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Greenhouse Gas Permit Requirements Delayed Until January 2011 – Sort Of

If you own or operate a stationary source of air emissions and were worried about imminent greenhouse gas regulation, EPA's actions today will not go far to ease your concerns. This afternoon, EPA announced that stationary sources, like power plants and factories, will not need a clean air act permit covering greenhouse gasses until at least 2011. However, EPA is finalizing GHG controls of mobile sources (cars and light trucks) and said today that regulation of stationary sources could commence *as early as January 2, 2011* if those mobile source rules are finalized as expected.

The technical reason for EPA's action today is its final reanalysis of the so-called "Johnson Memo," in which former EPA Administrator Stephen Johnson indicated when EPA would require GHG permits for stationary sources. In today's reanalysis, EPA stated that those permits are required when another nationwide control rule – like the mobile source rule – comes into effect, but not before then. Just as importantly, EPA announced today that it will *not* grandfather pending stationary source permit applications.

What this means is that only permits issued before the stationary source GHG controls kick in can be certain to avoid a GHG analysis.

There are a number of open questions. The first – whether EPA will finalize the mobile source rule by the end of the month – is fairly certain. That rule is in the final stages of approval and issuance is widely expected in the next couple of days. The second question is what EPA will say about delayed implementation in its "tailoring" rule. That rule, proposed last fall, has been delayed by the controversy surrounding which stationary sources will be immediately subject to GHG permitting. EPA recently indicated to Congress that it plans to require only the largest sources to get a permit at first – likely those emitting more than 75,000 tons per year of CO₂. EPA could build this and other extensions into the permitting timeline when and if the tailoring rule is finalized. The exact scope of these delays remains to be seen.

The final uncertainty is the length of any applicant's individual permitting process. A stationary source permit can be issued fairly quickly – in several months from application to permit – or they can take years. Only permits issued before January 2, 2011 can definitely avoid GHG analysis. The window to apply for a permit that will be issued in 2010 is quickly closing; for some larger permits – like those likely to require immediate permitting under EPA's tailoring rule – the window may already be closed.

As a result, despite the uncertainties, proactive applicants – including those with pending applications for very large projects – should be carefully considering how to address GHG emissions. This is admittedly a challenge, particularly given the absence of EPA guidance on what control technologies should be used to reduce GHG emissions. Nonetheless, guidance or not, the need for GHG analysis is coming, and today's announcement by EPA pushes off the inevitable only a bit.

For information on how to address these challenging issues or for other information about Greenhouse Gas regulation, please contact [Lowell Rothschild](#) 202.344.4065, [Doug Green](#) 202.344.4483 or [Bob Smith](#) 410.244.7590.

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