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EPA’s Proposed Tailoring Rule — Another Significant Step Toward Regulating Climate Change Under The Clean Air Act

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On September 30, 2009, the U.S. EPA released a proposed rule, called the “Tailoring Rule,” that would modify the Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) and Title V permitting thresholds for the emission of greenhouse gases (GHGs). The modified permitting thresholds for GHGs are designed to allow the EPA to directly regulate GHG emissions from specific sources without inundating the permitting system. The EPA believes that this step is immediately necessary because the agency plans to promulgate regulations under the CAA to control GHG emissions, including the proposed rule published two weeks earlier to regulate GHG emissions from light duty vehicles. Although the EPA’s announcement certainly is not the first step the EPA has made toward regulating climate change it would be have the most far-reaching impact. By setting permitting thresholds for GHGs under the PSD and Title V programs, the EPA is setting the foundation for widespread regulation of GHGs under these programs.

The EPA's recent and increasing rulemaking activity appears to indicate that the pendulum of federal climate change law and regulation may be shifting from the U.S. Congress to the Administration, at least for the short term. Although the Congress continues to take small steps toward enacting comprehensive climate change legislation — on the same day that the EPA released its proposed rulemaking language, Senators John Kerry and

Barbara Boxer introduced language for comprehensive climate change and clean energy legislation that is intended to eventually meet the House's Waxman-Markey bill — Congress continues to extend the time horizon in which it predicates to enact such legislation. Currently, neither Congress nor the White House thinks it likely that any such legislation will be enacted during 2009.

The EPA has consistently taken the position that it would prefer that Congress act to address climate change through legislation, but that should Congress fail to act, the EPA will. The proposed Tailoring Rule, so named because it modifies the current CAA permitting thresholds, signifies the EPA's intent to keep pressure on Congress by moving forward with rulemaking. If Congress's legislative horizon continues to expand or legislation fails to pass, the EPA will already have laid the groundwork to put a CAA-based climate change regulatory structure in place.

Nuts and Bolts of the Proposed Tailoring Rule

The full text of the EPA's proposed rule and an EPA Fact Sheet on the rule can be found at http://www.epa.gov/nsr/guidance.html. The following summarizes some of the key provisions.

The proposed rule defines "greenhouse gases" or "GHGs" to include the following gases: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs). In order to account for the varying global warming potential of each of these cases, the EPA proposes to measure each of the gases in the metric of "carbon dioxide equivalent (CO_2-e)", a common international standard practice for measuring greenhouse gases.

The rule would set a new applicability threshold of 25,000 tpy CO_2-e for when stationary sources of GHGs would need to obtain CAA permits under the PSD and Title V programs. The proposed PSD significance level (the level of increased emissions due to major modifications from major sources that triggers PST permitting) is set at 10,000-25,000 tpy CO_2-e. These levels are significantly higher than CAA thresholds for most criteria pollutants, which commonly are set at a significance level of 100 tpy and a stationary source level of 250 tpy. The EPA defends its decision to propose significantly higher levels on the basis that lower levels would produce "absurd results" and could "paralyze[]" state permitting authorities, but as is discussed further below, it is not entirely clear that EPA has the authority to modify these statutorily-set thresholds. Even at these higher levels, the EPA estimates that nearly 70 percent of national GHG emissions that come from stationary sources would fall within the permitting programs.

The EPA estimates that at these higher levels, approximately 14,000 large sources would need to obtain operating permits for GHG emissions, and that of these, approximately 3,000 would be newly subject to CAA permitting requirements. The EPA estimates that under these levels, 400 new sources and modifications would be subject to PSD review each year for GHG emissions. This rule will have broad implications across a large

number of industries, including the following:

- Agriculture, fishing and hunting
- Mining
- Utilities (electric, natural gas, other systems)
- Manufacturing (food, beverages, tobacco, textiles, leather)
- Wood products and paper manufacturers
- Petroleum and coal products manufacturers
- Chemical manufacturers
- Rubber product manufacturers
- Miscellaneous chemical products
- Nonmetallic mineral product manufacturers
- Primary and fabricated metal manufacturers
- Machinery manufacturers
- Computer and electronic products manufacturers
- Electrical equipment, appliance and component manufacturers
- Transportation equipment manufacturers
- Furniture and related products manufacturers
- Waste management and remediation
- Hospitals/Nursing and residential care facilities
- Personal and laundry services
- Residential/private households
- Non-residential (commercial) facilities

Small farms, restaurants, and certain other types of small facilities are not covered by the proposed rule.

Next Steps

The EPA refers to this proposed rule as a "first-phase rulemaking." After five years it proposes to conduct a study of the "permitting authorities' ability to administer the programs going forward," and to engage in a "second-phase rulemaking" within a year after that.

The EPA has stated that it will accept comment on the proposed rule for 60 days after publication in the Federal Register, which is expected to occur shortly. The EPA has set a goal of finalizing this rule by March 2010.

The proposed rule is anticipated to receive extensive public comments, both in favor or and in opposition. Industry opponents are likely to criticize the fact that thousands of facilities will become newly subject to CAA regulation. Environmentalist opponents may argue that the EPA has no statutory discretion to raise the applicability and significance thresholds established in the CAA.

In defense of the rulemaking, the EPA points to the landmark ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the U.S. Supreme Court ruled that GHGs are air pollutants covered by the CAA and that the EPA was required to determine whether or not emissions of GHGs from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. The EPA

takes the position since it has no choice but to regulate GHGs under the CAA, and in order to meet that obligation without entirely inundating permitting authorities with applications from low level emitters of GHGs, it must create an exception to the statutory provisions of the CAA. The agency dedicates a significant portion of the lengthy preamble to the proposed rulemaking to defending its proposed exemption to the terms of the statute, identifying the two separate legal doctrines of "absurd results" and "administrative necessity" as providing the necessary legal foundation. Whether or not this proposed use of either of these relatively uncommon and narrow legal doctrines will stand judicial scrutiny it not known, but should the EPA finalize this rule, it is likely to be judicially tested.

For owners of facilities that have large source emissions of GHGs, the EPA rulemaking, while not unexpected, is another reminder of the increasing legal scrutiny on large source emitters. It follows another recent reminder from the Second Circuit that such facilities continue to face damage claims in court. (Click to read "Second Circuit Revives Climate Change Public Nuisance Lawsuit Against Electric Power Companies," an O'Melveny Client Alert about the decision.)

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