



January 25, 2011

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READY OR NOT, HERE IT COMES: UPDATE ON THE EPA-DRIVEN REGULATION OF GREENHOUSE GASES IN TEXAS

**Air & Waste Management Association
North Texas Chapter**



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Roadmap

- How We Got Here
- Where We Are Now
- The Tailoring Rule
- EPA's BACT Guidance
- EPA Takeover in Texas
- A Look Forward



How We Got Here

- *Mass. v. EPA*, 127 S.Ct. 1438 (Apr. 2, 2007)
- Advanced Notice of Proposed Rulemaking (July 30, 2008)
- Johnson Memo (Dec. 18, 2008)
- Endangerment Finding (Dec. 15, 2009)
- PSD Interpretive Memo (April 2, 2010)
- Light-Duty Vehicle Rule (May 7, 2010)
- Tailoring Rule (June 3, 2010)



Where We Are Now

- **Greenhouse Gas Reporting Rule**
 - Sector-based approach; subparts issued for source categories
 - First reports due March 2011 for 2010 GHG emission
 - Oil and gas sectors recently added – 2012 reporting
- **End of 2010 Rush to Finalize Permitting**
 - After January 2, 2011, GHGs regulated under Clean Air Act (subject to Tailoring Rule)
 - Sources working to finalize permitting
- **Not everyone made it**
 - New permitting requirements
 - Best Available Control Technology now required



The Tailoring Rule

Brief Background on NSR

- Clean Air Act § 165 requires new or modified “**major emitting sources**” to obtain New Source Review (NSR) permit before commencing construction / modifying
- **Major emitting sources:**
 - 100 tons per year of “NSR regulated pollutant” if source falls into one of 18 listed source categories in CAA § 169(1)
 - 250 tons per year of “NSR regulated pollutant”
- **Justification for Tailoring Rule:** Avoiding the “absurd results” of regulating sources that emit as few as 250/100 tons per year of CO₂e



The Tailoring Rule

Two-Step Implementation

- **Carbon dioxide equivalent:**
 - Based on “global warming potential”
 - Carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbon, and sulfur hexafluoride
- **Tailoring Rule Step 1: January 2, 2011**
 - New sources: NSR applies if new facility is already considered a major source for non-GHG criteria pollutants and the facility will emit 75,000 tons of CO₂e per year
 - Modifications: NSR applies if existing facility is already considered a major source for non-GHG criteria pollutants and modification will result in an increase of regulated NSR pollutant and modification will result in emissions increase of 75,000 tpy of CO₂e



The Tailoring Rule

Two-Step Implementation

- **Tailoring Rule Step 2: July 1, 2011**

- New Sources: NSR applies if the new facility will emit or have PTE of 100,000 tpy of CO₂e
- Modifications: NSR applies if the existing facility emits 100,000 tpy of CO₂e or more and modification will result in an emissions increase of at least 75,000 tpy of CO₂e
- Mass Basis: New facility must result in 250/100 tpy of GHGs on a mass basis / modification must result in a net increase of GHGs on a mass basis

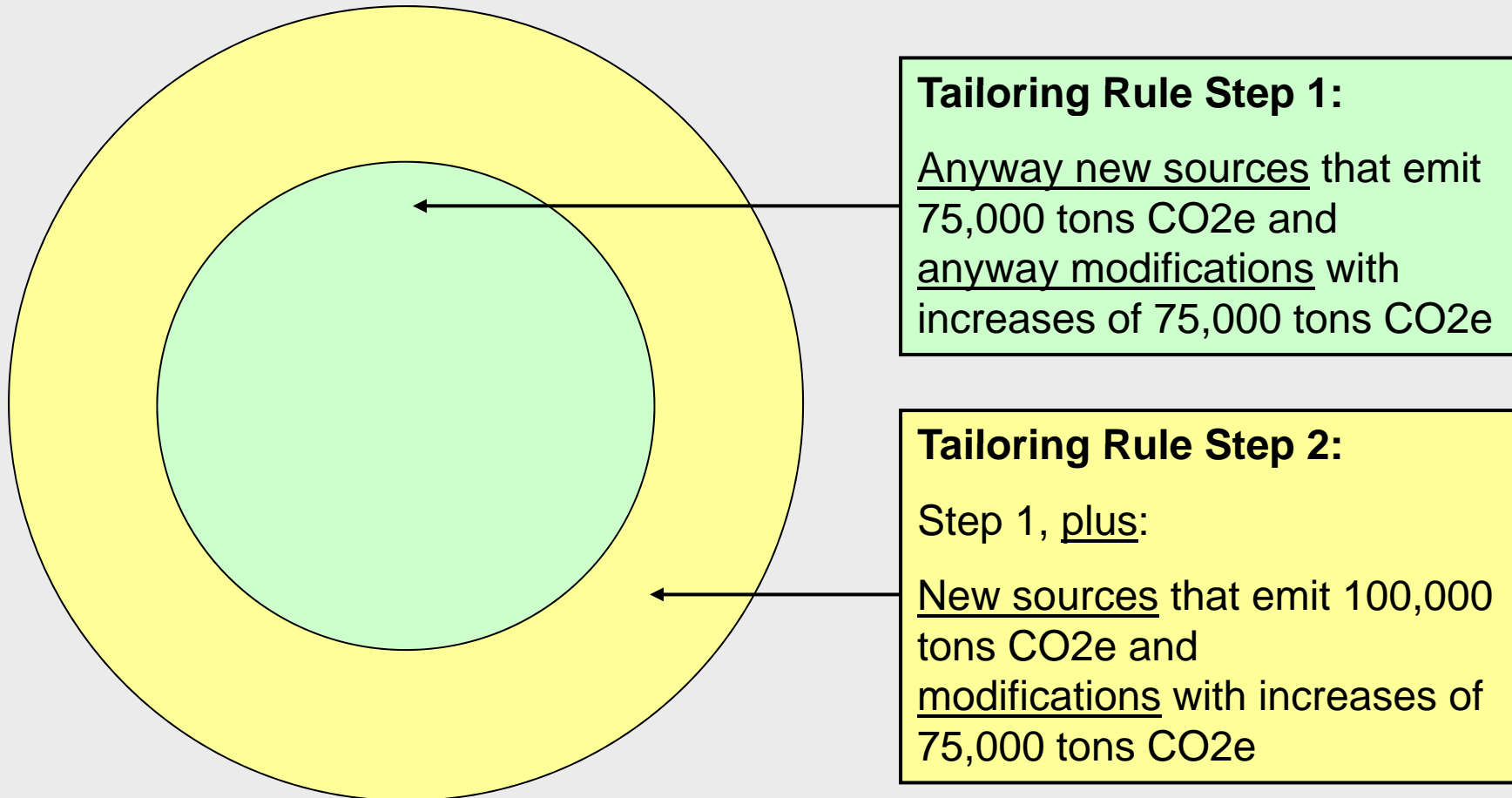
- **Key issues**

- Small equipment changes or upgrades can trigger GHG review
- Mass Basis Requirement: May provide opportunity to avoid NSR applicability for modifications at facilities that emit GHGs with high CO₂ equivalency



The Tailoring Rule

Two-Step Implementation



The Tailoring Rule

Title V Impacts

- **Tailoring Rule Step 1 (Jan. 2, 2011):** No sources subject to Title V solely because of GHG emissions
- **Tailoring Rule Step 2 (July 1, 2011):** Sources subject to Title V if will emit or have PTE of 100,000 tpy CO₂e or more and 100 tpy or more on a mass basis
- **Issues:**
 - Will result in new Title V applicability for several industries
 - Could result in new compliance assurance monitoring (e.g., opacity) for new Title V sources



EPA's BACT Guidance

Background & History

- **Best available control technology:** Major emitting sources of GHGs must use BACT to reduce GHG emissions:
 - Inherently lower emitting processes/practices/designs
 - Add-on controls
 - Combination of the two
- Oct. 2009: EPA Clean Air Act Advisory Committee (CAAAC) convenes BACT Work Group made up of government, industry, and NGOs
- Oct. 2009 – Feb. 2010: BACT Work Group conducts meetings and conferences
- Feb. 2010: Interim Phase I Report released without consensus on primary issues; final report never issued
- Nov. 2010: EPA issues final BACT Guidance to states implementing NSR for GHGs



EPA's BACT Guidance

Substance of Final Guidance

- **Framed in terms of EPA's 5-step "top-down" approach:**
 - Step 1: Identify all available control technologies
 - Step 2: Eliminate technically infeasible options
 - Step 3: Rank remaining control technologies
 - Step 4: Evaluate most effective controls and document results (and evaluate energy, environmental, and economic impacts)
 - Step 5: Select the BACT
- **Key issues:**
 - Guidance focuses on energy efficiency – will likely result in additional efficiency benchmarking (e.g., EnergyStar)
 - Guidance does not mandate fuel switching where fuel switching would result in a redefinition of the source

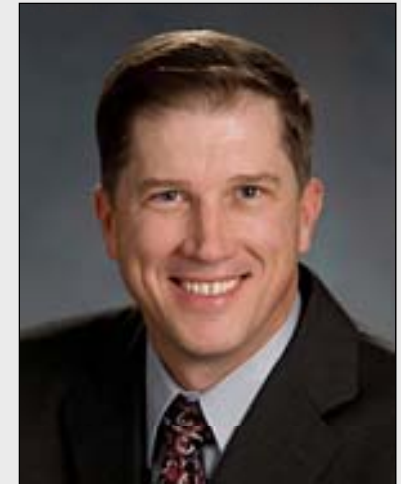


EPA Takeover in Texas

In the Left Corner



In The Right Corner



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EPA Takeover in Texas

EPA GHG Information Request



“We are requesting that states submit information . . . so that we may determine whether it is still necessary to finalize any of our proposed limited approvals for any SIP-approved PSD and part 70 title V state programs . . . states should explain whether they will apply the meaning of the term ‘subject to regulation’ established by EPA.” Tailoring Rule 75 FR 31525



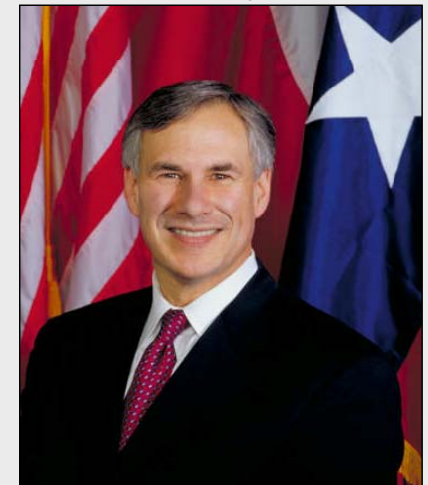
EPA Takeover in Texas

Texas' Response

“To encourage acquiescence with your unsupported findings, you threaten to usurp state enforcement authority and to federalize the permitting program of any state that fails to pledge their fealty to the [EPA] On behalf of the State of Texas, we write to inform you that Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions.” Letter from TCEQ Chairman Shaw & Texas AG Abbott to Lisa Jackson (Aug. 2, 2010)



Chairman Bryan Shaw, Ph.D., Texas Commission on Environmental Quality



Texas Attorney General Greg Abbott



EPA Takeover in Texas

Effects of Texas' Position

- **Dual permitting:**

- EPA Regional Administrator Armendariz stated that if Texas did not permit for GHGs, EPA Region 6 will take over permitting
- Federal Implementation Plan – 1/2/11
- Texas retains NSR permitting authority for non-GHG pollutants

- **Impacts:**

- Time-consuming and expensive to have two preconstruction permitting processes
- EPA Region 6 will carry out BACT analysis



State/Federal Litigation

- Challenges to GHG Rules Ongoing
 - Endangerment Finding, 2010 EPA Interpretive Memo, CAFE Standard, Tailoring Rule all at issue
 - motion for stay denied
- Challenge to EPA Takeover in TX Ongoing
 - Dec. 30, 2010 granting of temporary stay
 - motion for stay ultimately denied
 - however, this decision "should not be construed in any way as a ruling on the merits"
 - largely a challenge to procedure of FIP



A Look Ahead

- **Federal legislative action**
 - Attempt to preempt EPA action?
 - Challenge to Tailoring Rule?
 - Federal cap and trade legislation?
- **EPA action**
 - Cap-and-trade under the Clean Air Act?
 - National Ambient Air Quality Standard
 - New Source Performance Standards?

