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## EPA's Proposed Rule for New Power Plants Could Trigger Excessive Title V Permit Fees

***Proposed Greenhouse Gas Performance Standards for new power plants will have broader implications for Clean Air Act operating permit fees.***

The public comment period will soon close on May 9, 2014 for the Environmental Protection Agency's (EPA's) re-proposed rule on the Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units (GHG NSPS).<sup>1</sup> While EPA's proposal focuses on regulating greenhouse gas (GHG) emissions from new power plants, the new standards would trigger potentially excessive annual mandatory fees for facilities with Clean Air Act (CAA) Title V operating permits, unless EPA and states adopt changes to the current Title V fee calculation methods. The proposed rule presents several alternative approaches to fee calculation, and EPA solicits comments on its proposed alternatives and other approaches to prevent excessive fees while still meeting the CAA's mandate that Title V fees cover the permitting program's reasonable costs.<sup>2</sup>

### Potential for Excessive Title V Permit Fees

CAA Title V is implemented through 40 CFR parts 70 and 71. Under part 70, EPA approves a state's (or local or tribal agency's) operating permits program and the state must demonstrate that its permitting fee approach sufficiently covers all reasonable direct and indirect costs required to develop and administer the permit program.<sup>3</sup> Part 71 provides for a federal operating permits program, which is functionally very small and primarily involves EPA administering the Title V permitting program in Indian country.<sup>4</sup>

Early in 2014, EPA proposed CAA new source performance standards (NSPS) in the GHG NSPS rule to limit carbon dioxide emissions from new fuel-fired electric steam generating units and natural gas-fired stationary combustion turbines.<sup>5</sup> EPA's proposed regulation, if finalized, would include GHGs as a "regulated air pollutant" for the first time under part 70 and 71 regulations.<sup>6</sup> As a result, regulating GHGs under NSPS may trigger steep increases in annual Title V permit fees for facilities, depending on the permit fee framework EPA or the state, local or tribal agency use to administer the program. Since sources emit significantly more GHGs than other air pollutants,<sup>7</sup> fee calculations based on emissions volume would significantly exceed the amount needed to cover the Title V permitting program's reasonable costs.

### Title V Programs Using the Presumptive Minimum Fee Approach

Federal regulations provide states with a formulaic option — the "presumptive minimum" approach to fee calculation — to satisfy the requirement that sources pay an annual Title V permit fee sufficient to cover reasonable direct and indirect program administration costs. Under this presumptive minimum approach, if a state collects at least a specified minimum fee per ton of each regulated air pollutant, then EPA generally presumes the fees are sufficient.<sup>8</sup> EPA's GHG NSPS, if finalized, would include GHGs a "regulated pollutant (for presumptive fee calculation)" under the part 70 regulations.<sup>9</sup> The current minimum

fee rate is approximately US\$47 per ton for sources under part 70 programs (a rate EPA adjusts annually for inflation).<sup>10</sup> States may choose to exclude from the presumptive minimum fee calculation any emissions of regulated pollutants above 4,000 tons each year.<sup>11</sup> Even with this potential cap, the total GHG emissions fee increase for a source under the current Part 70 rule could still be very significant — up to US\$190,080 per year for only the GHG portion of the permit fee.<sup>12</sup>

### **Title V Permit Programs Without the Presumptive Minimum Fee Approach**

A state or other agency administering a Title V operating permit program may elect not to use the presumptive minimum approach. The CAA provides that EPA may approve a state, local or tribal Title V program if the entity demonstrates the collected fees sufficiently cover the program costs.<sup>13</sup> EPA's GHG NSPS rule proposal does not directly affect states operating part 70 programs that do not use the presumptive minimum fee approach.<sup>14</sup> However, the GHG NSPS rule may still affect those Title V programs if they define air pollutant consistent with the federal regulatory definition of "regulated air pollutant."<sup>15</sup>

### **EPA's Proposed Alternatives in the Rule**

EPA has recognized the implications of the proposed GHG NSPS rule on Title V fee requirements and proposes alternative approaches to allow permitting authorities to collect fees as needed while avoiding excessive and unnecessary fees.<sup>16</sup> EPA proposes to exempt GHGs from the standard Title V permit presumptive fee calculation, and asks for comments on its alternative proposed adjustments to the Title V fee calculation to account for GHGs in part 70 permit fees,<sup>17</sup> as outlined below. EPA also proposes similar approaches to address Part 71 permit fees.<sup>18</sup>

#### **Alternative 1: Fee Adjustment Based on GHG-related Permit Administration Activities**

EPA proposes to account for GHG emissions in the presumptive minimum fee by multiplying the number of "burden hours" for one of three listed GHG-related administrative activities by the cost of the administering agency's staff time; including wages, benefits and overhead.<sup>19</sup> This sum would then be added to the presumptive minimum fee calculated by multiplying the tons of non-GHG pollutants by the fee rate.

The three categories of agency activities, along with corresponding proposed burden hours, are:

- GHG completeness determination (for initial permit or updated application) – 43 burden hours
- GHG evaluation for a modification or related permit action – 7 burden hours
- GHG evaluation at permit renewal – 10 burden hours<sup>20</sup>

EPA invites comment on the accuracy of the specific burden hour amounts proposed for these GHG-related activities.<sup>21</sup>

#### **Alternative 2: Fee Adjustment Based on Increasing the Presumptive Fee Rate for Non-GHG Air Pollutants**

Alternatively, EPA proposes an increase in the per ton rate used in the presumptive minimum fee calculation for each non-GHG regulated air pollutant. Based on a cost estimate conducted in connection with the Tailoring Rule,<sup>22</sup> EPA suggests that the permitting authority increases the permit fee by approximately seven percent above the baseline in order to account for GHG costs. Under this approach, the new presumptive minimum fee rate currently in effect for Part 70 sources would be US\$50 per ton for each regulated air pollutant, excluding GHGs.<sup>23</sup>

### **Alternative 3: Exempting GHGs From Presumptive Minimum Calculation Without Adjustment**

EPA is also soliciting comments on an option that would not adjust for GHG costs in the presumptive minimum fee approach to Title V permit fees. Accordingly to EPA, the fact that most GHG sources subject to Title V permitting actually emit other regulated air pollutants, may merit this approach. Therefore, the current fee amounts sources pay may already adequately account for the costs of GHGs in the permitting program.<sup>24</sup>

### **Other Viable Alternatives**

EPA also invites commenters to propose other viable alternatives and to provide data and information supporting the proposed approach. As an example, EPA notes that states have previously commented on establishing a separate, lower presumptive fee per ton of GHG emissions.<sup>25</sup>

### **Conclusion**

EPA's proposed GHG NSPS rule presents significant cost implications for annual Title V permit fees. The agency's solicitation of comments on its proposed cost adjustment approaches, and on any approach beyond EPA's proposal, presents an opportunity for Title V permit holders to comment by May 9, 2014 in support of a preferred fee calculation approach that may affect facilities for years to come.

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If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**[Claudia M. O'Brien](#)**

claudia.o'brien@lw.com  
+1.202.637.2181  
Washington, D.C.

**[Karl A. Karg](#)**

karl.karg@lw.com  
+1.312.876.7691  
Chicago

**[Stacey L. VanBelleghem](#)**

stacey.vanbelleghem@lw.com  
+1.202.637.2153  
Washington, D.C.

**[Devin M. O'Connor](#)**

devin.o'connor@lw.com  
+1.202.637.2343  
Washington, D.C.

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## Endnotes

- <sup>1</sup> EPA, Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430, 1430-1519 (Jan. 8, 2014). EPA later extended the comment period to May 9, 2014. EPA, 79 Fed. Reg. 12,681, 12,681 (Mar. 6, 2014).
- <sup>2</sup> CAA Section 502(b)(3)(A).
- <sup>3</sup> *Id.*; 40 C.F.R. § 70.9 (2014).
- <sup>4</sup> See EPA, 79 Fed. Reg. 1430, 1490.
- <sup>5</sup> *Id.* at 1432.
- <sup>6</sup> *Id.* at 1490.
- <sup>7</sup> *Id.* at 1492.
- <sup>8</sup> CAA Section 502(b)(3)(B)(i); 40 C.F.R. § 70.9(b)(2).
- <sup>9</sup> EPA, 79 Fed. Reg. 1430, 1490.
- <sup>10</sup> EPA, Calculation of the Part 70 Presumptive Minimum Fee Effective September 1, 2013 through August 31, 2014 (Sept. 18, 2013), available at [http://www.epa.gov/oaqps001/permits/pdfs/fee70\\_2014.pdf](http://www.epa.gov/oaqps001/permits/pdfs/fee70_2014.pdf).
- <sup>11</sup> CAA Section 502(b)(3)(B)(iii).
- <sup>12</sup> The current Part 70 presumptive minimum fee is US\$47.52 per ton of a regulated pollutant emitted. When multiplied by the potential 4,000 ton limit in the fee calculation, the amount is US\$190,080 per year.
- <sup>13</sup> CAA section 502(b)(3)(B)(iv).
- <sup>14</sup> See EPA, 79 Fed. Reg. 1430, 1493.
- <sup>15</sup> See *id.* at 1490 n.262.
- <sup>16</sup> *Id.* at 1492-93.
- <sup>17</sup> *Id.* at 1493.
- <sup>18</sup> *Id.* at 1494.
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.* at 1518.
- <sup>21</sup> *Id.* at 1494.
- <sup>22</sup> EPA relied on data, gathered in the Information Collection Request for part 70, concerning the state burdens of permitting GHGs through step three of the Tailoring Rule. *Id.* Under the Tailoring Rule, EPA is phasing in GHG permitting requirements for CAA Title V and Prevention of Significant Deterioration permits to apply to larger sources of GHG emissions. *Id.* at 1444.
- <sup>23</sup> *Id.* at 1495.
- <sup>24</sup> *Id.* at 1494-95.
- <sup>25</sup> *Id.* at 1495.