



JONES DAY  
**COMMENTARY**

## EPA DELAYS GREENHOUSE GAS PERMITS FOR MANUFACTURING PLANTS

On April 2, 2010, EPA published a notice delaying the date when PSD and Title V regulations will apply to greenhouse gases (“GHGs”) until after January 2, 2011.<sup>1</sup> Originally, the requirements were thought to take effect on the date EPA finalized the GHG emissions standards for vehicles. The April 2 final rule therefore both clarified and delayed the applicability of PSD and Title V permitting programs to GHGs. Questions about the PSD and Title V permitting programs arose as EPA made plans to promulgate regulations for GHG emissions from motor vehicles under Title II of the Clean Air Act in the near future. The April notice marks the culmination of a series of events beginning in 2007 but faces challenges.

In 2007, the U.S. Supreme Court held that GHGs fell within the definition of air pollutants under the Clean Air Act (“CAA”). The Court required EPA to determine whether GHG emissions from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make such a finding. *Massachusetts v. EPA*, 549 U.S. 497 (2007). On November 13, 2008, EPA Region 8 issued a PSD construction permit that did not include best available control technology (“BACT”) limits for carbon dioxide, a GHG. Recognizing *Massachusetts*, the Region concluded the court decision alone did not mandate PSD permits to include limits on carbon dioxide emissions. However, the Environmental Appeals Board remanded the permit to the Region with instructions to reconsider whether carbon dioxide was subject to BACT based on EPA’s interpretation of the CAA’s definition of which pollutants are “subject to regulation.”

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<sup>1</sup> Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17,004 (April 2, 2010).

Thus, on December 18, 2008, the then-Administrator of the EPA issued a memorandum (“Johnson Memo”) interpreting which pollutants were “subject to regulation” for the purposes of the federal PSD program. According to the Johnson Memo, pollutants “subject to regulation” were either subject to a CAA provision or subject to a regulation that required actual control of the emissions from the specific pollutant and was adopted by EPA under the CAA. Pollutants for which EPA regulations required mere monitoring or reporting were not considered “subject to regulation.” In response to criticism of EPA’s interpretation of the phrase “subject to regulation,” EPA agreed to reconsider the Johnson Memo.

After issuance of the Johnson Memo, EPA determined that GHGs endanger the public health and welfare, although this finding is currently being challenged by many industry groups. EPA collaborated with the Department of Transportation’s National Highway Traffic Safety Administration, and they issued a joint proposal to establish new GHG emissions regulations that affect tailpipe standards for model years 2012–2016 light-duty vehicles. The Secretary of the Department of Transportation and the Administrator of the Environmental Protection Agency signed the rule on April 1, 2010, and it has been submitted for publication in the Federal Register.

The April 2, 2010, publication affirms EPA’s interpretation that a pollutant is “subject to regulation” when it is subject to either a provision in the CAA or a regulation adopted by EPA under the CAA that requires actual control of the pollutant’s emissions. EPA tweaked the Johnson Memo’s interpretation by adding that permitting requirements are triggered only upon the date the control requirements “take effect.” Specifically, the permitting requirements are not triggered by the signature date of the rule, the date of publication in the Federal Register, or the effective date for the rule after publication in the Federal Register. EPA anticipates the tailpipe standards for light-duty vehicles, which will regulate GHGs, will “take effect” no earlier than January 2, 2011.

This announcement affects stationary sources as well as motor vehicles. Under the CAA, regulation of GHGs from vehicles also triggers PSD requirements. New and modified stationary sources must control GHG emissions. Major sources are also subject to Title V requirements, which EPA announced are also triggered when a new regulation “takes effect.” Assuming the EPA issues final GHG emissions standards for vehicles as proposed, GHGs will initially become “subject to regulation” on January 2, 2011. Thus, EPA announced the PSD and Title V permitting program requirements for GHGs will also apply no earlier than January 2, 2011. This will provide EPA time to develop guidance on BACT for GHGs and allow states to change their PSD permitting programs to accommodate GHG regulations.

Further, EPA has also proposed a “Tailoring Rule” to phase in PSD and Title V requirements for sources emitting GHGs in various amounts above 100 or 250 tons per year. EPA Administrator Lisa Jackson has said that, under the final Tailoring Rule, the requirements for new and modified sources may be limited to sources that emit more than 75,000 tons so as not to affect small sources not currently subject to CAA requirements. Jackson has also said that in the first half of 2011, the requirements would apply only to sources required to comply with PSD regulations for pollutants other than GHGs. The final Tailoring Rule is expected to be published soon. However, while EPA will phase in the PSD and Title V requirements, pending permit applications will not be “grandfathered in.” Thus, if a permit is issued after January 2, 2011, the permit must address GHG emissions, even if the permit was submitted and deemed complete prior to January 2, 2011.

Despite EPA's attempts to develop a manageable regulatory approach to the situation by both delaying the effects of the regulations and publishing a Tailoring Rule, EPA faces opposition to the new rulemaking. For example, mining and agricultural groups filed suit on April 2, 2010, challenging the rule. *Coalition for Responsible Regulation v. EPA*, No. 10-1073, (D.C. Cir. petition filed April 2, 2010). Such groups question whether EPA has authority under CAA to regulate stationary source GHG emissions. Moreover, Senator Murkowski, and 40 cosponsors, introduced legislation in the Senate that would strike down EPA's endangerment finding. The legislation has been referred to the Senate Committee on Environment and Public Works. Similar proposals have been introduced in the House and referred to the House Committee on Energy and Commerce. *E. g.*, S.J.Res. 26, 111th Cong. (2010); H.R.J.Res. 77, 111th Cong. (2010).

If EPA's endangerment finding is overturned, EPA will lack authority for regulating GHGs from motor vehicle emissions, and in turn, will lack authority for phasing in PSD and Title V permitting regulations for GHG emissions from stationary sources. As the challenges make clear, there remain important questions about whether any of the procedures put in place by EPA's April 2, 2010, notice or the proposed Tailoring Rule are consistent with the Clean Air Act.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

**Thomas M. Donnelly**

San Francisco  
+1.415.875.5880  
[tmdonnelly@jonesday.com](mailto:tmdonnelly@jonesday.com)

**G. Graham Holden**

Atlanta  
+1.404.581.8220  
[ggholden@jonesday.com](mailto:ggholden@jonesday.com)

**Kevin P. Holewinski**

Washington  
+1.202.879.3797  
[kpholewinski@jonesday.com](mailto:kpholewinski@jonesday.com)

**John A. Rego**

Cleveland  
+1.216.586.7542  
[jreg@jonesday.com](mailto:jreg@jonesday.com)

**Charles T. Wehland**

Chicago  
+1.312.269.4388  
[ctwehland@jonesday.com](mailto:ctwehland@jonesday.com)

**Caitlin A. Cline**

Chicago  
+1.312.269.1524  
[cacline@jonesday.com](mailto:cacline@jonesday.com)

**Casey M. Fernung**

Atlanta  
+1.404.581.8119  
[cfernung@jonesday.com](mailto:cfernung@jonesday.com)

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