

March 30, 2010

EPA Sets Timeline for Regulating Greenhouse Gases in Permits

The EPA said Monday that it will begin regulating greenhouse gas emissions no earlier than January 2, 2011. The EPA announcement came in its March 29, 2010 decision regarding reconsideration of the December 18, 2008 memorandum from then EPA Administrator Stephen Johnson (“the Johnson Memorandum”) that addressed when air pollutants become regulated pollutants under the federal Clean Air Act (“the Act”). EPA’s decision affects when stationary sources will have to begin considering greenhouse gases (“GHGs”) in new source review and operating permits. EPA’s announcement provides a clearer picture of when EPA will implement and enforce GHG permitting requirements and of what affected persons should be doing in the meantime.

Background

Under the Act, an air pollutant must be a regulated pollutant before the permitting requirements are applicable to it. The Johnson Memorandum expressed EPA’s position that a pollutant does not become a regulated pollutant, triggering air permitting requirements, until the Act or an EPA rule required actual control of the pollutant. Therefore, GHGs, which currently are subject only to requirements regarding monitoring and reporting of emissions, are not regulated pollutants. In February 2009, EPA agreed to reconsider the Johnson Memorandum, but refused to stay its effectiveness.

EPA’s Decisions

EPA has affirmed the Johnson Memorandum position that air pollutants do not become regulated pollutants until a provision of the Act or an EPA rule requires actual control of the pollutant. EPA further announced that the specific date will be the date that the provision of the Act or the rule “takes effect,” which can be later than the day the rule becomes effective. According to EPA, GHGs will become regulated pollutants not when EPA promulgates the proposed rules limiting GHGs from motor vehicles (expected within the next few days), but rather when those rules actually take effect, which will be no earlier than January 2, 2011.

EPA also addressed a number of related issues. Those determinations include:

1. There will be no “grandfathering” of permit applications. If a permit is not issued until after the rule takes effect, the permit will have to address GHGs even though the application was filed and considered to be complete prior to the date the rule takes effect;
2. Applicants for permits should already be evaluating energy efficiency in determining the best available control technology (“BACT”) for existing air pollutants. Energy efficiency is expected to play a large role in evaluating BACT for GHGs.

Persons planning new or modified sources that would emit pollutants in amounts sufficient to trigger the federally required prevention of significant deterioration permit may want to expedite their plans in order to obtain a permit prior to the anticipated January 2, 2011 commencement of consideration of GHGs in permitting decisions. Although EPA presently intends to initially limit the permitting threshold for GHGs to 75,000 tons or more of carbon dioxide equivalent per year, its authority to so restrict the permitting requirements is subject to challenge. Given EPA’s announcement that the submission of a permit application will not “grandfather” the applicant out of the GHGs permitting requirement, persons seeking to avoid those requirements will want to expedite submission of applications for new or modified sources.

Please feel free to contact us if you have any questions regarding these matters.

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