

EPA Reveals Timelines For Regulation of Greenhouse Gases

As we reported in our February 2010 Environmental Alert,¹ the Environmental Protection Agency's Greenhouse Gas (GHG) Endangerment Finding raised more questions than it answered regarding the regulation of stationary sources. As the snow melted in our nation's capital on Friday evening, Feb. 19, 2010, eight Democratic senators, including West Virginia's Jay Rockefeller, IV, wrote to EPA Administrator Lisa Jackson and asked her to address a number of those pending questions. Administrator Jackson responded in a six-page letter the following Monday, February 22, that, for the first time, discloses EPA's intended timeline for the regulation of stationary sources emitting GHG emissions under the Prevention of Significant Deterioration (PSD) program.²

EPA's final endangerment finding allows it to begin regulating GHG emissions from mobile sources, such as planes, trains and automobiles. EPA has indicated that it will finalize fuel efficiency regulations intended to reduce GHG emissions from mobile sources that apply to Model Year 2012 (MY 2012) and later automobiles. This, in turn, triggers regulations on GHG emissions from stationary sources such as power plants and factories. (Please see our February Alert for additional discussion.) The timing and scope of these potential regulations was unknown at the time the final endangerment finding was issued, however.

Administrator Jackson's February 22 letter clarified EPA's position on these issues. As an initial matter, Administrator Jackson disclosed that EPA will finalize its reconsideration of the 2008 Johnson Memorandum by further refining the definition of "subject to regulation." Administrator Jackson also indicated that GHG emissions from stationary sources will be "subject to regulation" beginning in calendar year 2011. Although she does not state the basis for this date, it is our understanding that it is based on the earliest date which a MY 2012 automobile, subject to the pending fuel efficiency regulations intended to reduce GHG emissions, may be sold to consumers.³

Administrator Jackson also announced that EPA expects to phase in those stationary source regulations. In the first half of 2011, only the facilities "that already must apply for Clean Air Act permits as a result of their non-greenhouse gas emissions will need to address GHG emissions in their applications." This presumably includes both PSD and Title V permit applications. In addition, between late 2011 and 2013, the threshold for

¹ EPA Finalizes Greenhouse Gas Endangerment Finding, <http://www.drinkerbiddle.com/epafinding>

² http://epa.gov/oar/pdfs/LPJ_letter.pdf.

³ See, e.g., 42 U.S.C. § 7521(b)(3)(A); 26 U.S.C. § 4064(b)(4); and 49 U.S.C. § 32901(a)(15) (defining "model year").

permitting will be “substantially higher” than the 25,000-ton limit proposed in EPA’s original “tailoring rule.” The “smallest sources” will not be subject to permitting requirements until 2016 at the earliest, although it is unclear from the letter whether “smallest sources” means those at the 25,000-ton permitting threshold in the tailoring rule or the 100/250 ton thresholds in the Clean Air Act.

Administrator Jackson also noted on her letter that while “EPA continues to review and analyze options for defining Best Available Control Technologies (BACT)” for GHG emissions, it is “closely following” efforts to make carbon capture and sequestration technology commercially available.

Administrator Jackson’s letter expressed confidence that EPA’s tailoring rule (and her proposal for phased implementation) will survive judicial scrutiny, although she does not supply a legal explanation for why this is the case. Nevertheless, in response to the letter, Sen. Rockefeller indicated an intent to amend the Clean Air Act to codify EPA’s proposed timeline and postpone regulations until 2011 while Congress debates comprehensive climate legislation. Sen. Rockefeller has not announced the details of his proposal, including whether it will explicitly modify the Clean Air Act to accommodate the tailoring rule.

Of course, all of these developments could be for naught if the GHG endangerment finding is overturned either judicially or legislatively. Sen. Lisa Murkowski (R-Alaska) continues to sponsor a bill aimed at reversing the endangerment finding. And 16 legal challenges to the endangerment finding have been filed in federal court in Washington, D.C., by fossil fuel industry groups, conservative think tanks, several members of Congress and three states.⁴ Whether any of these efforts will succeed in derailing the EPA’s planned course of action is unclear.

GHG REPORTING RULE

The Greenhouse Gas Reporting Rule (40 CFR Parts 86, 87, 89 et al.) went into effect on January 1, 2010, and any necessary monitoring equipment upgrades are required to be implemented by March 31, 2010. Stationary sources subject to the Rule should currently be collecting, analyzing and preparing to report data on greenhouse gas emissions, including carbon dioxide (CO₂), methane, nitrous oxide and fluorinated GHGs. The potential for each GHG to cause global warming is measured in CO₂ equivalents (CO₂e). The Rule requires the monitoring and reporting of greenhouse gas data, *not* controls on GHG emissions.

While the Rule applies generally to facilities that emit at least 25,000 metric tons of CO₂e per year, some types of facilities, such as petrochemical factories, petroleum refineries and certain electricity generators, are subject to the Rule regardless of their volume of GHG emissions. Other facility types may be subject to the Rule if they meet a capacity and emission threshold. In addition, EPA has deferred reporting requirements until at least 2011 for approximately a dozen source categories, including certain types of electronics manufacturing, food processing and wastewater treatment facilities (these source categories may still be subject to reporting for stationary combustion sources under Subpart C of the Rule). The requirements for each economic sector/industry are outlined in individual subparts of the Rule.

Sources subject to the Rule should be using best available monitoring methods until March 31, 2010, after which facilities must follow all applicable monitoring and QA/QC requirements. All data collected from 2010 operations must be submitted to EPA by March 31, 2011, and annually thereafter. All emissions data will be publicly available, unless the facility can demonstrate that the data satisfies EPA’s requirements for confidential business information.

⁴ Sixteen states and New York City have filed petitions to intervene on behalf the EPA in support of the endangerment finding.

If you have any questions about these issues and what they may mean for your company, please contact the following lawyers or your regular Drinker Biddle contact:

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