

**Current GHG Legal Status in the United States:  
EPA's "Endangerment Determination" and Proposed "Tailoring Rule"**

As debate continues in Congress over potential cap-and-trade legislation, a two-decade battle over EPA's duty to regulate greenhouse gases (GHGs) under the Clean Air Act (CAA) has come to a critical juncture. On December 7, 2009, EPA issued its final determination that GHGs endanger public health and welfare. Anticipating this determination and recognizing that it will have enormous implications for EPA's obligation to regulate GHGs under the CAA, EPA proposed in September 2009 a "Tailoring Rule" under the Prevention of Significant Deterioration (PSD) and Title V provisions of the CAA.

EPA's "endangerment determination" is a response to the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*, which held that GHGs are "pollutants" under the CAA and that, if EPA finds GHGs from new motor vehicle emissions endanger public health and welfare, it must regulate those emissions. Because of the structure of the CAA, the implications of EPA's determination are not limited to vehicles. Instead, the determination will inevitably trigger regulatory action on virtually every commercial GHG source. EPA's "Tailoring Rule" is an effort to come to grips with this reality.

**The "Tailoring Rule" – EPA Begins to Regulate Carbon under CAA**

EPA's proposed "Tailoring Rule" recognizes that, absent congressional action, the CAA will require extensive GHG regulation. The proposed rule thus would limit regulation, initially, to GHG sources emitting 25,000 tons or more of CO<sub>2</sub>e annually. Existing sources would be subject to Title V operating permits, and new or modified sources would require PSD review. EPA claims that this approach will allow it to begin controlling GHGs from sources accounting for 70% of the total U.S. GHG emissions.

This rule is "tailored" to avoid the statutory requirement that would trigger Title V and PSD at GHG emission thresholds orders of magnitude lower than 25,000 tons. EPA's rule would give the agency 5 years to consider how to address sources emitting GHGs below 25,000 tons. The U.S. Chamber estimates such facilities could include:

- 260,000 office buildings
- 150,000 warehouses
- 71,000 hotels/motels
- 37,000 churches
- 92,000 health care facilities
- 17,000 farms
- 51,000 food service facilities

**Did you know?**

**Number of Days per Year with Peak Temperature over 90°F**

1961-1979                      2080-2099

0   15   30   45   60   75   90   105   120   135   150   165   180   >180  
Number of Days per Year                      CH2P3-B™

**Key Findings of U.S. Global Change Research Program**

- Global warming unequivocal and human-induced
- U.S. climate change underway and growing
- Climate impacts occurring and increasing
- Climate change will stress water resources
- Crop and livestock production will be stressed
- Coastal areas threatened by sea level rise and storm surge
- Public health affected by heat, disease, poor air quality, extreme weather, and increase in pests
- Sea level rises, increased hurricane intensity, increased storm surge
- Climate change synergistic with other stressors

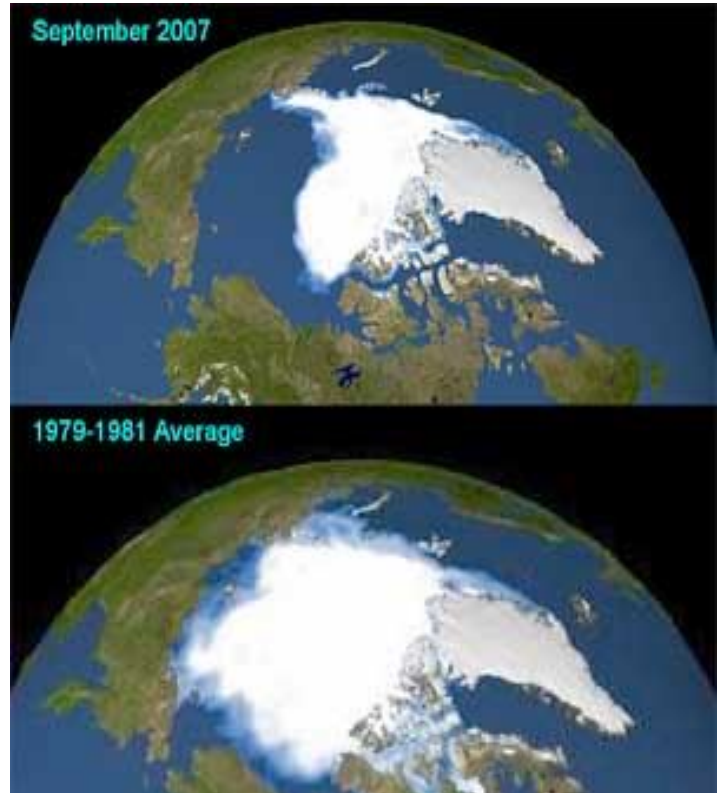
EPA recognizes the challenges associated with applying the CAA as written to GHGs, stating in its proposal that permitting authorities would be “paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate.” EPA estimates, for example, that the literal application of the PSD requirements would lead to approximately 40,000 PSD permit applications annually – compared to the 300 or so annual applications currently processed. (Notably, EPA discusses the burdens on permit-issuing authorities much more extensively than the burdens on entities required to obtain permits.)

EPA indicates that the Tailoring Rule is not an exemption of other sources from the CAA – instead, the agency is “deferring” consideration on how to address those sources in 6 years.

The proposed Tailoring Rule rests on EPA’s theory that it can avoid the literal language of the CAA, triggering regulation at levels as low as 100 tons of a pollutant, through legal doctrines of “administrative necessity” and “absurd results.” EPA argues in the proposed rule that a literal application would undermine the CAA’s intent. Needless to say, this approach has the potential to draw legal challenges both from industry and environmental groups, particularly since the U.S. Supreme Court in recent years has taken a very literal approach to interpreting environmental statutes. On one hand, most-immediately affected industries may object to the exclusion of so many other sources from coverage. And, as a general matter, certain business interests, such as the U.S. Chamber of Commerce, have argued that the proposed rule will put major roadblocks in the way of building needed major facilities. On the other hand, some in the environmental community may balk at the arguable end-run around the CAA’s statutory language, although early indications are that environmental groups may favor EPA’s approach.

Did You Know?

### Changes in Arctic Ice Cap, Source: NASA



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