

GHG PSD Program Development, Litigation and Implementation

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GHG PSD Program Development

GHG PSD Program Development

- Beginning in 2009, EPA developed a six-part program for regulation and state implementation of GHGs from mobile and stationary sources
 - Endangerment Finding
 - Motor Vehicle Rule
 - Timing Rule
 - Tailoring Rule
 - SIP Call
 - Texas FIP

GHG PSD Program Development

- Endangerment Finding – 12/15/2009
 - GHG emissions from new motor vehicle engines “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” CAA Section 202(a)(1)

- Motor Vehicle Rule – 4/1/2009
 - Imposes qualitative emissions limits on manufacturers, beginning with model year 2012

GHG PSD Program Development

- Timing Rule
 - Mass. v. EPA: GHGs are CAA pollutants
 - To trigger PSD for stationary sources, must also be “subject to regulation,” which requires actual controls
 - Problem – Statutory thresholds too low for GHGs
- Tailoring Rule – 6/3/2010
 - Solution – “tailor” the statutory thresholds

GHG PSD Program Development

- SIP Call – 12/1/2010
 - Proposed Tailoring Rule asks states to explain how they intend to implement the Tailoring Rule
 - Texas Response:
 - “Texas has neither the authority not the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions.”
 - EPA issues SIP call – Texas does not respond

GHG PSD Program Development

- Texas FIP – 12/23/2010
 - EPA disapproves part of the Texas SIP
 - Establishes a partial FIP for GHG PSD in Texas

GHG PSD Program Litigation

GHG PSD Program Litigation

- All of EPA's GHG rules were subject to legal challenge in the D.C. Circuit – “rules of national applicability”
- Also a “grounds arising after” challenge to EPA's 1980 PSD rules
- Challengers included states, members of Congress, and trade groups representing industry
 - In total, 85 petitions for review filed
- Court denied industry and state motions to stay the rules during judicial review

GHG PSD Program Litigation

- D.C. Circuit Opinion Issued June 26, 2012
 - Endangerment Finding – upheld on the merits
 - Motor Vehicle Rule – upheld on the merits
 - Timing and Tailoring Rules – upheld based on lack of standing
 - “Grounds Arising After” Challenge – standing found, but upheld on the merits

GHG PSD Program Litigation

- D.C. Circuit Split Decision Issued July 26, 2013
 - SIP Call/Texas FIP
 - Majority – PSD is self-executing – i.e., as soon as a new pollutant is regulated under the Act, PSD permitting requirements apply, regardless of whether SIPs have been updated
 - Dissent – Under EPA’s regulations, states have up to 3 years to revise their SIPs when new pollutant is regulated under Act

GHG PSD Program Litigation

- Appeal
 - First Four Cases
 - Rehearing *en banc* denied
 - Cert petitions pending – decision imminent
 - SIP Call/Texas FIP
 - Abeyance pending Supreme Court decision on whether to grant cert. in first four cases

GHG PSD Program Implementation

GHG PSD Program Implementation

- EPA Region 6 is the permitting authority for Texas GHG sources
 - TCEQ still permits other pollutants
- Statistics (approximate)
 - 70 applications filed
 - 15 permits issues

GHG PSD Program Implementation

- Key Issues
 - Carbon Capture and Sequestration as BACT
 - No modeling required
 - “Cross-cutting” – Endangered Species Act and National Historic Preservation Act
 - “Major for one, major for all”
 - Completeness determinations, *Avenal* and the “Page Memo”
 - Sierra Club Comments and potential EAB appeals

GHG PSD Program Implementation

- Title V: Not addressed by the SIP Call or Texas FIP
- How will TCEQ address EPA-issued PSD GHG requirements in Texas Title V permits?
- Concern: “Operation Ban”
 - A change that triggers PSD is a “Title I modification” and also triggers a significant Title V permit revision.
 - Permit holder cannot operate a significant permit revision before the TCEQ has issued the revised Title V permit.
 - Will EPA/TCEQ dispute result in an EPA objection that prevents/delays Title V permit issuance?

GHG PSD Program Implementation

- TCEQ initial proposal: “Qualified incorporation” identifying GHG PSD requirements as *Federal-Only Enforceable*
- TCEQ practice after reconsideration: “Clean incorporation”
 - Statement of Basis used to describe circumstances of EPA GHG PSD permit issuance

The Coming Transition

- PSD authority: House Bill 788 (2013)
 - TCEQ *shall* adopt rules to implement HB 788 and authorize GHG emissions in Texas
- Key Issues:
 - Transition: timing and effect on pending applications
 - Contested case hearings: permit processes authorized by HB 788 are not subject to contested case hearing requirements
 - Escape clause: program to be repealed if GHG permitting no longer required under federal law

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