



Legal Updates

4/2/2010

EPA Issues First-Ever Rule Regulating GHG Emissions from Light Duty Vehicles, Confirms GHG Stationary Source Permitting Begins January 2011

This week, the U.S. Environmental Protection Agency (EPA) took two major steps in the agency's continued march toward establishing a new regulatory framework to control greenhouse gas (GHG) emissions under the Clean Air Act (CAA).

On Monday, March 29, 2010, EPA finalized the agency's formal reconsideration of the Dec. 18, 2008, "Johnson Memo" addressing when GHGs would become "subject to regulation" under the CAA. EPA's reconsideration action was the first formal confirmation of recent informal statements by Administrator Lisa Jackson that EPA is not planning to regulate GHG emissions through the CAA Prevention of Significant Deterioration (PSD) and Title V permitting programs until 2011.

On Thursday, April 1, 2010, EPA and the U.S. Department of Transportation took another momentous step by announcing the much-anticipated final light duty vehicle rules, which formally establish EPA's first-ever national regulation of GHGs. Finalizing the vehicle rules has been a major priority for the Obama Administration, as well as the automobile industry, which has worked with the administration to avoid a potential state-by-state patchwork of GHG automobile emissions regulations.

The final light duty vehicle rules increase Corporate Average Fuel Economy (CAFE) standards on model year 2012 to 2016 automobiles, and set GHG emission reduction requirements that will result in a fuel economy standard equivalent to an average of 35.5 miles per gallon by 2016.

By triggering GHG regulation under the CAA, the light duty vehicle rules also indirectly impact many other carbon-intensive industries, which potentially will be subject to PSD and Title V permitting requirements. The reconsideration of the Johnson Memo issued Monday sets forth some of the details of how and when such GHG permitting will occur, and additional details are expected in EPA's forthcoming final Tailoring Rule. The final Tailoring Rule is expected to be released later this month.

EPA's final action on Monday concludes the agency's reconsideration of former EPA Administrator Stephen L. Johnson's determination that the CAA's permitting programs only apply to pollutants subject to an actual emissions limitation or other substantive regulation under either the CAA itself, or regulations adopted by EPA under the CAA. This action confirms Administrator Johnson's interpretation that GHGs were not "regulated" under the CAA prior to the finalizing of the light duty vehicle GHG regulation.

On Dec. 30, 2008, the Johnson Memo was challenged by a coalition of 17 environmental groups that petitioned EPA for reconsideration of its determination. While the Johnson Memo interpretation has remained in effect, EPA formally requested comments in October 2009 on five alternative interpretations of when a pollutant becomes "subject to regulation" and must be addressed through, *inter alia*, implementation of Best Available Control Technology (BACT) under the PSD program.

EPA noted in its reconsideration proposal that it expressly favored the actual control interpretation adopted in the Johnson Memo, over the other more expansive interpretations including the monitoring and reporting interpretation advocated by the environmentalist petitioners.

EPA's final action on Monday affirmed the Johnson Memo's determination that GHGs would become subject to PSD

permitting requirements only after a national emissions rule is finalized requiring actual control of GHG emissions. This determination set the stage for the announcement of the light duty vehicle rules, which officially established national climate change regulation and triggered the CAA's statutory requirement for PSD permitting and BACT determinations for new and modified sources of GHGs.

Importantly, however, EPA's decision on Monday also refined its interpretation under the Johnson Memo to provide that PSD permitting requirements will only apply to new pollutants at the time the regulatory requirement to control emissions actually "takes effect," rather than immediately upon finalizing the rule or upon the rule's legally effective date.

EPA states that since the light duty vehicle rules will not take effect until Jan. 2, 2011, the date when emissions from 2012 model year vehicles are actually subject to limitation, the PSD permit program requirements will not be triggered under the CAA until that date. This change in interpretation moves the trigger date for GHG PSD permitting under the CAA from about mid-June 2010 (the expected effective date of the motor vehicle rule) to January 2011. This provides a respite of approximately nine months for state and federal permitting authorities to prepare for what many fear will be an onerous new permitting duty.

EPA also stated on Monday that its interpretation on reconsideration – including the delayed trigger date – will apply to the related Title V operating permit program as well as the PSD construction permit program.

Much ambiguity remains as to how PSD and Title V permitting for GHG's will be implemented. Recent public statements by Administrator Jackson suggest that the final Tailoring Rule will contain an initial emissions threshold of 75,000 or potentially even 100,000 tons per year in 2011, which is well above the 25,000 tons per year threshold initially proposed in the draft Tailoring Rule on Sept. 30, 2009.

To further ease the burden on permitting authorities, the administrator also suggested that sources that are only "major" under PSD permitting for GHGs (and not for other traditional pollutants such as NOx or SOx) may not need to obtain PSD permits in the initial early 2011 phase of the program.

While EPA's latest interpretation of the trigger date slows the application of GHG regulations to stationary sources under the CAA, EPA also makes clear that no grandfathering or exclusion will apply to permit applications already pending when the PSD program becomes operative for GHGs in January 2011. EPA notes that permit applications submitted prior to its final action should "in most cases" be issued prior to Jan. 2, 2011, thus will have a nine-month transition period to complete the permitting process before PSD requirements become effective.

However, EPA's determination not to grandfather pending permits applications will likely incentivize new permit challenges and delay tactics in the coming months by environmental activists who would like to see pending permit applications become subject to GHG regulation.

EPA also called on permitting authorities in states authorized to implement their own PSD permit programs to consider now (even before GHG permitting requirements become effective) energy efficiency technologies in BACT determinations for non-GHG criteria pollutants in order to indirectly facilitate GHG emission reductions prior to January 2011.

EPA recognized that current guidance is lacking regarding utilization of energy efficiency in making BACT determinations, and EPA proposed to issue guidance in the near future addressing precisely how energy efficiency should be incorporated into BACT determinations for current criteria pollutants, or prospectively, for GHGs.

Following Monday's action, state permitting agencies and industry groups have expressed concern that the CAA continues to be the wrong instrument for regulating ubiquitous and difficult-to-control GHG emissions. Furthermore, the nine-month respite prescribed by EPA's interpretation is unlikely to be enough time for cash-strapped state permitting authorities to ramp up their permitting staff, and for EPA and the states to develop uniform and defensible approaches to making BACT determinations for

reducing GHGs.

McGuireWoods LLP Clean Air Act Team

McGuireWoods LLP is a full service law firm with a focused practice in Climate Change and Clean Air Act matters. For more information on the final light duty vehicle rule or EPA's initiatives to regulate greenhouse gases, please contact the authors Patricia Sharkey, Neal Cabral and Brett Breitschwerdt, or any member of our Clean Air Act team.

If you would like to receive our legal news updates by e-mail, please use our online sign-up form.

McGuireWoods news is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention.

MORE INFORMATION

Patricia F. Sharkey
312.750.8601
psharkey@mcguirewoods.com

Neal J. Cabral
202.857.1727
ncabral@mcguirewoods.com

David L. Rieser
312.849.8249
drieser@mcguirewoods.com

Gordon R. Alphonso
404.443.5716
galphonso@mcguirewoods.com

James Y. Kerr II
919.755.6688
jkerr@mcguirewoods.com

E. Brett Breitschwerdt
919.755.6563
bbreitschwerdt@mcguirewoods.com