

To: Our Clients and Friends

September 17, 2010

## EPA Phases In Regulation of Greenhouse Gas Emissions Under the Prevention of Significant Deterioration Program of the Clean Air Act

The U.S. Environmental Protection Agency (EPA) has been working overtime to create a regulatory structure for addressing the emission of Greenhouse Gases (GHGs) under the Prevention of Significant Deterioration (PSD) provisions of the Clean Air Act. Anticipating the applicability of the PSD requirements to GHG emissions as a consequence of EPA regulations issued in the wake of the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the agency has issued a series of rulemakings to put into place a phased approach to the regulation of such emissions under the PSD program. These rulemakings seek to ensure nationwide uniformity of regulation, even in States that have their own delegated PSD programs. To that end, EPA has this month proposed regulations that would assure the implementation of EPA's phased approach in those States whose PSD regulations do not encompass GHGs. These developments are summarized below.

The PSD program is applicable to new and modified major stationary sources. Among its principal requirements is that a new major source — or an existing source that undergoes a non-routine modification that significantly increases its emissions — obtain a PSD permit that, among other things, imposes the Best Available Control Technology (BACT) for the affected pollutants. This permitting process for new and modified sources is also known by the general term "New Source Review" (NSR).

### 1. How GHGs Came to be Regulated under the PSD Program

In *Massachusetts v. EPA*, the Supreme Court held that carbon dioxide and other GHGs are "air pollutants" within the meaning of the Clean Air Act. Thereafter, on May 7, 2010, EPA and the U.S. Department of Transportation published a rule limiting GHG emissions from automobiles and light trucks. 75 Fed. Reg. 25324 (May 7, 2010). This light duty vehicle rule takes effect on the first date of the 2012 model year — January 2, 2011. 75 Fed. Reg. at 25445 The six GHGs subject to regulation under the light duty vehicle rule are:

- Carbon Dioxide (CO<sub>2</sub>)

This Client Bulletin is published for the clients and friends of Bryan Cave LLP. Information contained herein is not to be considered as legal advice. This Client Bulletin may be construed as an advertisement or solicitation. © 2010 Bryan Cave LLP. All Rights Reserved.

- Methane (CH<sub>4</sub>)
- Nitrous oxide (N<sub>2</sub>O)
- Hydrofluorocarbons (HFCs)
- Perfluorocarbons (PFCs)
- Sulfur hexafluoride (SF<sub>6</sub>)

The light duty vehicle regulation adopted after *Massachusetts v. EPA* directly affects the automobile industry. However, its adoption also has (according to EPA) a considerably broader *indirect* effect, since it opens the door to the regulation of GHGs from major stationary sources under the PSD program. Section 165(a)(4) of the Clean Air Act requires a BACT analysis for “each pollutant subject to regulation” under the Clean Air Act. 42 U.S.C. § 7475(a)(4). Similarly, EPA’s PSD regulations require that a new major stationary source undergo a BACT analysis “for each regulated NSR pollutant that it would have the potential to emit in significant amounts.” 40 C.F.R. § 52.21(j)(2). Many of the other obligations imposed by the PSD regulations are also keyed to the definition of “regulated NSR pollutant.” See, e.g., 40 C.F.R. § 52.21(b) (defining “major stationary source,” “major modification,” “net emissions increase,” “stationary source” and “emissions unit” using the term “regulated NSR pollutant”). The term “regulated NSR pollutant” is, in turn, defined as including “any pollutant that ... is subject to regulation under the [Clean Air] Act [with immaterial exceptions].” 40 C.F.R. § 52.21(b)(50)(iv). EPA has taken the position that these provisions would automatically render the six GHGs identified above to be PSD-regulated pollutants as soon as the light duty vehicle rule becomes effective on January 2, 2011. 75 Fed. Reg. at 31522-23.

A major stationary source subject to PSD regulation is one that emits more than 250 tons of any air pollutant per year (or 100 tons per year if the source falls into certain specified source categories). 42 U.S.C. §§ 7479(1), 7475(a). Since many thousands of stationary sources currently not covered by the PSD program (including ordinary apartment buildings) would trip these thresholds with their GHG emissions, the prospect exists that an avalanche of new PSD applications could result from the application of these thresholds to GHGs, which are emitted in large quantities even by relatively small boilers. The agency’s recently adopted regulations seek to address this problem by gradually phasing in the regulation of GHGs under the PSD program.

## 2. EPA’s “Tailoring” Rule

On June 3, 2010, EPA published a final rule titled “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule.” 75 Fed. Reg. 31513 (June 3, 2010). Among other things, the Tailoring Rule purports to change the applicability threshold for PSD from 100 or 250 tons per year to 75,000 tons per year for GHGs. Since each of the six GHGs has a different global warming potential, this new 75,000 ton threshold is expressed in the common metric of “CO<sub>2</sub> equivalent” (CO<sub>2</sub>e). Total GHG emissions from a stationary source are calculated by adding together the CO<sub>2</sub>e emissions of each of the six GHGs emitted from each of the emission units at the source.

The Tailoring Rule establishes a multi-phase approach to regulating GHGs under the PSD program.

### Phase 1 (January 2, 2011)

During Phase 1, which begins on January 2, 2011, only “anyway” sources — that is, those new and modified sources that would be subject to PSD permitting in any event, due to new or increased emissions of non-GHG pollutants (such as sulfur dioxide), will be subject to PSD regulation with respect to GHGs, and only if their new (or modification-induced increase in) GHG emissions are greater than or equal to 75,000 tons per year of CO<sub>2</sub>e. During Phase 1, no sources will be subject to PSD permitting requirements due solely to GHG emissions.

### Phase 2 (July 1, 2011)

Phase 2, which begins on July 1, 2011, adds two new categories of sources requiring PSD permits for GHG emissions: (i) a new source that emits (or has the potential to emit) 100,000 tons per year of CO<sub>2</sub>e and (ii) a modified source that emits (or has the potential to emit) 100,000 tons per year of CO<sub>2</sub>e with modification-induced emission increases of 75,000 tons per year of CO<sub>2</sub>e. During Phase 2, the Phase 1 sources will continue to be regulated for GHGs as well.

### Phase 3 (July 1, 2013)

The Tailoring Rule sets forth a purportedly “enforceable commitment” to engage in further PSD regulation in a Phase 3 implementation of PSD permitting for stationary sources of GHG emissions. In this portion of the Tailoring Rule, EPA makes the commitment to undertake another rulemaking, beginning in 2011 and concluding by July 1, 2012 (with an effective date of July 1, 2013), with respect to the potential phase-in of the regulation of smaller sources of GHG emissions under the PSD program. This rulemaking may also address whether certain source categories may be “permanently excluded” from PSD permitting. 75 Fed. Reg. at 31575. The Tailoring Rule states that Phase 3 will not require permitting for sources that emit less than 50,000 tons per year of CO<sub>2</sub>e before April 30, 2016. 75 Fed. Reg. at 31578.

## **3. Imposing PSD Regulation of GHGs on EPA’s Schedule in States with Delegated PSD Programs**

The majority of States have their own PSD regulations, and in virtually all of these States, sources are subject to these State-issued PSD regulations rather than those promulgated by EPA. The Tailoring Rule amended the federal PSD regulations but did not itself amend the PSD regulations of individual States. Accordingly, EPA is concerned that, as of January 2, 2011 (the effective date of the light duty vehicle rule discussed above), all sources in States with their own PSD permitting regulations may be subject to the 100 ton and 250 ton thresholds, rather than the much higher thresholds specified in the Tailoring Rule, unless the individual State takes action to amend its requirements.

EPA sought to facilitate rapid State adoption of the Tailoring Rule by drafting what it hopes to be a regulatory shortcut. Recognizing that under the regulatory language in many States the PSD program is applicable to pollutants “subject to regulation,” EPA has incorporated the new 100,000/75,000 ton thresholds discussed above into the federal definition of that term, rather than codifying these thresholds in the PSD definitions of “major stationary source” (40 C.F.R. § 52.21(b)(1)) or the “significance” levels for net emissions increases (§ 52.21(b)(23)(ii)). Thus, the final Tailoring Rule

redefines the term “subject to regulation” so that GHGs emitted below the new, higher thresholds described above are not pollutants “subject to regulation.” In what may be merely wishful thinking, EPA has opined that because the new thresholds are incorporated into the new definition of “subject to regulation” in the federal PSD regulations, “many state ... programs will likely be able to immediately implement our approach without rule or statutory changes by, for example, interpreting the term ‘subject to regulation’ that is part of the applicability provisions for PSD [in the state regulations].” 75 Fed. Reg. at 31518. The validity of this regulatory maneuver is likely to be among the many issues to be tested in court.

EPA has asked each State to notify EPA by August 2, 2010, whether it has the legal authority to implement EPA’s phased approach to GHG regulation under the Tailoring Rule and, if so, when the State will adopt such changes. 75 Fed. Reg. at 31525. EPA further indicates that with respect to any State that does not commit to adopting the Tailoring Rule thresholds for the State PSD program, EPA will take action to limit the EPA approval of the State PSD program. In particular, the Agency indicates that it will modify its approval of the State PSD regulations so that their application to GHG sources below the Tailoring Rule thresholds will no longer be considered part of the EPA-approved State Implementation Plan (SIP). 75 Fed. Reg. at 31526.

On September 2, 2010, EPA proposed two companion rules in its effort to impose the Tailoring Rule’s phased approach on the States.

The first proposed rule is titled “Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call.” 75 Fed. Reg. 53892 (Sept. 2, 2010). This proposed SIP call would apply to 13 States – Alaska, Arizona (certain counties), Arkansas, California (one air quality management district), Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada (one county), Oregon and Texas – that EPA believes do not have the authority under their existing SIPs to sweep GHGs into their PSD programs in accordance with the Tailoring Rule. The draft rule proposes to require the listed States, as well as any other State with a SIP found to have the same inadequacy, to submit corrective SIP revisions to EPA.

The second proposed rule, issued in conjunction with the proposed SIP call described above, is titled “Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan.” 75 Fed. Reg. 53883 (Sept. 2, 2010). In this proposed rule, EPA proposes to issue a Federal Implementation Plan (FIP) to apply in any PSD-delegated State that fails to submit a revised SIP to EPA that would allow the issuance of PSD permits for GHGs consistent with the Tailoring Rule. The proposed rule would apply in the 13 States identified above whose SIPs do not apply the PSD program to GHGs and in other areas that suffer from the same EPA-designated defect. 75 Fed. Reg. at 53886.

#### 4. Conclusion

The Tailoring Rule has been challenged in multiple pending lawsuits brought by industry, environmental groups, various States and others, and it is likely that the rules proposed by EPA on September 2, 2010 will suffer a similar fate after they have been finalized by the agency. The ultimate impact of these measures remains to be seen, but EPA's objective is clear: to subject the construction and non-routine modification of the largest stationary sources of GHG emissions to uniform, nationwide permitting under the PSD provisions of the Clean Air Act, and to thereby require the application of BACT to such sources to reduce their emissions. EPA has indicated that it will issue BACT guidance in the GHG context by the end of 2010.

For questions or further information concerning EPA's regulation of GHG's under the Clean Air Act, please contact your Bryan Cave contact or the authors of this client alert:

Philip E. Karmel  
(212) 541-2311  
[pekarmel@bryancave.com](mailto:pekarmel@bryancave.com)

J. Kevin Healy  
(212) 541-2311  
[jkhealy@bryancave.com](mailto:jkhealy@bryancave.com)

Steven J. Poplawski  
(314) 259 2610  
[sjpoplawski@bryancave.com](mailto:sjpoplawski@bryancave.com)

Thor W. Ketzback  
(312) 602 5111  
[thor.ketzback@bryancave.com](mailto:thor.ketzback@bryancave.com)

Brandon W. Neuschafer  
(314) 259 2317  
[bwneuschafer@bryancave.com](mailto:bwneuschafer@bryancave.com)