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## Target Industry: EPA Issues Final GHG Permitting Rule

### Background

On May 13, 2010, the United States Environmental Protection Agency (“EPA”) issued its final “tailoring regulation” (“Rule” or “Tailoring Rule”). The Rule is EPA’s first direct regulation limiting greenhouse gas (“GHG”) emissions from stationary sources under the Clean Air Act (“CAA”). It establishes new applicability thresholds for permitting under the CAA’s Prevention of Significant Deterioration (“PSD”) and Title V permitting programs. The thresholds established by EPA for GHGs differ from those established by Congress in the CAA for major sources of other air pollutants, and have been increased significantly from the thresholds contained in EPA’s proposed version of the Rule.

The catalyst for EPA’s Tailoring Rule was the *Massachusetts v. EPA*, 549 US 497 (2007) decision of April 2007. In *Mass v. EPA*, the United States Supreme Court held that GHGs are air pollutants under the definition in the CAA and required EPA to make a determination as to whether GHGs from motor vehicles cause or contribute to air pollution that could endanger public health or welfare. EPA made that determination (the “Endangerment Determination”) on December 7, 2009. Based on the Endangerment Determination, EPA promulgated regulations controlling GHG emissions from mobile sources. As a result of those regulations, EPA now asserts it is required to regulate GHG emissions from stationary sources as well. EPA takes the position that when a pollutant is subject to regulation under the CAA, it is deemed to be a regulated pollutant. Once a pollutant is “regulated,” stationary source emissions of that pollutant are generally subject to permitting.

The Tailoring Rule establishes thresholds for permitting GHGs that are higher than those currently triggering CAA permitting requirements for all other pollutants. Major source status for GHGs is

set at 100,000 tons per year (“TPY”) of GHGs, as adjusted for global warming potential (“GWP”), and the significance level for triggering permitting review based upon facility modifications is 75,000 TPY, as adjusted for GWP. This represents a significant increase over the thresholds contained in the proposed Rule. ([Click here](#) for our October 7, 2009 *Client Alert* on the proposed Tailoring Rule).

Pursuant to this rulemaking, EPA committed to undertake additional rulemaking to be completed by July 1, 2012. That additional rulemaking will potentially address streamlining the permitting process for smaller sources, phasing in additional GHG permitting, and whether smaller sources should continue to be excluded from the GHG permitting program.

### Covered GHGs

GHGs covered by the final Tailoring Rule are consistent with those subject to EPA’s GHG reporting rule promulgated on September 29, 2009. Specifically, GHGs addressed include carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (“HFCs”), perfluorocarbons (“PFCs”), and sulfur hexafluoride (SF<sub>6</sub>). For the purposes of the Rule, EPA regulates the group as a single air pollutant. Emissions of all GHGs are aggregated and measured in CO<sub>2</sub> equivalents (“CO<sub>2</sub>e”). The CO<sub>2</sub>e metric is intended to take into account the different GWPs of the six primary greenhouse gases. For example, because CH<sub>4</sub> has heightened heat trapping capabilities, 1 ton of CH<sub>4</sub> equals 21 tons of CO<sub>2</sub>e.

### Programs Covered

The Tailoring Rule establishes permitting thresholds for GHG emissions under the PSD and Title V programs. The rulemaking does not apply to nonattainment New Source Review (“NSR”) because GHGs are not criteria pollutants and no

part of the country has been deemed to be nonattainment for GHGs. Thus, the Rule only addresses major source status under the CAA's PSD and Title V programs.

### Sources Covered

The final Rule makes clear that there are no categorical exclusions from coverage. The Rule's preamble provides that "[e]ntities affected by this action include sectors in all sections of the economy, including commercial and residential sources." Prospective GHG permittees need to be prepared to open their wallets. EPA estimates that the GHG permit application process will be time consuming and expensive. For PSD permitting, industrial sources are expected to spend about \$84,500 to receive a PSD permit, while commercial and residential sources will spend about \$59,000. Title V permitting is expected to cost somewhat less, at \$46,400 for industrial sources and \$23,200 for commercial and residential sources. The Tailoring Rule contains a six (6) year small source exclusion, providing that no source with less than 50,000 TPY CO<sub>2</sub>e emissions and no modification resulting in net GHG increases of less than 50,000 TPY CO<sub>2</sub>e will be subject to PSD or Title V permitting. This exclusion lasts until April 30, 2016, when EPA will address smaller sources. As described in more detail below, the Tailoring Rule establishes a two-step process to authorize and control GHG emissions from stationary sources.

### The PSD Program and the Rule's Effect

PSD permitting applies to new major stationary sources and major modifications to those sources. The PSD program requires persons to obtain a permit before commencing construction of a "major source" of air emissions. Sources in 28 identified categories are deemed

"major" if they have a potential to emit ("PTE") 100 TPY or more of a regulated air pollutant. All other sources within non-listed categories are considered major if they have a PTE 250 TPY or more of a regulated pollutant. PSD permitting is also triggered if a major source is modified such that it increases emissions of a regulated pollutant above a specific threshold called the "significance level." The significance level is set at zero unless EPA establishes a rule to the contrary for a particular regulated pollutant. Sources subject to PSD permit requirements are required, among other things, to install best available control technology ("BACT") to limit emissions. What constitutes BACT for a specific type of source varies for each pollutant, and in many cases BACT can be extremely expensive.

Prior to the Endangerment Determination and EPA's subsequent mobile source rules, GHGs were not regulated as pollutants. With the adoption of those rules, EPA now considers GHGs to be a regulated pollutant, meaning they are also subject to the PSD and Title V permit programs. The Tailoring Rule implements permitting for GHG emissions through amendments to the definitions of "major source" and pollutants that are "subject to regulation." Absent the Rule's tailoring provisions, the PSD program would require permitting of any source of GHGs with the potential to emit either 100 or 250 TPY depending upon the nature of the source, and additional permitting would be required for any modification that would result in any increase in GHG emissions as a result of the default significance level of zero. This could result in potentially many thousands, if not millions, of new sources becoming regulated. By determining that GHGs are not "subject to regulation" until they exceed the new major source threshold of 100,000 TPY of CO<sub>2</sub>e, and setting a significance level for GHG emissions

increases of 75,000 TPY of CO<sub>2</sub>e, EPA has sought to mitigate the potentially crippling impact that GHG regulation under the CAA would otherwise have.

As with other regulated pollutants under the PSD program, GHGs will be subject to best available control technology ("BACT") for emissions control. Whether specific controls satisfy BACT requirements has historically been a focal point of litigation by citizens' groups challenging permits. That is likely to be the case with GHG emissions as well.

### Title V Permitting and the Rule's Effect

The Title V program generally requires all major sources<sup>1</sup> to obtain an operating permit that consolidates the various CAA requirements applicable to the facility into a single document. Title V permits generally contain five core elements: (i) emission standards; (ii) monitoring, recordkeeping, and reporting requirements; (iii) permit fees; (iv) annual compliance certification; and (v) expiry with renewal periods, not to exceed five years. Prior to the Tailoring Rule, Title V coverage was applicable to those sources with a potential to emit 100 TPY or more of any regulated pollutant.

As with the PSD program, EPA concluded that Title V permitting was triggered for GHG emissions when GHGs became "subject to regulation" under the CAA by virtue of the Endangerment Determination and the mobile source regulations. Due to the pervasiveness of GHG emissions, however, application of Title V to all sources of 100 TPY or more of CO<sub>2</sub>e emissions would have subjected countless sources to this complex and burdensome program, including many small industrial facilities, office buildings, hotels, restaurants, and apartment complexes. Hence, again as with the PSD program, the Tailoring Rule establishes a

new definition of “subject to regulation” and defines a “major source” of GHG emissions as one with a PTE of 100,000 TPY or more of CO<sub>2</sub>e, significantly reducing the scope of the Rule and its potential impact on many sources.

### Two-Step Approach to GHG Permitting

The Tailoring Rule adopts a two-step approach to stationary source permitting for GHGs. Step 1 focuses on those sources that would be subject to permitting “anyway” regardless of their GHG emissions (colloquially referred to as “Anyway Sources”). Under Step 1, Anyway Sources that also meet the Rule’s new major source threshold or significance level for GHG emissions are required to obtain permit coverage for their GHG emissions beginning January 2, 2011. Step 2 commences on July 1, 2011, and extends the permit requirement to major sources of GHG emissions that are not major sources of other pollutants and would not otherwise be required to obtain a PSD or Title V permit.

#### Step 1 PSD Permitting

During Step 1, all PSD Anyway Sources that will also be a major source of GHG emissions will be required, as part of the PSD permitting process, to conduct a BACT analysis for GHG emissions from the new construction. This requirement will also apply to modifications at existing PSD Anyway Sources that will increase GHG emissions by at least 75,000 TPY of CO<sub>2</sub>e.

#### Step 1 Title V Permitting

The Tailoring Rule does not require all holders of a Title V permit to immediately obtain a permit modification. During Step 1, Title V Anyway Sources must address GHGs through their normal Title V application, renewal or revision process. Again, during Step 1, sources will not be brought into Title V just through GHG

emissions. If a source is subject to Title V for non-GHG emissions, then its GHG emissions are subject to Title V requirements. At this time, there are limited GHG operating requirements, but Title V requirements would include BACT if subject to PSD monitoring, recordkeeping, and reporting. GHG emissions would also need to be identified and quantified in a Title V application.

#### Step 2 PSD Permitting

Step 2 Permitting begins on July 1, 2011, and will mark the first time that sources will become subject to permitting based exclusively on GHG emissions. Under Step 2, sources with a PTE of at least 100,000 TPY<sup>2</sup> of CO<sub>2</sub>e emissions are deemed major sources for the PSD program. Further, modifications resulting in a net GHG emissions increase of at least 75,000 TPY of CO<sub>2</sub>e will be subject to PSD review. Note, however, that under Step 2 major new or modified GHG emissions sources must also satisfy the CAA’s existing mass based requirements, namely the 100/250 TPY requirements for new sources and the 0 TPY significance level for modifications, before becoming subject to regulation for purposes of the PSD program. Thus, a facility modification resulting in a net decrease in GHGs on a mass basis, but which would otherwise result in an increase exceeding 75,000 TPY of CO<sub>2</sub>e, would not be subject to PSD permitting.

#### Step 2 Title V Permitting

Under Step 2, Anyway Sources will continue to be covered, and GHG sources having emissions of 100,000 TPY of CO<sub>2</sub>e must obtain Title V coverage. A Title V permit will be required for new or existing sources when the source has actual emissions exceeding 100 TPY of GHGs on a mass basis and a PTE of at least 100,000 TPY of CO<sub>2</sub>e. These new Title V permits will not result in additional substantive control

requirements, but will incorporate then-applicable CAA requirements.

#### Beyond Step 2

In the Tailoring Rule EPA committed to additional rulemaking where it will pursue either additional permitting and/or consider source exclusion from GHG permitting. During the next five years, EPA committed to study the effectiveness and administrative burden of regulating smaller sources. EPA’s approach could include streamlining actions or other measures to be determined.

#### Transitional Issues

EPA’s Tailoring Rule does not contain a reach back provision. So, PSD permits issued before January 2, 2011, will not be reopened to incorporate GHG requirements. Further, under such a permit, if construction of a permitted source did not commence by the Step 1 kickoff date, construction can proceed even though the permit was issued without consideration of GHGs. Title V sources will be subject to existing Title V application requirements, mandating the submittal of a Title V permit application within 12 months of either commencing operation or becoming subject to the program. As GHG requirements are promulgated, the Title V program’s existing supplementation procedures will be applicable.

#### Practical Effect

While the Endangerment Determination established the basis, the Tailoring Rule establishes the means by which EPA will regulate GHGs under the existing CAA regime. Because there is scant history on BACT for GHGs, permit challenges could create heightened uncertainty of outcome. Similarly, an existing Title V facility could be subject to enforcement or citizen suits if application for coverage is not made within the year after the source is subject to GHG regulations.

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The Tailoring Rule has already been challenged judicially as an unlawful loosening of the statutory thresholds that Congress established under the CAA. More challenges are likely as EPA has relied upon the rarely used doctrines of “absurd results,” “administrative necessity,” and “one step at a time” to establish permitting levels less stringent than those authorized by Congress in the CAA. There is little judicial authority establishing the parameters of these doctrines, so the likely outcome of any challenge is difficult to call. If the tailoring provisions of the Rule are struck down, however, a vast number of additional sources would need to be permitted, at great financial impact to the regulated community.

Taking these issues into account, this is an area warranting close scrutiny by the regulated community, as pervasive litigation is likely to shape the ultimate timing, outcome, and extent of GHG permitting under the CAA, particularly in the absence of legislative intervention by a gridlocked Congress. For additional information or insight into this subject, feel free to contact one of the authors listed on the first page or any member of Locke Lord’s Environmental or Climate Change Practice Teams for further information.

**Endnotes**

- 1 In addition to “major sources,” other sources subject to Title V requirements are: (i) sources subject to the acid rain program; (ii) sources subject to the PSD/non-attainment NSR permitting programs; (iii) any source subject to New Source Performance Standards or National Emissions Standards for Hazardous Air Pollutants; and (iv) other sources designated per EPA rulemaking.
- 2 The sources must also emit GHGs or another NSR pollution above the 100/250 TPY on a mass basis.

**About the Authors**

Gerald J. Pels is a partner in the Environmental Section at Locke Lord. He focuses in the area of multimedia environmental compliance, counseling, and litigation support and provides strategic guidance on corporate compliance strategies, environmental investigations, sustainability initiatives and stakeholder relations and management. His 26-years of wide range experience includes agency negotiations, assessing and counseling air, water stormwater, and waste permit compliance, representing clients at permit and other hearings, and providing comprehensive representation to potentially responsible parties and steering committees at both state and federal superfund sites.

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