

To: Our Clients and Friends

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## EPA Proposes to Use PSD and Title V Programs to Control GHG Emissions

Fulfilling its promise to regulate greenhouse gas emissions regardless of the fate of climate change legislation in Congress, EPA has proposed to use the Clean Air Act's PSD and Title V programs for regulation of greenhouse gas emissions. If it becomes effective, the rule would, for the first time, subject facilities with emissions greater than 25,000 metric tons per year of CO<sub>2</sub> equivalent (mt/CO<sub>2</sub>e) to (1) Title V operating permit requirements for both new and existing sources; and (2) Prevention of Significant Deterioration (PSD) permitting for new construction above 25,000 mt/CO<sub>2</sub>e per year or modifications that would result in GHG emissions increases greater than 10,000 - 25,000 mtCO<sub>2</sub>e per year. EPA has proposed to "tailor" the regulation to apply only to sources emitting GHGs at threshold levels that are higher than the statutory threshold amounts for the PSD and Title V permitting programs set forth in Sections 169 and 502(a) of the Clean Air Act. These higher threshold amounts are intended to limit the number of facilities that would be subject to Title V and PSD requirements in connection with their GHG emissions and allow small business and agricultural operations to avoid these requirements. EPA estimates that 400 new sources and modifications would be subject to PSD review annually under the proposed rule, less than 100 of which would be newly subject to PSD. EPA also estimates that about 14,000 facilities would be subject to Title V permitting for GHG emissions, but that only about 3,000 sources would be newly subject to the operating permit requirements, including notably municipal solid waste landfills.

### **EPA Considers the Proposal to Provide Regulatory Relief**

EPA argues this "tailoring" of the Title V and PSD programs is necessitated by the fact that EPA plans to finalize GHG emissions limits for light-duty motor vehicles in March 2010. Once the light-duty motor vehicle rule is in place, GHG will be "pollutants subject to regulation" under the Clean Air Act and thus will immediately be subject to regulation under the PSD and Title V permitting program. All these actions are consequences of the 2008 *Massachusetts v. EPA* Supreme Court decision, in which a narrow 5-4 majority ruled GHG were "air pollutants" within the meaning of the Clean Air Act. EPA states that without this rule, the statutory provisions in the Clean Air Act would subject an estimated 40,000 facilities to PSD review annually and an estimated 6 million facilities would require Title V permitting.

EPA justifies its proposed higher threshold amounts by relying on the legal doctrines of “absurd result” and “administrative necessity.” The “absurd result” would be burdening small sources with the cost of individualized PSD control technology. The “administrative necessity” is avoiding the paralyzing effect on state agencies that would result from the enormous numbers of permit applications. The preamble devotes more than 100 pages of its proposal to a lively explanation of these doctrines. To avoid these burdens, EPA proposes that the GHG “major stationary source” emissions applicability threshold level be 25,000 tons per year (“tpy”) on a CO<sub>2</sub>e basis, compared to the 100/250 tpy thresholds in effect now for air pollutants. That is, sources that emit at this level or higher would be “major stationary sources” subject to PSD requirements for new facilities or modifications of existing facilities. EPA also proposes a range for the “significant level” of emissions increase at 10,000 to 25,000 tpy CO<sub>2</sub>e for the purpose of determining whether a physical or operational change subjects an existing facility to PSD. The Title V applicability threshold would be 25,000 tpy CO<sub>2</sub>e, compared to the general statutory 100 tpy potential-to-emit threshold. Facilities with GHG emissions exceeding that amount would be “major sources” for Title V permitting purposes.

EPA proposes to complete a study to (1) evaluate the actual administrative burden of this rule; (2) evaluate other potential threshold amounts; and (3) evaluate progress at the state and federal level for streamlining the permitting process for GHG emissions. This study would be completed within five years and followed by a second phase of rulemaking for GHG permitting. EPA is seeking comments on a variety of streamlining methods, including potential use of general PSD permits, electronic permitting and use of permits-by-rule. EPA is also seeking comments on determining Best Available Control Technology for sources with GHG emissions subject to PSD, including use of presumptive BACT for certain source categories to ease the burdens posed by case-by-case BACT determinations.

## Implementation Issues

The tailored emissions thresholds would be effective immediately under the federal PSD and operating permit programs once the rule is finalized. At that time, EPA would put the new thresholds into effect in state, local and tribal levels that run PSD and Title V permitting programs under EPA approval. Those agencies would continue to have the option to seek EPA approval for lower thresholds if they demonstrate they can adequately implement the PSD program at the lower thresholds.

Many view this rule as intended at least in part to encourage Congress to enact climate change legislation, and the rule is unlikely to be finalized if Congress does so. Even if the rule is finalized, litigation can be expected to follow immediately after its adoption. But it is yet another example of the rapidly changing legal and regulatory landscape in the field of Clean Air Act regulation.

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