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*Editor's Note: In this issue, **Patrick Rowe of Sussman Shank LLP**, summarizes a rule recently proposed by the federal Environmental Protection Agency requiring the control of greenhouse gases from certain sources.*

I am also pleased to announce that Mr. Rowe is now the new E-Outlook editor. Article ideas should now be addressed to him at prowe@sussmanshank.com or (503.243.1651). Thank you for allowing me to serve you these past few years.

*Your E-Outlook Editor,
Hong Huynh*

EPA PROPOSES RULES TO REDUCE GREENHOUSE GAS EMISSIONS

On September 30, the EPA proposed new rules that would control emissions of greenhouse gases for the first time. EPA estimates that the rules would cover nearly 70 percent of the nation's largest stationary source GHG emitters—including power plants, refineries, and cement production facilities. These facilities would be required to obtain permits that would demonstrate they are using the best practices and technologies to minimize GHG emissions.

Under the Clean Air Act, facilities that emit air pollutants exceeding a certain threshold - generally 100 tons or more per year - are subject to greater permitting requirements. The proposed GHG rules, however, would adopt new, substantially higher thresholds for GHG emissions, in an effort to capture large emitters while not affecting small businesses and farms.

Applicability

The proposed rules apply to both the Clean Air Act's Title V and New Source Review prevention of significant deterioration ("PSD") programs.

Under the Title V program, EPA is proposing:

- a major source emissions applicability threshold of 25,000 tons per year (tpy) of carbon dioxide or carbon dioxide equivalent ("CO₂e") for existing industrial facilities. Facilities with GHG emissions below this threshold would not be required to obtain an operating permit.

Under the PSD program (designed to minimize emissions from new sources and existing sources making major modifications)—EPA is proposing, inter alia:

- A major stationary source threshold of 25,000 tpy CO₂e. This threshold level would be used to determine if a new facility or a major modification at an existing facility would trigger PSD permitting requirements.

The thresholds described above would last 6 years. Within 5 years of the final version of the proposed rule EPA would conduct a study to assess the rules. EPA would then conduct another rulemaking, to be completed by the end of the sixth year, that would promulgate, as the second phase, revised applicability and significance level thresholds, as appropriate.

Is it legal?

Some critics immediately questioned the legality of the proposed rules. Luke Popovich, a spokesman for the National Mining Association expressed skepticism as to whether the EPA is allowed under the Clean Air Act to distinguish between small and large emitters when setting new controls on greenhouse gases. Popovich told the Dow Jones newswire that "EPA is trying to play Solomon here, cleaving this thing in such a way that the law does not seem to permit." Similarly, Jeff Holmstead, a former EPA official who represents utilities and refineries for the law firm Bracewell & Giuliani, was quoted in the Wall Street Journal as stating: "Normally, it takes an act of Congress to change the words of a statute enacted by Congress, and many of us are very curious to see EPA's legal justification for today's proposal."

EPA appears to have anticipated these arguments, describing its legal justification for the higher threshold for GHG in the introduction summary of the rules, explaining that:

"If PSD and title V requirements apply at the applicability levels provided under the CAA, state permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate. On the basis of the legal doctrines of 'absurd results' and 'administrative necessity,' this proposed rule would phase in the applicability thresholds."

Oregon facilities affected

The Oregonian reported on October 1 that at least 33 facilities in Oregon would be affected by the proposed rules, including Portland General Electric's coal-fired power plant in Boardman, Legacy Meridian Park Hospital, Oregon Health & Science University, Oregon State University, and the Ash Grove cement plant in Baker County. (The Ash Grove cement plant, however, appears to have greater concerns at this time. The Oregonian also reported on October 1 that the plant will be closing, resulting in the layoff of 68 workers).

Political maneuver?

Some perceive the proposed rules as a tactical move by the Obama Administration to push Congress to pass cap & trade legislation, or have industry face the hammer of traditional command and control regulation under the Clean Air Act. The House of Representatives' cap & trade bill (Waxman-Markey) would exempt GHG emissions from any EPA program. However, a bill introduced in the Senate (Kerry-Boxer) on September 30 would not. Thus, if EPA adopts the proposed rules, the Senate approach, at least as currently drafted, would leave sources open to regulation under both the EPA rules and a cap & trade program.

Comments

EPA will accept comment on the proposal for 60 days after publication in the Federal Register.

For more information: Contact Patrick Rowe at prowe@sussmanshank.com and visit EPA's site at <http://www.epa.gov/NSR/documents/GHGTailoringProposal.pdf>

If you would like to contribute or have comments, please contact the E-Outlook Editor, Patrick Rowe at prowe@sussmanshank.com or (503) 243-1651.