WASTE & RECYCLING NEWS

EPA to regulate GHG emissions under Clean Air Act

Oct. 2 -- The U.S. EPA is ready to regulate greenhouse gas emissions under the Clean Air Act if Congress doesn't pass specific climate change legislation.

EPA Administrator Lisa P. Jackson unveiled a proposal Sept. 30 during the California Governor's Global Climate Summit.

Jackson is proposing large industrial facilities that emit at least 25,000 tons of greenhouse gases annually obtain construction and operating permits covering those emissions. The permits would require the use of "best available control technologies" and energy efficiency measures to minimize emissions. The permits would be required whenever a new facility is built or when an existing facility is significantly modified.

"By using the power and authority of the Clean Air Act, we can begin reducing emissions from the nation's largest greenhouse gas emitting facilities without placing an undue burden on the businesses that make up the vast majority of our economy," Jackson said. "This is a common sense rule that is carefully tailored to apply only to the largest sources -- those sectors responsible for nearly 70% of U.S. greenhouse gas emissions."

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EPA PROPOSES NEW "TAILORING" RULE FOR GREENHOUSE GASES UNDER CLEAN AIR ACT
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EPA Proposes New "Tailoring" Rule for Greenhouse Gases Under Clean Air Act

On September 30, 2009, just as Sens. Barbara Boxer (D-Calif.) and John Kerry (D-Mass.) were introducing their long-awaited global climate bill in the Senate, EPA released a proposed rule under the Clean Air Act (CAA) to "tailor" requirements for greenhouse-gas (GHG) emissions. The proposed rule — if finalized — would affect the scope of two CAA programs for certain air pollution sources: (1) the Prevention of Significant Deterioration (PSD) program for pre-construction and pre-modification review; and (2) the "Title V" permitting program.

The basics of EPA's proposed tailoring regulation are as follows:

For a "first phase" (of at least five years):

Instead of the applicable statutory triggers of 100 or 250 tons per year (tpy), sources of 25,000 tpy or more of CO_2e (carbon dioxide equivalent) will be considered "major sources" for PSD purposes.

Modifications to major GHG sources will trigger PSD at "threshold" levels in the range of 10,000 – 25,000 tpy or more of CO_2e.

Instead of the applicable statutory level of 100 tpy, sources of 25,000 tpy or more of CO_2e will be subject to Title V permitting.

During the "first phase," EPA will study the effects of the tailored programs and determine whether further revisions may be appropriate in light of the statutory tonnage levels. EPA also will work on "streamlining options" in an effort to ascertain whether programs moving towards the statutory levels could be developed.

EPA's Legal Dilemma

The proposed rule's tailoring is prompted by a dilemma EPA faces as it moves to

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finalize certain pending decisions. In *Massachusetts v. EPA* (549 U.S. 497 (2007), the U.S. Supreme Court ruled that GHGs are air pollutants under the CAA and that EPA is required to make a finding on whether GHGs "endanger" public health and welfare. The Obama EPA is well on its way towards making an affirmative finding of "endangerment" and has proposed regulations limiting GHG emissions from motor vehicles that it plans to finalized in March 2010. Once EPA sets regulatory controls on GHGs for motor vehicles, under the structure of the current CAA, many other new requirements would be triggered.

Many observers believe that the current version of the CAA is not well tailored to addressing GHG emissions in a comprehensive fashion, and that major implementation impracticalities would be triggered if EPA moved forward to regulate GHGs under the CAA — the most significant and burdensome being the PSD and Title V programs subject to EPA's new rulemaking proposal.

The Obama administration and others who favor GHG regulations are strongly pushing new legislation from Congress that could help obviate these problems. While the Waxman-Markey Bill narrowly passed the House of Representatives in late June 2009, the prospects for new GHG legislation this year are growing dimmer by the week. The Boxer-Kerry Bill was introduced well behind the sponsors' original timetable, and the bill leaves certain key items open "for further discussion." Moreover, many vote counters are growing increasingly skeptical that the full Senate will approve a GHG bill this year. In the meantime, the regulatory train has been moving at EPA, and EPA is now squarely addressing the PSD and Title V problems associated with regulating GHGs.

Tailoring to Address the Impracticalities

For PSD, the CAA specifies that any new source of air pollution emissions will be considered a "major" source if it emits (depending upon the type of source) either 100 or 250 tpy of pollutants regulated under the CAA. Based on the pollutants currently regulated under the CAA (e.g., sulfur dioxide, particulate matter, and so forth) EPA estimates approximately 300 new PSD applications are filed nationally each year.

Anyone who wants to construct a major source — or modify a major source by increasing emissions over certain threshold amounts — must first obtain a PSD permit from EPA or a state. Depending upon the type of project, the permitting process can involve detailed technical reviews, inter-governmental consultations, public comment and hearings (often highly contentious), and sometimes judicial review. But this process is fairly manageable at the current level (roughly 300) of applications per year.

The Title V permitting process also can involve detailed reviews, and the number of sources required to have permits is much greater. The CAA specifies that generally, any air pollution source with emissions of 100 tpy or more must obtain a Title V permit that will incorporate into one document all of the myriad air pollution requirements to which the source is subject. Based on the pollutants currently regulated under the CAA, EPA estimates there are approximately 11,000 sources subject to Title V permits nationally.

In its tailoring proposal, EPA finds that implementing the statutory requirements in the GHG context would have mind-boggling consequences. EPA says that adherence to the statutory requirements specifying 100 and 250 tpy would put EPA and state agencies in a "paralyzing" bind and create results that Congress could never have intended. EPA cites full regulatory coverage of schools, hospitals, small farms, and restaurants as examples. EPA estimates that instead of 300 new PSD permit applications per year, there would be 40,000. Instead of 11,000 sources being subject to Title V permitting, there would be 6,000,000.

EPA crafted it new proposal to avoid such results. EPA proposes to designate six common GHGs as components of a metric referred to as CO_2e (similar to the GHG monitoring and reporting rule issued last month). The six are carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_20), hydroflourocarbons (HFCs), perflourocarbons (PFCs), and sulfur hexafluoride (SF_6).

Once the proposed rule is finalized, the 25,000 tpy threshold levels would take effect immediately in all EPA-administered PSD programs. For state-administered PSD programs, EPA is proposing a mechanism whereby the state plan would be disapproved to the extent it covered more GHG sources than EPA's regulations required. There would be no immediate PSD effect on any company or facility unless and until the company decided to apply for a PSD permit to construct a new source or modify an existing source. EPA estimates that at the 25,000 tpy level, perhaps only 100 additional new and modified sources would be subject to PSD permitting per year (compared to the current level of approximately 300 per year).

With respect to Title V, EPA estimates approximately 3,000 sources that are not now subject to Title V requirements (approximately 11,000) would become newly-subject to Title V permitting. EPA says that most of these newly regulated sources would be municipal solid waste landfills (due to high methane emissions). Existing facilities with GHG emissions greater than 25,000 tpy that already have Title V permits would not need to revise them immediately. At the end of a five-year period when the operating permit must be renewed, these facilities would be required to include estimates of their GHG emissions in their permit applications.

EPA's Legal Justification

EPA's rulemaking preamble goes to great lengths in propounding legal theories supporting departure from statutory provisions that EPA concedes "are clear on their face." Citing Supreme Court and other federal cases, EPA develops and explains avoidance of "absurd results" and "administrative necessity" grounds to support its position. EPA's legal justification comprises 92 pages of the rulemaking preamble, with a total of 20,035 words. (The standard brief length allowed in the D.C. Circuit is 14,000 words. F.R.A.P. 32(a)(7).)

To buttress its legal position, EPA emphasizes that the proposed tailoring rule is merely the "first phase," and that EPA will be prepared to revise the regulations at the end of a five-year study. During this five-year period, EPA says it will consider whether it could make additional "streamlining" changes to the PSD program.

Among the "streamlining" options EPA is considering are:

- Moving away from the current "potential to emit" elements of the program "to more closely approximate a source's actual emissions"
- Issuing "presumptive BACT" limits through rulemaking for various types of sources
- Employing "general permit" and "permit-by-rule" concepts borrowed from the CAA
- Finding ways to expedite matters through enhanced electronic permitting "e-permitting"

There will be a 60-day public comment period once the proposal is published in the Federal Register.

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