

EPA Issues Final PSD and Title V GHG Tailoring Rule

On June 3, 2010, EPA published its Final PSD and Title V Greenhouse Gas (GHG) Tailoring Rule (75 Fed. Reg. 31,514). The key provisions are as follows (as generally reflected in EPA's Fact Sheet):

Step 1 (January 2, 2011 – June 30, 2011)

- Only major sources currently subject to the PSD permitting program (i.e., those that are newly-constructed major sources, or existing major sources that are modified in a way that significantly increases emissions, of a pollutant other than GHGs) will be subject to permitting requirements for their GHG emissions under PSD.
- For these projects, only new major sources that emit or have the potential to emit 75,000 tpy of GHG, or existing major sources that increase emissions of GHG by 75,000 tpy or more, on a CO₂e basis, will need to determine the Best Available Control Technology (BACT) for their GHG emissions.
- Similarly for the Title V operating permit program, only sources currently subject to the program (i.e., newly constructed or existing major sources for a pollutant other than GHGs) will be subject to Title V requirements for GHGs.
- During this time, no sources will be subject to Clean Air Act permitting requirements due solely to GHG emissions.

Step 2 (July 1, 2011 to June 30, 2013)

- Step 2 increases the sources covered beyond those in Step 1. In this phase, PSD permitting requirements will cover for the first time construction of new stationary sources that emit GHG emissions of at least 100,000 tpy even if they do not exceed the permitting thresholds for any other pollutant. Modifications at existing stationary sources that increase GHG emissions by at least 75,000 tpy will be subject to permitting requirements, even if they do not significantly increase emissions of any other pollutant.
- In Step 2, Title V operating permit requirements will, for the first time, apply to sources based on their GHG emissions even if they would not apply based on emissions of any other pollutant. Facilities that emit at least 100,000 tpy CO₂e will be subject to Title V permitting requirements.
- EPA estimates that about 550 sources will need to obtain Title V permits for the first time due to their GHG emissions. The majority of these newly permitted sources will likely be solid waste landfills and industrial manufacturers. EPA estimates that there will be approximately 900 additional PSD permitting actions each year triggered by increases in GHG emissions from new and modified emission sources.

Step 3

- EPA commits to undertake another rulemaking, which is to begin in 2011 and conclude no later than July 1, 2012. That action will take comment on an additional

step for phasing in GHG permitting, and may address whether certain smaller sources can be permanently excluded from permitting. EPA also plans to explore a range of possibilities for streamlining future GHG permitting with the goal of significantly reducing permitting burdens. EPA will propose streamlining options it believes to be viable in the Step 3 rulemaking.

- Step 3 will not require permitting for sources with greenhouse gas emissions below 50,000 tpy.
- EPA will not require permits for smaller sources in Step 3 or through any other action until at least April 30, 2016.

Other Steps Outlined in the Rule

- By the end of April 2015, EPA commits to completing a study on remaining GHG permitting burdens that would exist if it applies the program to smaller sources. It will consider the results of the study and is required to complete a rule by April 30, 2016 further addressing Clean Air Act permitting for these facilities. In that rule, EPA may decide that streamlining will allow it to phase in more sources, but it may also decide that certain smaller sources should be permanently excluded from permitting.

Implementation

- Step 1 under the rule takes effect on January 2, 2011. EPA asks states to inform the Agency whether they must make rule changes to implement the new GHG emissions thresholds, and when such changes will be adopted. If there are cases where this cannot happen by January 2, 2011, EPA indicates that it will take action to ensure that the existing CAA permitting rules do not apply to sources excluded by the rule.

- EPA also plans to develop supporting guidance and other information to assist permitting authorities as they begin to address permitting actions for GHG emissions for the first time. EPA indicates that it will work with states on technical information and data needs related to identifying BACT requirements for PSD permits. The guidance would first cover source categories that typically emit GHGs at levels exceeding the thresholds established through this rulemaking.

EPA Issues Proposed SIP Call and FIP for GHG PSD Implementation

On August 12, EPA issued two proposed rules – for a SIP Call and a Federal Implementation Plan (FIP) – that are aimed at ensuring that PSD can be implemented for greenhouse gas (GHG) emissions. In the SIP Call proposal, EPA divides states into two categories: (1) ones that do not have authority to issue PSD permits for GHGs, and (2) ones that presumptively have such authority. States that do not have such authority will be subject to a SIP Call. Until these states adopt necessary PSD requirements, a FIP would be in place so that PSD permits can be issued for GHG sources. The objective is to ensure that PSD can be implemented nationwide for GHGs on the schedule outlined in the PSD and Title V Tailoring Rule. The proposals were published in the Federal Register on September 2 (75 Fed. Reg. 53,892, 53,883).

The States that EPA has determined do not have authority to issue PSD permits for GHGs are as follows:

Alaska; Arizona: Pinal County, Rest of State (Excludes Maricopa County, Pima County, and Indian Country); Arkansas; California: Sacramento Metropolitan

AQMD; Connecticut; Florida; Idaho; Kansas; Kentucky: Jefferson County, Rest of State; Nebraska: Lincoln Lancaster, Omaha, Rest of State; Nevada: Clark County; Oregon; Texas

The States that presumptively have authority to issue PSD permits for GHGs are:

Alabama: Jefferson County, Huntsville, Rest of State; California: Mendocino County AQMD, Monterey Bay Unified APCD, North Coast Unified AQMD, Northern Sonoma County APCD; Colorado; Delaware; Georgia; Indiana; Iowa; Louisiana; Maine; Maryland; Michigan; Mississippi; Missouri; Montana; New Hampshire; New Mexico: Albuquerque, Rest of State; North Carolina: Forsythe County, Mecklenburg, Western NC, Rest of State; North Dakota; Ohio; Oklahoma; Pennsylvania: All except Allegheny County; Rhode Island; South Carolina; South Dakota; Tennessee: Chattanooga, Nashville, Knoxville, Memphis, Rest of State; Vermont; Virginia; West Virginia; Wisconsin; Wyoming; Utah

EPA seeks comments on whether states are correctly divided into these two categories. Under the SIP Call proposal, EPA intends to make a finding of “substantial inadequacy” for the states it finds do not have authority to implement PSD for GHGs. It plans to finalize the SIP Call by December 1 of this year. States that are subject to the SIP Call must respond within twelve months, but may respond in as short a period as three weeks, i.e., by December 22. EPA indicates that it will not finalize the SIP Call for any state that submits a proposed GHG SIP provision by December 1.

As an apparent check on states asserting lack of authority, EPA requests detailed information on the basis for states concluding that they are not able to implement PSD for GHGs in their

states. It asks for regulations, state constitution provisions, and other provisions of law that may limit the authority to implement PSD for GHGs.

EPA fails to address the significant concern that some states only have authority to apply PSD to GHGs at the statutory 100/250 tpy major source threshold and zero tpy significance level. EPA’s accelerated approach for GHGs differs greatly from the authorization that is provided for adoption of SIP provisions to address pollutants under new National Ambient Air Quality Standards.

Under section 110 of the Act, states have three years to adopt an implementation plan for a newly-regulated pollutant.

According to the September 2 FR notices, comments are due on the SIP Call and FIP proposals by October 4. However, in a separate FR notice published on August 30 regarding the date for the FIP public hearing, EPA indicates that comments on the FIP proposal must be postmarked by October 14, i.e., thirty days after the September 14 hearing.

Fourth Circuit Decision Overturns Public Nuisance Ruling

On July 26, 2010, in *North Carolina v. TVA*, Case No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010), the Fourth Circuit overturned an injunction granted by a North Carolina district court under which TVA would have been required to install controls at four power plants in Alabama and Tennessee based on the lower court’s determination that the TVA plants’ emissions constituted a public nuisance in North Carolina. The Fourth Circuit summarized the basis for its decision, as follows:

This ruling [the district court’s injunction] was flawed for several reasons. If allowed to stand, the injunction would encourage courts to use vague

public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike. Moreover, the injunction improperly applied home state law extraterritorially in direct contradiction to the Supreme Court's decision in *International Paper Co. v. Ouellette* [citation omitted]. Finally, even if it could be assumed that the North Carolina district court did apply Alabama and Tennessee law, it is difficult to understand how an activity expressly permitted and extensively regulated by both federal and state government could somehow constitute a public nuisance. For these reasons the judgment must be reversed.

Highlights of the Fourth Circuit decision are set out below:

- At the outset, the Court's opinion contains an extensive discussion of the relevant provisions of the Clean Air Act that address attainment and maintenance of National Ambient Air Quality Standards, which the Court indicates it explained at some length "in order to emphasize the comprehensiveness of its coverage."
- The Court states that to "replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation

will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country."

- The opinion quotes approvingly from the Supreme Court's decision in *International Paper*, which the Fourth Circuit states "addressed this precise problem of multiplicity" and "emphasized that allowing 'a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states.'"
- The Court states that "public nuisance law doubtless encompasses environmental concerns," but states that, if "we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bull fights," we will be "hard pressed to derive any manageable criteria."
- The Court recognizes the existence of the Clean Air Act's savings clause, but states that the Court "cannot allow non-source states to ascribe to a generic savings clause meaning that . . . Congress never intended."
- After reviewing the Act's prescribed role for federal and state agencies and their respective processes, the Court states that "it is not open to this Court to ignore the words of the Supreme Court, overturn the judgment of Congress, supplant the conclusions of agencies, and upset the reliance interests of source states and permit holders in favor of the nebulous rules of public nuisance."
- The Court specifically rules that the district court's decision "compromised principles of federalism by applying North Carolina law extraterritorially to TVA plants located in Alabama and Tennessee and states further that there is "no question that the law of the states where emissions sources are located . . . applies in an interstate nuisance dispute."

- The Court further states that “TVA’s plants cannot logically be public nuisances under Alabama and Tennessee law where TVA is in compliance with EPA NAAQS, the corresponding state SIPs, and the permits that implement them.”
- Finally, the Fourth Circuit points out that North Carolina has an avenue specifically provided under the Clean Air Act, section 126, under which it can pursue its concerns about interstate pollution.

Eighth Circuit Applies Statute of Limitations and Concurrent Remedy Doctrine in Rejecting PSD Claims

On August 12, 2010, in *Sierra Club v. Otter Tail Power Co.*, No. 09-2862, 2010 WL 3168434 (8th Cir. Aug. 12, 2010) the Eighth Circuit issued a ruling on the Sierra Club’s challenge to a number of projects undertaken at Otter Tail’s power plant in Big Stone, South Dakota. Sierra Club had alleged PSD and NSPS violations. The bulk of the decision focuses on Sierra Club’s PSD violations. The Court denied Sierra Club’s PSD and NSPS claims, specifically ruling that the federal five-year statute of limitations bars claims for civil penalties for projects undertaken more than five years prior to the action and, under the concurrent remedy doctrine, claims for equitable relief (*i.e.*, BACT) are barred as well. (The concurrent remedy doctrine does not apply in actions brought by the government.)

The projects involve three types of changes at the power plant. The first was a change to the primary fuel from lignite coal to sub-bituminous coal in 1995. The second was carried out in 1998 to increase the surface area of the primary superheater of the plant’s boiler. The third involved changes in 2001 to allow the plant to supply steam to a nearby ethanol plant.

The action was brought by Sierra Club under the citizen suit provision in section 304(a) of the Act. EPA filed an *amicus* brief in support of Sierra Club’s legal position that the five-year statute of limitations did not bar its claims.

Highlights of the Court’s decision are as follows:

- The Court first reviewed the statutory language and concluded that the PSD requirements and the Act’s citizen suit provisions are focused on construction, not operation. The Court noted that other provisions of the Act, in contrast, clearly establish operational conditions. It pointed out that, where “Congress has intended to establish operational conditions under the Clean Air Act, it has clearly said so. But it has not done so for the PSD program.”
- The Court rejected Sierra Club’s claim that several regulatory provisions establish an ongoing duty for a polluting facility to obtain a PSD permit and to employ BACT as conditions of operation. The Court ruled that “a close reading” of the provisions pointed to by Sierra Club “shows that interpretation is incorrect.” The Court’s opinion includes a good review of the statutory provisions that EPA and Sierra Club rely on in arguing that the violation of the PSD requirements would be a continuing violation.
- The Court expressly notes that the command to apply BACT “is not a freestanding requirement.” It points out that its conclusion is “bolstered by the practical nature of BACT,” which results in establishing BACT limits that “are tailored to each facility ‘on a case-by-case basis’ during the PSD permitting process.”

- The Court specifically rules that the Eleventh Circuit’s decision finding that the five-year statute of limitations bars claims for civil penalties and that, under the concurrent remedy doctrine, equitable relief is barred as well, properly interprets the Act and EPA’s regulations and correctly applies the concurrent remedy doctrine.
- The Court distinguishes the Sixth Circuit’s decision in *National Parks & Conservation Association v. TVA*, explaining that the Tennessee SIP contains a provision that was read to require an ongoing BACT requirement.
- After concluding that civil penalties are barred under the five-year statute of limitations, the Court next reviews the legal principles under which equitable remedies are barred where civil penalty provisions are statutorily barred. The Court approvingly quotes the Eleventh Circuit’s decision in which it stated that “where a party’s legal remedies are time-barred, that party’s concurrent equitable claims generally are barred’ as well.” The Court then reviews Sierra Club’s argument that the concurrent remedy doctrine was improperly applied in the Eleventh Circuit’s decision and rules that the Eighth Circuit’s interpretation of the concurrent remedy doctrine is “in accord with” the Eleventh Circuit’s decision and others that it cites.
- enforcement action.” It further points out that such a scheme “could lead to simultaneous suits by multiple parties raising the same or similar issues” and thus “would not only waste judicial resources, but could also result in inconsistent decisions.”
- Sierra Club also argues that the district court’s interpretation effectively
- Finally, the Court rejects Sierra Club’s claim that the 2001 ethanol plant project triggered NSPS. The Court finds that the proper time for Sierra Club to challenge the absence of NSPS limits was when Otter Tail obtained its permit for the ethanol plant project. In addition, the Court ruled that Sierra Club’s claim, at this point, represents an impermissible collateral attack on Otter Tail’s Title V operating permit. The Court finds that Sierra Club’s challenge would be properly brought in the first instance in the appellate court, and the district court would not have jurisdiction to consider Sierra Club’s Title V claim. The Court finds that, by virtue of the fact that Sierra Club could have raised its NSPS claim during the permitting process and did not do so, its challenge is not subject to review in the enforcement action. The Court rules that Congress effectively foreclosed the alternative avenue of citizen suit enforcement by creating an avenue of judicial review under section 307.
- The Court points out that the interpretation that Sierra Club urges “would allow plaintiffs either to challenge permitting authorities’ applicability determination during the permitting review process or to wait and raise the same issues in an “excises the ‘permit shield’ provision.” It bases it on the fact that, although the permitting authority determined that NSPS did not apply to the 2001 modifications, it did not explicitly incorporate that determination in the facility’s permit. The Court states that the district court’s interpretation may restrict the permit shield’s applicability, but “this does not persuade” the Court

that its interpretation is erroneous. The Court then rules that its jurisdictional provisions govern and that a “fundamental rule of construction holds that [the Court] must not expand federal court jurisdiction in service to a broad reading of the permitting shield.”