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*Jenner & Block on***U.S. EPA Issues Proposed Rule – Stationary Sources of GHG Emissions Will Comply with "Tailored" Clean Air Act Permit Requirements**By Allison Torrence and Gabrielle Sigel
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On September 30, 2009, the United States Environmental Protection Agency (EPA) announced a proposed rule that will, if finalized, prescribe how the Clean Air Act (CAA) permitting requirements are applied to stationary sources of greenhouse gas (GHG) emissions. EPA Administrator Lisa Jackson announced the proposed rule, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ('Proposed Tailoring Rule')," in a speech to the Second Annual Governors' Global Climate Summit. The proposed rule is called a "tailoring rule" because it "tailors" the application of the CAA's permitting requirements so that only larger sources of GHG emissions are impacted. Notably, this rule, for the first time, explains how the CAA permitting requirements will be applied to GHG emissions from stationary sources, after much debate about whether the CAA does, could, or should apply to those emissions.

Stationary Sources to Be Subject to PSD and Title V Requirements As Early As March 2010. Under the CAA, "major sources" of regulated pollutants are required to obtain pre-construction permits for new construction or modifications as part of the new source review (NSR) program.¹ In areas that are in attainment of prescribed air pollution levels, facilities are required to obtain prevention of significant deterioration (PSD) permits before modified or new sources are constructed.² In addition, all "major sources" of air pollution are required to obtain a Title V operating permit, including for new and modified sources.³ Title V operating permits must be renewed every five years.⁴ A facility is determined to be a "major source" of air pollution if it has the potential to emit regulated pollutants above a threshold level. If the threshold level is exceeded, under both PSD and Title V permit requirements, facilities must use best available control technology (BACT) to control emissions and abide by emissions limits for any regulated pollutant emitted in significant quantities.

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1. [40 C.F.R. §§ 52.21](#), 52.24.
 2. [40 C.F.R. § 52.21](#).
 3. [40 C.F.R. § 70.1](#).
 4. [40 C.F.R. § 70.6](#).

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Currently GHGs are not considered by EPA to be regulated NSR pollutants; thus, under EPA's interpretation of the CAA, facilities are not required to obtain permits or use BACT measures for GHGs.⁵ However, on September 15, 2009, EPA announced a separate proposed rule to regulate GHG emissions from light-duty vehicles under the CAA.⁶ EPA anticipates that the light-duty vehicle GHG regulations will come into effect as early as March 2010.⁷ When that proposed rule comes into effect, GHGs unquestionably will be regulated pollutants and will therefore trigger the above-described PSD and Title V requirements.

The CAA's "default" major source applicability threshold is 100 or 250 tons per year (tpy) (depending on the type of facility) of any regulated pollutant. Thus, absent the Proposed Tailoring Rule announced on September 30, once the GHG regulations for light-duty vehicles take effect, any facility that emits more than 100/250 tpy of GHGs (a regulated pollutant) will be subject to PSD and Title V regulations.⁸ EPA has determined that if GHG thresholds remain at 100/250 tpy, the number of PSD and Title V permits, and the associated costs of issuing those permits, would increase significantly.⁹ Currently, EPA and the states issue, on average, 280 PSD permits every year. If GHGs had a threshold of 100/250 tpy, EPA estimates that almost 41,000 new and modified facilities per year would be subject to PSD permit review.¹⁰ Likewise, there are currently 14,700 existing Title V permits nationwide. This number would increase to 6 million if the GHG threshold remains at 100/250 tpy.¹¹ EPA believes that increasing the GHG threshold

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5. Proposed Tailoring Rule at 42. However, EPA also announced on September 30, 2009, that it was taking public comment on its reconsideration of an EPA policy memo, known as the Johnson memo. See "Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program" (publication version September 30, 2009). The Johnson memo provided, *inter alia*, that GHGs were regulated pollutants only if they were subject to "actual control," and could not be considered regulated NSR pollutants because, for example, GHGs were the subject of monitoring or reporting requirements. While EPA is reconsidering that position, if vehicle emission limits are finalized, GHGs would be subject to "actual control" and the debate about whether GHGs could be considered regulated NSR pollutants would have less immediate importance to the regulated community.
 6. Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, [74 Fed. Reg. 49,454](#) (Sept. 28, 2009).
 7. Proposed Tailoring Rule at 46.
 8. *Id.* at 46.
 9. *Id.* at 48.
 10. *Id.* at 49.
 11. *Id.* at 56.

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above 100/250 tpy is an administrative necessity, because if it fails to do so, the regulation of GHGs would be a significant burden to EPA and the regulated community.¹²

The Proposed Tailoring Rule. The main effect of the Proposed Tailoring Rule is to create new "threshold" and "significance" levels for the six primary GHGs.¹³ The new proposed threshold for these GHGs is 25,000 tpy of carbon dioxide equivalent (CO₂e), and the proposed significance levels are between 10,000 and 25,000 tpy CO₂e.¹⁴

The Proposed Tailoring Rule would increase the threshold level for all six GHGs to 25,000 tpy CO₂e. This would mean that unless a facility emits 25,000 tpy of CO₂e (or emits 100/250 tpy of other regulated pollutants), it will not be subject to CAA permitting requirements. The proposed rule also sets GHG significance levels to between 10,000 and 25,000 tpy CO₂e (depending on public feedback). This would mean that a major source of any pollutant that emits more than the 10,000/25,000 tpy CO₂e significance level will have to use BACT for the control of its GHG emissions.

EPA's Proposed Tailoring Rule also includes four "streamlining" techniques which EPA believes will allow for more efficient and less costly regulation of GHG emissions.¹⁵ The proposed streamlining techniques are:

1. Redefining "potential to emit" as it is used to evaluate whether a facility is above the threshold level. EPA proposes that a facility's actual GHG emissions, not its potential emissions, should be used to determine whether a source exceeds a threshold level. (A source's potential to emit is currently used for pollutants regulated under the CAA's permitting program.) Additionally, EPA proposed creating rules establishing how to calculate emissions for various source categories, so as to make GHG emission estimates simpler and more uniform.

12. *Id.* at 62-108.

13. The six GHGs effected by the CAA's regulation of GHG are carbon dioxide (CO₂); methane (CH₄); nitrous oxide (N₂O); hydrofluorocarbons (HFCs); perfluorocarbons (PFCs); and sulfur hexafluoride (SF₆).

14. CO₂e is the measure of Global Warming Potential (GWP) of all GHGs relative to the GWP of CO₂. For example, CH₄ has a GWP 12 times that of CO₂.

15. Proposed Tailoring Rule at 157-184.

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2. Creating presumptive BACT for small sources of GHGs. This would involve creating rules that establish what the best available control technology is for a standard GHG emission unit. BACT is usually determined on a case-by-case basis; thus, having a presumptive BACT will save smaller sources the cost of conducting an extensive BACT analysis.
3. Creating general permits that would cover numerous, essentially identical, sources, saving smaller sources the cost of getting individual permits.
4. Creating electronic permitting systems to further increase efficiency.

EPA believes that these streamlining measures will take three to four years to develop and implement fully. In the meantime, the proposed threshold and significance levels for GHG emissions would be put into effect for five years. At the end of the five-year period, EPA will evaluate the threshold and significance levels and within one year determine whether those levels should be changed.

Impact of the Proposed Tailoring Rule. EPA estimates that under the Proposed Tailoring Rule, 68% of national CO₂e GHG emissions will be regulated under the CAA permitting requirements. EPA estimates that, once GHGs are regulated under the light-duty vehicle program, industry and government will save a great deal of money by increasing the GHG threshold and significance levels. Under the Title V program, EPA estimates that industry will save more than \$38 billion over the first six years in permitting expenditures by having a threshold of 25,000 tpy CO₂e as opposed to 100/250 tpy. Permitting agencies will save another \$15 billion over six years. Likewise, under the PSD program, EPA estimates that industry will save more than \$900 million annually and permitting agencies will save \$249 million annually. Even with the savings represented in these estimates, there will be significant costs of addressing GHG emissions in PSD and Title V permit programs in the first place.

The Proposed Tailoring Rule does not itself make GHG emissions subject to CAA permitting requirements; thus, it will have no effect unless and until the light-duty vehicle GHG regulations take effect or GHGs are considered regulated pollutants under the CAA in some other way. If the light-duty vehicle GHG regulations do take effect, any facility that emits GHGs above the proposed threshold of 25,000 tpy CO₂e will be required to obtain a PSD permit for any new construction or major modification. Facilities that previously were not required to have Title V permits, but emit GHGs above the finalized threshold amount, will be required to apply for a Title V permit within one

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year of the date the light-duty vehicle GHG regulations take effect.¹⁶ Facilities that have a Title V permit when the rule is finalized will not have to immediately revise their Title V permits, but would have to include applicable GHG emissions when their Title V permit is renewed.¹⁷

EPA's recent announcement of several proposed rules with respect to stationary sources' reporting and permitting requirements for GHG emissions may prompt Congress to act with respect to legislation for a comprehensive GHG emissions program. EPA Administrator Jackson has stated on several occasions that the Administration's preferred approach is to have GHGs regulated other than through the CAA. However, when announcing the Proposed Tailoring Rule at the Governors' Summit, Administrator Jackson said that, while "[c]omprehensive [climate change] legislation from the U.S. Congress is the next frontier," EPA is taking its current actions because it is "not going to continue with business as usual while we wait for Congress to act."

EPA will accept comments on the Proposed Tailoring Rule for 60 days following the publication of the proposed rule in the Federal Register. A public hearing may be held if one is requested by a member of the public.

The full text of the proposed "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" is available on EPA's website at: <http://www.epa.gov/nsr/documents/GHGTailoringProposal.pdf>

Practice Pointers

1. How and when industry will be subjected to GHG permitting or reduction requirements is uncertain. If Congress passes comprehensive climate change legislation, GHG regulation under the CAA's current permitting scheme may not apply. However, if such legislation were not passed, under EPA's currently proposed approach, GHGs would need to be recognized as an NSR regulated pollutant, through the GHG vehicle rule or otherwise, before the proposed stationary source tailoring rule would need to

16. *Id.* at 57.

17. *Id.*

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be implemented. Although this uncertainty is difficult for industry's planning, it is prudent for facilities with GHG emissions potentially over 10,000 tpy CO₂e to prepare now by evaluating their emission monitoring and potential control technology requirements.

2. Facilities that have GHG emissions in the range of 10,000 to 25,000 tpy CO₂e should consider whether they can change their operations or resources in order to reduce GHG emissions below the threshold and/or significance levels and, therefore, eliminate this new regulatory obligation and potential enforcement liability. This also presents an opportunity for clean technology and other businesses to promote methods and products reducing GHG emissions below permitting thresholds.
3. If a GHG emitting facility already has a Title V operating permit triggered by other air pollutants, that facility now should be preparing how it will evaluate and control GHGs if it has GHG emissions above the proposed significance level of 10,000 or 25,000 tpy CO₂e. Also, if a facility anticipates it will be required to obtain either a PSD or Title V permit for the first time (because it emits more than the proposed threshold of 25,000 tpy CO₂e), that facility also should evaluate whether it emits any other air pollutants above their respective significance levels, and would therefore be required to include those additional emissions in a PSD or Title V permit.
4. Companies that determine that the GHG permitting requirements will not apply to their activities — because their GHG emissions are below the threshold and/or significance levels — should consider documenting and retaining the bases for that determination.
5. All companies with facilities that emit GHGs near or above the potential 10,000 tpy CO₂e significance level should continue to monitor carefully developments in Congress, as well as those from EPA headquarters.

For complete coverage of the Clean Air Act, see [Environmental Law Practice Guide Ch. 17](#); [Treatise on Environmental Law Ch. 2](#).

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Ms. Torrence graduated with distinction from the University of Michigan in 2002 with a B.S. in environmental science and policy and obtained her J.D. from the University of Chicago in 2006.

[Gabrielle Sigel](#), a partner in Jenner & Block's Environmental Practice, is Co-Chair of her Firm's [Climate and Clean Technology Law Practice](#).

Ms. Sigel's national practice focuses primarily on environmental, safety and health litigation and counseling, toxic tort defense, and insurance coverage litigation and counseling. She recently concluded several toxic tort lawsuits concerning a contaminated site located in a residential area. A significant portion of Ms. Sigel's litigation practice involves representing employers in matters concerning work-related injuries, including OSHA proceedings, personal injury lawsuits, criminal investigations, workers' compensation hearings and insurance coverage claims.

In addition to her litigation practice, Ms. Sigel advises clients on a variety of counseling, regulatory, and transactional issues. For example, she currently is advising a multinational corporation on how to address climate change issues, including working to develop definitions, inventory, and programs for greenhouse gas emission reduction. Her transactional experience has included due diligence investigations of environmental, safety and health issues nationwide, in Europe, and in Canada, in preparation for both sales and acquisitions of manufacturing concerns.

Ms. Sigel has been an adjunct professor, teaching environmental law at Northwestern University School of Law. She is active in the American Bar Association, Sections of Litigation and Environment, Energy and Resources. The Illinois State Bar Association appointed her to its Environmental Law Section Council. Ms.

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Sigel began developing her diverse legal practice when she joined Jenner & Block in 1983, immediately after graduating cum laude from Boston University School of Law. Ms. Sigel is AV Peer Review Rated, Martindale-Hubbell's highest peer recognition for ethical standards and legal ability.

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