

**January 18, 2011**

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## A New Regulatory Frontier (and a New Sheriff): Greenhouse Gases in Texas

By [Michael J. Nasi](#), [Pinar Dogru](#) and [Jake Archiga](#)

Barring a court decision striking down the Environmental Protection Agency's (EPA) actions regulating greenhouse gases or without federal legislative intervention, Texas facilities will be facing new permitting requirements and standards in the coming years.

On January 12, 2011, the U.S. Court of Appeals for the D.C. Circuit denied Texas' motion to stay EPA's permitting of greenhouse gas (GHG) in Texas.<sup>1</sup> While the case will continue in the U.S. Court of Appeals, denying the stay means that for now, unless Texas agrees to assume permitting for greenhouse gases, EPA Region 6, in Dallas, will proceed with issuing GHG permits for large sources in Texas.<sup>2</sup>

### New or Modified Texas Facilities Will Require a Second Permit for GHG

Sources that are either constructing a new facility or expanding an existing one, and requiring a new permit after January 2, 2011, will be required to now obtain a GHG permit from EPA Region 6 if their carbon dioxide equivalent (CO<sub>2</sub>e) emissions are greater than 75,000 tons per year (tpy). Failure to obtain a GHG permit within the required timeframe will result in the facility being barred from commencing construction, according to the EPA, even if the Texas Commission on Environmental Quality (TCEQ) has already issued an air quality permit for the new facility or expansion.<sup>3</sup> [Click here](#) for additional detail on the EPA's GHG permitting timelines and impacted sources.

The potentially most burdensome element of GHG permitting is that new or modified facilities may be required to install Best Available Control Technology (BACT) for GHG emissions. EPA has outlined the process for BACT determinations in their draft guidance document "PSD and Title V Permitting Guidance for Greenhouse Gases."<sup>4</sup>

The guidance focuses on efficiency as the primary means for sources to demonstrate BACT, but leaves open the possibility that carbon capture and sequestration (CCS) may soon be a requirement for the largest of GHG emitting sources (e.g. power plants), particularly as the technology becomes more economical. Further, EPA has stated its intent to take a "hard look" at key elements of applications, particularly the ability for facilities to burn alternative sources of lower GHG emitting fuels.

The guidance recognizes that existing sources would not need to include GHG emissions in their Title V operating permits until the permit is renewed or a major modification is made that increases GHG emissions to over 75,000 tons per year. However, the guidance states that some existing facilities with Title V permits may be required to estimate their level of GHG emissions. Additional information about EPA's BACT guidance, including a limited number of industry specific (e.g. electric generating units, cement,

refineries) technical white papers, can be found [here](#).

\*Note that EPA intends to delay regulating GHG emissions from biomass-fired and biogenic sources for three years, pending additional scientific research.<sup>5</sup>

### **Existing Power Plants and Refineries Not Exempt – GHG Emission Guidelines**

Two longstanding cases with the EPA regarding GHG New Source Performance Standards (NSPS) for refineries and power plants were recently settled and, as a result, the EPA has agreed to promulgate standards for these facilities within the next few years.<sup>6</sup> In addition to issuing emission standards for new or modified facilities, the EPA will also be issuing emission guidelines for *existing* facilities. When the EPA issues emission guidelines,<sup>7</sup> states are required to submit plans controlling the pollutants at the existing facilities. Either the EPA approves the plan, or where a plan is not timely or sufficient, the EPA can promulgate their own plan establishing controls for existing facilities.

**Power Plants:** By July 26, 2011, the EPA will propose two rules: (1) a rule for GHG NSPS for new and modified power plants (subject to 40 CFR part 60, subpart Da); and (2) a rule for GHG emissions guidelines for existing power plants. Each state will be required to submit a plan to the EPA for approval that includes standards for the existing facilities and failure to submit a timely plan or to get EPA approval, results in the EPA issuing its own plan for the existing facilities. According to the agreement, the rules will be finalized by May 26, 2012.

**Refineries:** By December 10, 2011, the EPA will propose three rules: (1) a rule for GHG NSPS for new and modified refineries (subject to subpart J, Ja, Db, Dc, GGG, QQQ) and emission guidelines for existing facilities; (2) a review of emission standards in 40 CFR part 63, subpart UUU; and (3) a proposed resolution of outstanding issues outlined in the August 25, 2008, petition for administrative reconsideration. According to the agreement, the rules will be finalized by November 10, 2012.

The public may provide comment on the settlement agreements (and timelines to implement the standards) until January 31, 2011. Additional information on the NSPS and emission guidelines can be accessed [here](#).

If you have questions about the impact of EPA's GHG Permitting Program and NSPS to Texas facilities, please contact any of the following Jackson Walker attorneys:

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<sup>1</sup>*State of Texas v. U.S. EPA*, U.S. Court of Appeals for the D.C. Circuit (Case No. 10-1425) (January 12, 2011). In this order, the Court stated that Texas (petitioners) did not meet the necessary standards for a stay and that while the motion for leave to participate was granted, amici's motion for leave to file a response was denied (noting procedural restrictions for amici to file a response at this stage).

<sup>2</sup>*Id.* A second order issued the same day sets a deadline for statement of issues and procedural motions (February 11th, 2011) and dispositive motions (February 28th, 2011), stating also that any briefing on the case be deferred pending further order from the Court.

<sup>3</sup>A facility does not have an infinite amount of time to begin

construction after receiving their permit. Both the EPA and Texas Commission on Environmental Quality (TCEQ) have regulations and guidance on when construction must commence, otherwise risking avoidance of the air authorization.

<sup>4</sup>EPA anticipates a final version of the guidance with minor changes, in response to comment, to be issued in January 2011. In the interim, EPA expects sources to follow the November 2010 draft guidance document.

<sup>5</sup>EPA News Alert, "EPA to Defer GHG Permitting Requirements for Industries that Use Biomass"

<http://www.epa.gov/nsr/actions.html#jan11> (January 12, 2011)

<sup>6</sup>75 Fed. Reg. 82390 (Dec. 30, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-32929.pdf>.

<sup>7</sup>CAA Section 111(d).

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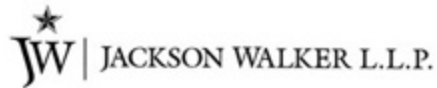
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