposed Tailoring Rule attempts to amend the CAA, and create a major stationary source threshold of 25,000 tpy of carbon dioxide equivalent ("CO<sub>2</sub>e"). This threshold level would be used to determine (1) if an existing source would be required to obtain a Title V operating permit, and (2) if a new facility or a major modification at an existing facility would trigger PSD permitting requirements.

**Thresholds in Flux.** Recently, in a February 22, 2010 letter to Senator Rockefeller, EPA's Administrator Lisa Jackson wrote she anticipated that at some point between July 2011 and 2013, EPA will set the threshold level for large sources of GHG emissions at a level that is "substantially higher" than the 25,000 tpy threshold EPA originally proposed in the Tailoring Rule. She added that the "smallest sources" of GHG emissions will not be subject to CAA regulation prior to 2016. The Administrator has since elaborated on her February 22nd letter during a March 3, 2010 hearing before the Senate Interior and Environment Appropriations Subcommittee, where she was reported as saying that if a source is smaller than 75,000 tpy CO<sub>2</sub>e, EPA would not require the source to obtain a PSD permit for the next two years.

**Potential Challenges.** EPA's proposed Tailoring Rule is potentially vulnerable on several fronts. Industry representatives argue that EPA lacks authority to rewrite the CAA and raise the statutory tpy thresholds applicable to the PSD and Title V programs. EPA has countered that the "absurd results" and "administrative necessity" doctrines provide exceptions that allow EPA to depart from the CAA's statutory requirements. Opponents of the

proposed Tailoring Rule argue that EPA has yet to provide an opportunity for the public to comment on the costs and benefits of regulating GHG emissions through the PSD program. This concern appears to be well-founded, as thus far, EPA has only analyzed the costs of excluding sources from the PSD program, and has not accounted for the costs to those sources that will be regulated. Last, industry representatives argue that EPA's proposed Tailoring Rule violates the Title V program, because in their view, EPA cannot unilaterally revise a State Implementation Plan ("SIP") without first allowing states sufficient time to amend their rules and laws and submit amended SIPs to EPA.

Apart from any legislation that Congress may enact, EPA's action to promulgate the first-ever national GHG emissions standards on autos sets the stage for high-stakes regulation on broader sectors of the economy.

If you have any questions about this newsletter, please contact the author listed above or the Riddell Williams attorney with whom you normally consult.

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