



# GHG Regulation, Legislation and Litigation

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# GHG Regulation

# Mandatory Greenhouse Gas Reporting Rule



- Final rule signed by EPA Administrator on September 22, 2009
- Rule was specifically authorized and required by the FY2008 Consolidated Appropriations Act (H.R. 2764; Public Law 110–161)
- Covers approximately 85% U.S. GHG emissions from approximately 10,000 facilities in 31 industries. Stationary source threshold is 25,000 metric tons of CO<sub>2</sub>e.
- Record keeping starts January 1, 2010 and first reports due March 2011.
- Minimal impact to EPD
- On March 22, 2010 (April 12, 2010 Fed Reg) EPA proposed to add 3 additional industry classes

# Endangerment Finding



- Legal prerequisite to the imposition of GHG emission controls under the CAA.
  - Final Rule: Published in FR December 15, 2009.
  - Pollutants:
    - Carbon dioxide (CO<sub>2</sub>),
    - Methane (CH<sub>4</sub>),
    - Nitrous oxide (N<sub>2</sub>O),
    - Hydrofluorocarbons (HFCs),
    - Perfluorocarbons (PFCs),
    - Sulfur hexafluoride (SF<sub>6</sub>)

# Endangerment Finding



- Endangerment Finding: EPA finds that six GHGs threaten the public health and welfare.
- Cause or Contribute Finding: EPA finds these GHGs from motor vehicles contribute to the GHG pollution which threatens public health and welfare.

# Reconsideration of PSD GHG Interpretive Memo



- Addresses when the PSD program would cover a new pollutant (such as carbon dioxide).
- 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.” (Published in FR April 2, 2010)

# Reconsideration of PSD GHG Interpretive Memo



- PSD permitting is not triggered for a pollutant such as GHGs until a final nationwide rule requires actual control of emissions of the pollutant.
- 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 controlling GHGs takes effect. 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.

# Reconsideration of PSD GHG Interpretive Memo



- 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 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.

# CAFE & Tailpipe Emission Standards for GHGs



- EPA and NHTSA rules for MY2012-2016 passenger vehicles and light-duty trucks.
- The EPA GHG standards require these vehicles to meet an estimated combined average emissions level of 250 grams of carbon dioxide (CO<sub>2</sub>) per mile in model year 2016, equivalent to 35.5 miles per gallon (mpg) if the automotive industry were to meet this CO<sub>2</sub> level all through fuel economy improvements.
- EPA is allowing auto manufacturers to earn credits toward the fleet-wide average CO<sub>2</sub> standards for improving air conditioning systems, such as reducing both hydrofluorocarbon (HFC) refrigerant losses (i.e. system leakage) and indirect CO<sub>2</sub> emissions related to the increased load on the engine.
- EPA is also setting standards to cap tailpipe nitrous oxide (N<sub>2</sub>O) and methane (CH<sub>4</sub>) emissions at 0.010 and 0.030 grams per mile, respectively.
- Georgia EPD submitted comments on proposed rule.
- Rules were signed April 1, 2010, EPA – effectively triggering the provision in the Clean Air Act causing GHG emissions to be regulated at stationary sources.

# Summary of EPD Comments



- Supported CAFE (NHTSA rule) improvements
- EPA should have evaluated potential impacts to stationary sources as a result of mobile source rule.
  - Deferring this issue to the “GHG Tailoring Rule” was improper
    - Note: In Tailoring Rule they still didn’t evaluate impacts to stationary sources. Tailoring Rule was considered to provide regulatory relief from the 100/250 tpy permitting requirements. So, they only calculated the amount of relief.
  - GHG Tailoring Rule is vulnerable to legal challenge
  - EPA failed to account for time needed for states to hire and train additional staff (or even if it was feasible given current economic conditions).
  - EPA significantly underestimated increase in workload for states
- Federal Govt. should finalize NHTSA CAFE rule but not the companion EPA rule. Therefore stationary source requirements would not be triggered.
  - Virtually all of the GHG emission reductions come from the CAFE rule. Therefore duplicative EPA rule comes at huge cost with virtually no environmental benefit.

# Tailoring Rule



- “Temporarily” Changes PSD and Title V thresholds from 100 (or 250) tpy to ???
  - Comment period ended December 28, 2009.
  - Proposed threshold of 25,000 tpy CO<sub>2</sub>e for GHGs.
  - Georgia EPD submitted comments on proposed rule.
  - Expected to be finalized late April/early May

# Tailoring Rule Proposed Definition of Carbon Dioxide Equivalent



- *Carbon dioxide equivalent, or CO<sub>2</sub>e*, means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The CO<sub>2</sub>e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy CO<sub>2</sub>e can be found in EPA's "Inventory of U.S. Greenhouse Gas Emissions and Sinks," which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

# Summary of EPD Comments (Tailoring Rule)



- Reiterated main points from GHG Tailpipe Comments.
  - Use NHTSA CAFE rule. Don't do EPA GHG rule.
- Need more time to implement – 2 years after final rule.
- Threshold should be raised further – Not less than 100,000 CO<sub>2</sub>e.
- GHG Metric
  - Don't combine gases. Base applicability on mass of individual pollutants.
  - Don't base thresholds on values that can change without going through EPA rulemaking.



# GHG Legislation

# Climate Action in the House



- On June 26, the U.S. House of Representatives passed the American Clean Energy and Security Act of 2009 (ACES), H.R. 2454, by a vote of 219 to 212.
- ACES establishes an economy-wide, greenhouse gas (GHG) cap-and-trade system requiring 17% reduction in GHG by 2020 and 83% reduction by 2050.
- Notably ACES Preempts EPA's ability to use parts of the CAA:
  1. May not become criteria pollutants (Sec. 831)
  2. May not become hazardous air pollutants (Sec. 833)
  3. May not be regulated under new source review (Sec. 834)
  4. May not cause facility to become subject to TV (Sec. 835)

# Climate Action in the Senate

- The Clean Energy Jobs and American Power Act of 2009 (S.1733)
  - Status: Passed out of the Senate Environment and Public Works Committee on Nov. 5
- The American Clean Energy Leadership Act of 2009 (S.1462)
  - Status: Passed by the Senate Energy and Natural Resources Committee on June 17
- The Clean Energy Partnerships Act of 2009 (S.2729)
  - Status: Introduced by Senator Stabenow (D-Michigan) on Nov. 4 and referred to the Senate Environment and Public Works Committee.
- The Clean Energy Act of 2009 (S.2776)
  - Status: Introduced by Senators Alexander (R-Tennessee) and Webb (D-Virginia) on Nov. 1
- The Carbon Limits and Energy for America's Renewal Act of 2009 (S.2877)
  - Status: Introduced by Senators Cantwell (D-Washington) and Collins (R-Maine) on Dec. 1
- Kerry-Lieberman-Graham (KLG)
  - Status: Draft available by April 26<sup>th</sup>???

# Joint Resolutions Disapproving of Endangerment Finding



- **H.J.RES. 77** - Rep Barton (introduced 3/2/2010) Cosponsors (111)
- **H.J.RES. 76** - Rep Skelton, Rep Peterson, Rep Emerson (introduced 2/25/2010) Cosponsors (41)
- **H.J.RES. 66** - Rep Moran (introduced 12/16/2009) Cosponsors (3)
- **S.J.RES. 26** - Sen Murkowski (introduced 1/21/2010) Cosponsors (40)

# Legislation Exempting 6 GHGs from Definition of Air Pollutant



- **H.R. 4572** – Rep Skelton, Rep Peterson, Rep Emerson (introduced 2/2/2010) Cosponsors (14)
- **H.R. 4396** –Rep Earl Pomeroy (introduced 12/16/2009) Cosponsors (21)

# “Stationary Source Regulations Delay Act”



- March 4, 2010 – Senator Rockefeller proposed legislation to delay EPA action on GHG emissions from stationary sources for 2 years. [S. 3072]
  - Would still allow GHG regulation of mobile sources.
- Companion legislation proposed in House by Nick Rahall (D-WV), Alan Mollohan (D-WV), and Rick Boucher (D-VA). [H.R. 4753]

# 20 Governors Letter



- On March 10<sup>th</sup> a group of 20 state and territorial governors sent a letter to Congressional leaders stating their support for efforts to prevent EPA from implementing GHG regulations under the Clean Air Act.
- 18 Republican and 2 Democratic governors argued that GHG policies should be developed by elected representatives that a mere delay in EPA GHG regulations would be insufficient to prevent job loss and economic harm that might result from such regulations.
- Mississippi, West Virginia, Alaska, Nebraska, Georgia, Kentucky, Rhode Island, Nevada, North Dakota, South Dakota, South Carolina, Minnesota, Utah, Hawaii, Louisiana, Alabama, Virginia, Arizona, Guam, Puerto Rico

# GA Legislature GHG Proposals - Senate



- SR 801: Opposes GHG Cap and Trade legislation (specifically the American Clean Energy and Security Act of 2009). Focuses on potential costs to American farmers and families and potential deforestation. (Senate Passed/Adopted 3/30/10)
- SR 958: Requests Congress adopt legislation that would postpone the US EPA's effort to regulate GHGs under the Clean Air Act. (Reported out of committee 2/9/10)
- SR 973: Opposes GHG Cap and Trade legislation (specifically the American Clean Energy and Security Act of 2009). Uses softer language than SR 801. Emphasizes need for cost benefit analysis. Points out that there has not been warming since 1998 and that natural variation may exceed human influence with respect to climate changes. Finally, it advocates that any GHG policies should originate in US Congress. (Reported out of committee 3/18/10)
- SB 401: Georgia Energy Freedom Act of 2010. Amends Georgia Air Quality Act to permit GA Gov. to delay implementation of federal GHG regulations (or federal law) until Gov. finds that implementation of such regulations (or federal law) would be beneficial to GA. (Senate Passed/Adopted 3/22/10, House Natural Resources and Environment committee 3/26/10)

# GA Legislature GHG Proposals

## House



- HR 1357: Identical to SR 958 (House Committee on Governmental Affairs 2/10/10)
- HR 1649 - Urges the Congressional Delegation of the State of Georgia to support federal legislation to prevent the United States Environmental Protection Agency from adopting regulations to regulate carbon emissions; and for other purposes. (House Natural Resources and Environment Committee 3/17/10)
- HR 1650 - Urges the Governor and Attorney General of Georgia to initiate action to sue the federal Environmental Protection Agency to prevent the agency from regulating carbon emissions; and for other purposes. (House Natural Resources and Environment Committee 3/17/10)



# GHG Litigation

# Litigation – Endangerment Finding



- Industry groups, conservative think tanks, lawmakers and three states filed 16 court challenges to U.S. EPA's "endangerment" finding for greenhouse gases before the February 16, 2010 deadline.
- On February 18<sup>th</sup> the DC Court of Appeals consolidated all of the challenges –Coalition For Responsible Regulation Inc. et al., V. United States Environmental Protection Agency (No. 09-1322 and consolidated cases)

# Groups Challenging EPA Endangerment Finding



Texas	Ohio Coal Association
Alabama	Utility Air Regulatory Group (UARG)
Virginia	Competitive Enterprise Institute (CEI)
Portland Cement Association	National Association of Manufacturers (NAM)
American Petroleum Institute	National Association of Home Builders
Corn Refiners Association	National Oilseed Processors Association
Peabody Energy Co.	National Petrochemical and Refiners Association
American Iron and Steel Institute	Western States Petroleum Association
Gerdau Ameristeel Corp.	American Farm Bureau Federation
National Mining Association	U.S. Chamber of Commerce
15 members US Congress* and the Southeastern Legal Foundation	Coalition for Responsible Regulation

\* All (R) GA Delegation in House

# States Intervening in Support of Petitioners



- In addition to the 3 States (Texas, Alabama, and Virginia) which filed petitions 14 States have intervened in Support of the Petitioners
- Nebraska, Florida, Hawaii, Indiana, Kentucky, Louisiana, Mississippi, North Dakota, Oklahoma, South Dakota, Utah

# States Intervening in Support of EPA



- 18 States have intervened in Support of EPA
- California, Massachusetts, Arizona, Connecticut, Delaware, Iowa, Illinois, Maine, Maryland, New Mexico, New Hampshire, New York, Oregon, Washington, Vermont, and Rhode Island
- Minnesota and Pennsylvania filed a separate intervention request

# Litigation – Reconsideration of PSD GHG Interpretive Memo

- On April 2<sup>nd</sup> Various companies and associations – the Coalition for Responsible Regulation, the Industrial Minerals Association, the National Cattlemen’s Beef Association, Great Northern Project Development, Rosebud Mining Company, and Alpha Natural Resources, Inc. – filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging EPA’s reconsideration of the PSD GHG Interpretive Memo
- June 1<sup>st</sup> is the deadline for additional challenges

# Contact Information



Chuck Mueller

Senior Policy Advisor

Georgia EPD

(404) 363-7047

[chuck.mueller@dnr.state.ga.us](mailto:chuck.mueller@dnr.state.ga.us)



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