



# EPA's GHG Regulation: What Your Company Needs to Know

## Troutman Sanders/Trinity Consultants Seminar

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### PRESENTED BY

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# Background

EPA Endangerment Finding (12/15/09)

leads to:

GHG Rule for Motor Vehicles (7/7/10)

leads to:

EPA determination that GHG emissions from stationary sources are automatically subject to regulation under PSD and Title V programs and to:

PSD Interpretive Memorandum (4/3/10) and Tailoring Rule (6/3/10) determining that GHG regulation will be phased in beginning 1/2/11.

# GHG Regulation to be Phased In Multi-Step Process

- Step One: 1/2/11 – Only “anyway” sources will be subject to GHG regulation.
  - Sources that potentially emit at least 100/250 tpy of non-GHG pollutants and that potentially emit at least 75,000 tpy of CO<sub>2</sub>e are subject to GHG BACT.
  - Only sources currently subject to the program (i.e., newly constructed or existing major sources for a pollutant other than GHGs) would be subject to Title V requirements for GHGs.
- Step Two: 7/1/11 – Sources undertaking new construction that will potentially emit at least 100,000 tpy of CO<sub>2</sub>e, and existing sources potentially increasing emissions by at least 75,000 tpy of CO<sub>2</sub>e, are subject to PSD (and GHG BACT) and Title V. Applies to permitted sources if not under construction!!!

# Further Steps

- Step Three: New rulemaking to begin in 2011 and conclude 7/1/12 to determine whether to lower thresholds, but new thresholds will not be effective until at least 7/1/13 and will not be less than 50,000 tpy through 4/30/16. Will also look at various permit “streamlining” mechanisms.
- Step Four: New study to be completed by 4/2015 to determine by 4/30/16 whether to lower thresholds further.

# State Law Implementation

- 43 States (and/or localities within these states) administer their PSD programs through SIPs – these programs are authorized under state law and approved by EPA.
- As of mid-2010, the laws of 13 SIP-approved states did not authorize GHG regulation.
- The laws of most (maybe all) of these SIP-approved states require PSD permits for sources that potentially emit above the CAA 100/250 tpy thresholds.

# For the 13 States that Do Not Authorize GHG Regulation:

- According to EPA, unless these laws were changed by 1/2/11, there will be a construction ban on facilities potentially emitting above the Tailoring Rule thresholds.
- Because federal law (the Tailoring Rule) will bar construction unless these facilities obtain a permit requiring GHG BACT controls, but state law will prohibit the permitting agency from issuing such a permit.



# For States With Regulatory Thresholds at 100/250 Levels:

- When GHGs become regulated pollutants on 1/2/11, 100/250 tpy permitting thresholds under state law that apply to other pollutants will automatically become effective for GHGs.
- Unless these states increase their thresholds to the Tailoring Rule levels, numerous small sources will become subject to PSD regulation and GHG BACT, creating the permitting gridlock – the “absurd result” - that the Tailoring Rule was designed to avoid.
- Because the Tailoring Rule does not automatically change the state law thresholds.

# Timing Problem for Changing State Law

- EPA did not begin addressing this problem until after Tailoring Rule was adopted in 6/10.
- Not enough time for states to push through law changes through notice-and-comment rulemaking or legislative action and for EPA to then approve revised SIPs reflecting the changed laws.

# The Regulatory Stampede

- In order to conform state and federal laws in the manner EPA wants by 1/2/11:
  - In December, EPA issued 7 rules, including 6 on the day before the Xmas holiday that totaled 544 pages and that were published in the Federal Register on 12/29 and 12/30.
  - Virtually every state in the union galloped through rulemakings from mid- to late-2010 to fix the state law problems, many acting under emergency authority.



# The Regulatory Stampede: States Whose Laws Don't Authorize GHG Regulation

- EPA GHG SIP Call and FIP (proposed 9/2/10, final 12/30/10).
- 13 states were subject to SIP Call requiring them to change their laws to authorize GHG regulation.
  - ostensibly given one year to change laws, but told that if laws not changed by 1/2/11, there would be a construction ban.
  - so offered “option” of being given an early SIP-Call date of 12/22/10 with knowledge that some states would not meet that date. But failure of states to meet 12/22/10 deadline would authorize EPA to impose FIP taking over permitting of GHG-emitting sources in those states in order to avoid the construction ban.



# The Regulatory Stampede

## States Whose Laws Don't Authorize GHG Regulation: The Final Count

- 7 states elected the early SIP Call option. On 12/30/10, EPA found that they had not submitted a SIP on time and imposed a FIP  
→ AZ, AR, FL, ID, KA, OR, WY
- EPA found that 5 states would change their state laws within first six months of 2011, so no FIP (but construction ban until changes made)  
→ CA (Sacto and AQMD), CT, KY (most of state), NE, NV (Clark Co)
- Unresolved FIP issues: will there be delegations and what will be the terms; EPA will only administer state PSD programs to extent of GHG emissions; state will administer for non-GHG emissions; dual masters, good luck getting a permit in timely fashion

# Texas

- Texas refused to accept an early SIP submittal deadline, says EPA is acting illegally, and says Texas SIP (that does not authorize GHG regulations) remains in place until Texas changes it after reasonable period of time (3 years).
- On 12/30/10, EPA adopted an interim final rule (without notice and comment) imposing a FIP on Texas, even though under SIP Call Texas is supposed to be given one year. Claims Texas has already said it will not meet the one-year deadline and EPA needs to act immediately to prevent a construction ban in the state.
- D.C. Circuit granted Texas an stay of this interim rule but then removed the stay. So Texas is also currently subject to a FIP.



## The Regulatory Stampede: States Whose Laws Require Regulation at the 100/250 tpy Threshold

- Differing accounts as to how many states made the necessary changes on time. Likely a number of states right now where sources emitting CO<sub>2</sub>e above 100/250 tpy that undertake new construction or modifications are violating CAA.
- Detour based on EPA attempt in final Tailoring Rule to avoid the necessity for states to change their thresholds by “interpreting” state thresholds at the Tailoring Rule level for GHGs – most states rejected this option.



## The Regulatory Stampede: States Whose Laws Require Regulation at the 100/250 tpy Threshold

- In theory, anyway, EPA still has to approve these changed state thresholds for GHGs. No time to do so by 1/2/11.
- EPA “parallel-processed” some state approvals and still has some in queue.  
→ Form of expedited approval.



## The Regulatory Stampede: States Whose Laws Require Regulation at the 100/250 tpy Threshold

- EPA also promulgated rule at end of year retroactively limiting EPA's prior approval of state SIPs to the extent that the SIPs authorize GHG regulation at thresholds below the Tailoring Rule levels...on theory that EPA made an "error" in these prior approvals by not having anticipated need to tailor thresholds for future GHG regulation. EPA says this has effect of pre-approving the changed state permitting thresholds, so EPA does not have to approve the changes now.
- Rule applies to 24 states under PSD, 33 under Title V.
- Major legal issues, to say the least.

## The Regulatory Stampede: Conclusion (for now)

- 8 States became subject to FIPs as of 1/2/11, including Texas, which is resisting. Terms of FIPs (delegation agreements, dual permitting still to be resolved).
- 5 states are subject to continuing SIP Call to change their laws to authorize GHG regulation at specified times in first half of 2011. Currently effective construction ban in these states for sources emitting CO<sub>2</sub>e above Tailoring Rule thresholds.
- Some states have not yet changed their thresholds to the Tailoring Rule levels and/or received EPA approval of SIP revisions. Some sources in these states may be in violation of CAA permitting requirements.
- Major unresolved legal questions as to the validity of EPA's process for requiring and then approving SIP revisions. More lawsuits on the December regulations?

# Litigation

- Large number of businesses and business associations plus NGOs plus 19 states have challenged EPA GHG regulations in D.C. Circuit
- 5 regulations challenged, consolidated into 3 cases:
  - endangerment finding plus denial of endangerment finding reconsideration petitions (climategate)
  - auto rule
  - tailoring rule. Johnson memo reconsideration
- Court will coordinate briefing of all 3 cases with single oral argument

# Litigation Status

- All motions to stay regulations pending disposition of case on merits denied
- Competing briefing formats and schedules have been submitted to court. Waiting for court order.
- Oral argument in Fall. Decision early 2012 (?)

# Litigation Issues

- Endangerment Finding
- Auto rule does not automatically trigger PSD and Title V
- If auto rule does automatically trigger PSD and Title V, EPA failed to engage in proper rulemaking procedure, including failure to assess consequences of stationary source regulation.
- Variety of implementation issues.

# Proposed NSPS Settlement Agreements

- EPA was sued to establish NSPS for GHG emissions from EGUs and petroleum refineries
- Proposes to settle these cases by agreeing to regulatory deadlines:
  - EGUs: Proposed rule: 7/26/11; final rule 5/26/12
  - Refineries; Proposed rule: 12/10/11; final rule 11/10/12

# Not Just New and Modified Sources!

- NSPS typically applies to new and modified sources.
- Compliments PSD, as NSPS becomes the “BACT floor,” with BACT potentially being more stringent as technology progresses from when NSPS was promulgated.
- EPA has little used authority to promulgate guidance for existing non-modified sources – states then must adopt standards per guidance. Proposing to use it here.

# Major Big Deal

- This is how they hit the existing fleet, something they can't do with PSD
- Compliance deadline of 2015-16 “or sooner”
- Is it appropriate for EPA to commit itself to this rarely used, discretionary, and hugely important form of regulation in a bilateral settlement agreement? And after the boiler MACT consent decree debacle?

→ Comments due 1/31

# Guidance and Associated Material

- Guidance Document.
- Control Measures White Papers for 7 Industry Sectors: coal-fired EGUs, large industrial, commercial, and institutional boilers, pulp and paper manufacturing, cement manufacturing, iron and steel, petroleum refineries, nitric acid plants.
- GHG Mitigation Strategies Data Base.
- GHGs added to RACT/BACT/LAER Clearinghouse.
- 3 hours of training videos.

# Guidance Ended Up Being Issued Later than EPA Planned

- Guidance issued 11/10/10, despite EPA indications it would come out in Summer .
- Issued in final without advance public comment.
- EPA conducted GHG task force two-phase process within CAAAC structure, but little impact on actual guidance.

# You Call This a Comment Period?

“EPA requested public comment on any aspect of the guidance that contains technical or calculation errors or where the statements concerning EPA policy might benefit from additional clarification. The comment period closed on December 1, 2010.”

# But They Took Comments Into Consideration Anyway...

“EPA received over 100 public comments on the “PSD and Title V Permitting Guidance For Greenhouse Gases” issued on November 10, 2010. Comments ranged from simple editorial comments to more involved suggestions pertaining to legal and policy positions in the guidance. After considering all of the comments, we believe that certain minor corrections and edits would help to improve the clarity and understanding of the information presented in the guidance document. Consequently, we are incorporating a limited number of minor clarifying edits into the guidance. EPA expects to issue the revised document in January 2011.”