



Update on the Proposed Greenhouse Gas Tailoring Rule

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On October 27, 2009, the United States Environmental Protection Agency ("EPA") published its "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" in the Federal Register and opened the rule to public comment ("Tailoring Rule"). 74 Fed. Reg. 55292. Currently, EPA is working on yet another rule to ensure states will implement the Tailoring Rule.

The Tailoring Rule seeks to impose a new threshold of 25,000 tons per year (tpy) of GHGs that would trigger the requirement to obtain Prevention of Significant Deterioration (PSD) and Title V permits for new and existing sources. A carbon dioxide equivalent (CO₂e) is the proposed metric for determining GHG emission rates of any combination of six GHGs: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). Capturing these GHGs under the new threshold, EPA estimates that this new rule would cover nearly 70 percent of the national GHG emissions coming from stationary sources.

Under the Title V operating permits program, an existing industrial facility emitting 25,000 tpy CO₂e or more would now be required to obtain an operating permit for existing industrial facilities. Facilities with GHG emissions below this threshold would not be required to obtain an operating permit. The Tailoring Rule would establish a major stationary source threshold for the PSD program for GHG to 25,000 tpy CO₂e. This threshold level would be used to determine if a new facility or a major modification at an existing facility would trigger PSD permitting requirements. EPA is also proposing to establish a significance level threshold between 10,000 and 25,000 tpy CO₂e that would apply to existing major sources making modifications. A modification that results in an increase of emissions above the significance level would be

required to obtain a PSD permit. In addition, new or modified facilities with GHG emissions that trigger PSD permitting requirements would need to apply for a revision to their operating permits to incorporate the best available control technologies and energy efficiency measures to minimize GHG emissions.

Comments on this proposed rule were due on December 28, 2009. EPA received a significant number of comments, some of which challenged the legal basis for the rule. One of those challenges is legality of the Tailoring Rule's reliance of the doctrines of "absurd results" and "administrative necessity" to support use of a 25,000 tpy CO₂e threshold.

States have warned EPA that it could take up to two years to change state laws and rules to implement the EPA's proposed Tailoring Rule. To address this concern, EPA is currently working on an "implementation rule" that it intends to use to identify state rules that are inadequate to carry out the tailoring rule proposal, require states to revise their rules to implement and carry out this permitting rule, and to utilize federal plans in cases where state laws and rules are inadequate under the proposed Tailoring Rule. For EPA to carry the burden of administering and enforcing this new rule would provide additional strain on agency resources, and likely create a longer permitting process timeline. Perhaps with this additional administrative burden in mind, the Obama Administration announced on February 1, 2010, the EPA's budget proposal of \$10 billion with \$43 million budgeted for additional climate change efforts.



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