

# CHALLENGES TO EPA'S GHG RULES HEAT UP



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## I. IN THE COURTS

EPA has taken a number of actions since the Supreme Court decided GHGs were air pollutants under the Clean Air Act. Some of the more significant ones are:

### Endangerment Finding:

Following on the Supreme Court's decision in Massachusetts v. EPA, the Endangerment Finding provided the basis for EPA's April 2010 GHG Tailpipe emission standard for cars and light trucks and its "Tailoring Rule."

### Tailpipe Emission Standards:

In a joint rulemaking with the National Highway Traffic Safety Administration, on April 1, 2010 EPA promulgated Tailpipe Emission Standards applicable to new passenger vehicles and light trucks. These standards apply to vehicle model years 2012 to 2016.

### EPA's Tailoring Rule:

EPA issued two rules in December of 2010 to implement the Tailoring Rule. The first Rule withdrew EPA's SIP approval for twenty-four states whose GHG emission thresholds were more stringent than the Tailoring Rule. The second Rule established GHG standards for large new or modified sources of GHGs.

## II. PENDING LEGAL CHALLENGES

- The Tailoring Rule and related actions by EPA have been challenged in at least 75 lawsuits, including suits by states, industry groups, NGOs and others.

### III. EFFORTS IN CONGRESS TO DERAIL GHG REGULATION

1. Despite the budget battle, efforts are also pending in Congress to derail EPA's Climate Change Rules.
  - A. Democratic Senator Jay Rockefeller has proposed a bill which would to delay EPA's GHG Regulations.
  - B. The Energy Tax Prevention Act of 2011 sponsored by Senator James Inhofe and Representatives Fred Upton and Ed Whitfield would block each of EPA's GHG-related efforts under the Clean Air Act, except the Tailpipe Emission Standards.
  - C. Senator John Barasso has also introduced a Senate Bill entitled "Defending America's Affordable Energy and Jobs Act," which in addition to blocking EPA GHG efforts (except the Tailpipe Emissions Standards), would prevent all federal agencies from considering GHG-related effects under laws other than the CAA.

### III. EFFORTS IN CONGRESS TO DERAIL GHG REGULATION (continued)

2. Specifically, these bills affect the following EPA Rules:
  - A. All of EPA's GHG-related actions, including the aforementioned Endangerment Finding and Tailoring Rule.
  - B. EPA's Tailpipe Emission Standards.
  
3. In addition these bills also address:
  - A. California's CAA Waivers
  - B. The ability of EPA to enforce state GHG-related laws
  - C. Federal GHG Reporting Requirements
  - D. Civil Tort claims based on the impact of GHGs
  - E. GHG consideration under NEPA, the Clean Water Act and the Endangered Species Act

### **III. EFFORTS IN CONGRESS TO DERAIL GHG REGULATION (continued)**

4. Republicans in the House have also introduced a “Continuing Resolution” that would cut funding for EPA’s GHG regulation until the end of the government’s fiscal year – September 30, 2011.

## IV. WHEN IS A CAA PSD PERMIT FINAL?

1. Order of the Environmental Appeal Board in Russell City Energy Center (“RCEC”), PSD Appeal, November 2010.
2. This Order denying review was the second time the EAB reviewed a challenge to the Russell City Energy Center PSD Permit. The first review resulted in a remand to the Bay Area Air Quality Management District (BAAQMD). On February 3, 2010 following post-remand proceedings BAAQMD issued a final permit.
3. Issues in the appeal included: (1) Whether the permit should be remanded again to consider NO<sub>x</sub> rules which came into effect a few days after the final permit was issued and two months before the rule was to go into effect; (2) whether GHG emission limitations should be included even though they were not to come into effect until after the appeal had been decided.
4. The Administrator has recognized that the proper point in time for fixing applicable standards is when the permit issuer initially issues the permit.
5. The Administrator has also recognized that the permit issuer need not apply a rule only “proposed” when the permit was issued and need not apply the rule on appeal.

## IV. WHEN IS A CAA PSD PERMIT FINAL? (continued)

6. The EAB in the RCEC case recognized that there were circumstances under which a permit on appeal might be remanded to add new conditions which went into effect when the appeal was pending. Those circumstances include: (1) when a separate permit modification by the permittee had been requested based on a regulatory change, (2) where the new rule required the permit applicant to apply for a permit modification to meet the new standards of the new rule.
7. EAB refused a remand of the RCEC permit to apply the new NO<sub>x</sub> rule because (a) the rule did not indicate it was intended to apply retroactively, (b) the length of time the application had been pending (November 2006), (c) the public and private resources that had been consumed in considering the permit application, and (d) the potential for an endless loop of new permits based on new regulations issued during the remand.
8. The EAB refused a claim that the permit should be denied because BAAQMD had failed to consider GHG emissions as regulated pollutant because the Tailoring Rule was not yet in effect.



## V. BIOMASS

The EPA has decided to exempt from the Tailoring Rule sources that burn biomass as a fuel.

- A. The deferral which has not yet been promulgated raises many questions. Deferral rulemaking is planned by July 2011.
- B. In the interim, EPA has said it will issue guidance that will provide a basis for states and local agencies can use to conclude that use of biomass is BACT.
- C. In 3 years, EPA will issue a rule that determines how biomass emissions should be treated or accounted for under GHG permitting requirements.