

Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs

Fact Sheet

ACTION

- On March 29, 2010, the U.S. Environmental Protection Agency (EPA) completed its reconsideration of a December 18, 2008 memorandum entitled “EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program.” A PSD permit is required before a new industrial facility can be built or an existing facility can expand in a way that significantly increases emissions.
- This interpretive memo, from then-EPA Administrator Stephen L. Johnson to the EPA Regional Administrators, addressed when the Clean Air Act (CAA) PSD program would cover a pollutant, including greenhouse gases (GHGs) such as carbon dioxide (CO₂).
- The memo indicated that the PSD Permitting Program would apply to pollutants that are subject to either a provision in the CAA or a regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant. The memo further explained that pollutants for which EPA regulations only require monitoring or reporting, such as the provisions for CO₂ in the Acid Rain Program, are not subject to PSD permitting.
- In its October 7, 2009 reconsideration proposal, EPA requested comment on several interpretations of when a pollutant is “subject to regulation” under the CAA for the purposes of triggering the requirements to get a PSD permit, including:
 - A final EPA rule requiring control of emissions of a pollutant;
 - Inclusion of regulatory requirements for a pollutant in an EPA-approved State Implementation Plan;
 - An EPA rule requiring monitoring or reporting of emissions of a pollutant;
 - An “Endangerment Finding” for a pollutant under the CAA; and
 - EPA’s granting of a Clean Air Act section 209 waiver, such as the “California Waiver.”
- After carefully reviewing comments on the proposal, EPA is taking the following actions:
 - Affirming our existing position that PSD permitting is not triggered for a pollutant such as GHGs until a final nationwide rule requires actual control of emissions of the pollutant.
 - Interpreting that PSD permitting requirements are triggered when the control requirement of the nationwide rule “takes effect” – rather than at signature,

Federal Register publication, or effective date for the rule after publication in the *Federal Register*.

- Explaining that for GHGs, "takes effect" means when the first national rule regulating GHGs takes effect. If finalized as proposed, the rule limiting GHG emissions for cars and light trucks would trigger these requirements in January 2011 -- the earliest 2012 vehicles meeting the standards can be sold in the United States.
- Explaining that this interpretation of "subject to regulation" applies for Title V permitting as well.
- Confirming that there is no "grandfathering" of pending permit applications. If a permit is issued after Jan 2, 2011 (the earliest possible "takes effect" date for the proposed GHG light duty vehicle rule) it will have to address GHG emissions, even if applications were filed (and determined complete) prior to that date.
- Reinforcing the fact that new and modified large stationary sources must already consider energy efficiency when selecting the best available control technology (BACT) for non-GHG pollutants. Greater energy efficiency results in lower GHG emissions.

LEADING UP TO TODAY'S ACTION

- On April 2, 2007, the Supreme Court found that GHGs, including carbon dioxide, are air pollutants covered by the CAA. *Massachusetts v. EPA*, 549 U.S. 497 (2007). The case arose from EPA's denial of a petition for rulemaking filed by environmental, renewable energy, and other organizations requesting that EPA control emissions of GHGs from new motor vehicles and new motor vehicle engines under section 202(a) of the CAA.
- The Court found that the Administrator was required to determine whether or not emissions of GHGs from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. This determination is known as an "endangerment finding."
- On August 30, 2007, EPA issued a PSD permit to Deseret Power Electric Cooperative, authorizing it to construct a new waste-coal-fired electric generating unit near its existing Bonanza Power Plant, in Bonanza, Utah. The permit did not include emissions control requirements known as best available control technology (BACT) limits for CO₂. EPA acknowledged the *Massachusetts* decision but found that decision alone did not require PSD permits to include limits on CO₂ emissions.
- Sierra Club challenged the Deseret permit. On November 13, 2008, the Environmental Appeals Board (EAB) remanded the permit to EPA to reconsider "whether or not to impose a CO₂ BACT limit in light of the 'subject to regulation' definition under the CAA." The remand was based in part on EAB's finding that

there was not an established EPA interpretation of the regulatory phrase “subject to regulation.

- On December 18, 2008, then-Administrator Johnson issued a memorandum that established an interpretation of this regulatory phrase.
- On December 31, 2008, Sierra Club and 14 other environmental, renewable energy, and citizen organizations petitioned EPA to reconsider the PSD interpretative memo issued by then-Administrator Johnson.
- On February 17, 2009, Administrator Jackson granted the Petition for Reconsideration of the December 18, 2008 memorandum and indicated that EPA would utilize a rulemaking process to solicit comment on Administrator Johnson’s memorandum and related considerations reflected in the opinion of EPA’s Environmental Appeals Board in the *Deseret* decision.
- On April 17, 2009, EPA proposed to find under the CAA that greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations. The Agency also proposed to find that the combined emissions of GHGs from new motor vehicles and new motor vehicle engines are contributing to this mix of greenhouse gases in the atmosphere, and thus the climate change problem.
- On September 15, 2009, EPA and the Department of Transportation’s National Highway Traffic Safety Administration (NHTSA) issued a joint proposal to establish a national program consisting of new standards for model year 2012 through 2016 light-duty vehicles that will reduce greenhouse gas emissions and improve fuel economy. EPA expects to complete this rule shortly.
- On September 30, 2009, EPA proposed new thresholds for GHG emissions that define which sources would need to obtain Clean Air Act permits under the New Source Review and Title V operating permits programs. The proposed thresholds would tailor these permit programs to limit which facilities would be required to obtain permits. EPA intends to complete this rule in the near future.
- On September 30, 2009, EPA issued its reconsideration proposal in this action, as discussed above.
- On December 7, 2009, EPA finalized its finding under Clean Air Act that greenhouse gases in the atmosphere endanger both the public health and the environment for current and future generations. The agency also found that the combined emissions of greenhouse gases from new motor vehicles are contributing to the buildup of greenhouse gases in the atmosphere, and thus to the climate change problem. This action provides the legal basis for the final emissions requirements for new cars and trucks.

BACKGROUND

- Congress established the NSR program as part of the 1977 Clean Air Act Amendments and modified it in the 1990 Amendments. NSR is a preconstruction permitting program that serves two important purposes:
 1. Ensures the maintenance of air quality standards or, where there are not air quality standards, it ensures that air quality does not significantly worsen when factories, industrial boilers, and power plants are modified or added. In areas that do not meet the national ambient air quality standards, NSR assures that new emissions do not slow progress toward cleaner air. In areas that meet the standards, especially pristine areas like national parks, NSR assures that new emissions fall within air quality standards.
 2. Ensures that state-of-the-art control technology is installed at new plants or at existing plants that are undergoing a major modification.

FOR MORE INFORMATION

- To download a copy of this notice, go to EPA's Web site at: <http://www.epa.gov/nsr>.
- Today's final action and other background information are also available electronically at <http://www.regulations.gov>, EPA's electronic public docket and comment system. The docket number for this action is Docket ID No. EPA-HQ-OAR-2009-0597.
- For more information on the final rule, contact Dave Svendsgaard at (919) 541-2380 or svendsgaard.dave@epa.gov.