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EPA Issues Proposed Rule on Regulation of GHGs in PSD and Title V Permits

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On October 3, 2016, EPA published a proposed rule to revise the permitting rules for Greenhouse Gas (GHG) emissions under the Clean Air Act. Most significantly, the proposed rule would set the Significant Emissions Rate (SER) for GHGs under the major source permitting program at 75,000 tons of carbon dioxide equivalent (CO₂e) per year, which is consistent with the threshold EPA has been applying informally since the Supreme Court overturned EPA's Tailoring Rule in the 2014 case *Utility Air Regulatory Group v EPA*.

The rule, if finalized, would require a new major source or major modification that triggers Prevention of Significant Deterioration (PSD) permitting for other criteria pollutants, such as NO_x, to go through the Best Available Control Technology (BACT) review for GHG if the potential to emit GHG exceeds the 75,000 tpy SER. EPA is, however, taking comment on a SER as low as 30,000 tpy of CO₂e, which would sweep numerous sources into a technology review for GHGs.

A 60-day comment period has been set for the proposed rule and comments are due by December 2, 2016.

The Proposed Rule

The Proposed Rule makes two important revisions with respect to GHG permitting:

- First, the proposed rule amends the PSD and Title V permitting regulations to clarify that a source cannot trigger PSD and Title V permitting requirements solely based on GHG emissions; but must be subject based on emissions of a regulated New Source Review (NSR) pollutant before GHG emissions will be regulated under those programs.
- Second, for PSD permitting purposes, EPA has proposed a SER, or “de minimis” level, below which BACT review would not be required even if a source is required to obtain a PSD permit. Therefore, if a source has been deemed a major stationary source or a major modification for another NSR pollutant first, and there is a significant net emissions increase of the source's GHGs emissions equal to or greater than the GHG SER, then GHGs will be subject to a BACT review. EPA has proposed a SER of 75,000 tpy of CO₂e. This is the same *de minimis* level set in the Tailoring Rule; however, EPA is asking for comment on setting the SER as

low as 30,000 tpy CO₂e.

The Tailoring Rule and Legal Challenges

This rule represents the regulatory resolution of the Supreme Court's 2014 decision in *Utility Air Regulatory Group v. EPA*.

In 2010, EPA finalized its Tailoring Rule, which phased in permitting requirements for GHG emissions from the PSD and Title V Clean Air Act permitting programs. Under Step 1 of the phased approach, the GHG permitting requirements were only applicable to sources that were already required to obtain a PSD or Title V permit based on emissions of pollutants other than GHGs. Under Step 2, the GHG permitting requirements were expanded to the sources that were above the permitting thresholds solely on GHG emissions.

The Tailoring Rule was challenged in the D.C. Circuit and made its way to review by the U.S. Supreme Court. The U.S. Supreme Court, in *Utility Air Regulatory Group v. EPA*, struck down portions of the Tailoring Rule and held that EPA could not require a PSD permit for a major source or a major modification, or require a major source to obtain a Title V permit, based solely on GHG emissions. The D.C. Circuit's Amended Judgment in *Coalition for Responsible Regulation v. EPA* implements the Supreme Court's decision.

In August 2015, EPA issued a direct final rule removing portions of the PSD and Title V programs that contravened the Supreme Court's holding and that were "readily severable." EPA has proposed the October 3 amendments to the PSD and Title V programs to fulfill the requirements of the Amended Judgment.

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