



ENVIRONMENTAL UPDATE

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**EPA proposes steps to toughen New Source  
 Review air permitting**

On February 11, 2010, the Environmental Protection Agency (“EPA”) took two actions under its New Source Review (“NSR”) programs. First, EPA proposed to accelerate the end of its policy of allowing an applicant for a Prevention of Significant Deterioration (“PSD”) permit to use PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> in their air quality modeling and analysis of best available control technology (“BACT”). 75 Fed. Reg. 6,827 (Feb. 11, 2010). Second, EPA proposed to stay indefinitely the December 2008 “Fugitive Emissions Rule,” leaving uncertain whether all sources must consider fugitives when making NSR determinations. 75 Fed. Reg. 6,823 (Feb. 11, 2010). Public comments are due on each proposal by March 15, 2010.

**EPA Accelerates End of PM<sub>10</sub> as a Surrogate for PM<sub>2.5</sub> by PSD Applicants**

**EPA PM<sub>10</sub> “Surrogate” Policy.** EPA set the PM<sub>2.5</sub> national ambient air quality standards (“NAAQS”) in July 1997 (later revised October 2006). However, after setting the NAAQS, EPA acknowledged that it lacked a way to calculate accurately a source’s PM<sub>2.5</sub> emissions, did not have modeling tools to project the ambient impact of PM<sub>2.5</sub> emissions, and lacked a network of PM<sub>2.5</sub> monitoring sites to develop background concentrations. To address this, EPA issued guidance that allowed sources to use PM<sub>10</sub> as a surrogate for assessing PM<sub>2.5</sub> emissions. EPA Memorandum, John S. Seitz, Dir. Office of Air Quality Planning and Standards, to Regional Air Directors, *Interim Implementation of New Source Review for PM<sub>2.5</sub>* (Oct. 23, 1997).

**EPA’s May 2008 Rule.** In May 2008, EPA issued a final rule requiring state permitting authorities to transition away from the PM<sub>10</sub> surrogate policy to direct regulation of PM<sub>2.5</sub> with two exceptions. First, sources that applied for PSD permits before July 15, 2008 but had not yet received their permits were subject to a grandfather provision and could still use the PM<sub>10</sub> surrogate policy. Second, SIP-approved states could continue to use the PM<sub>10</sub> surrogate policy until May 2011 or until EPA approved a state’s revised PSD regulations, whichever came first.

**Changes Under EPA’s February 11, 2010 Proposed Rule.** EPA has issued the February 11, 2010 proposed rule in response to challenges to its May 2008 rule.

- *End to grandfathering.* The proposal would end the grandfather provision, because EPA believes the technical difficulties that justified the surrogate policy no longer exist. A source that submitted a PSD permit application before July 15, 2008 and has not yet received a permit would have to demonstrate that its emissions of

PM<sub>2.5</sub> will not cause or contribute to a NAAQS violation and perform a BACT review for PM<sub>2.5</sub>.

- *Effectively narrowed use in approved programs.* The proposal would still allow states with approved PSD programs to apply the surrogate policy until EPA approves revised PM<sub>2.5</sub> regulations or May 2011 (whichever is earlier). However, EPA states that permitting agencies “should not ... allow[ ] the automatic use of a PM<sub>10</sub> analysis as a surrogate for satisfying PM<sub>2.5</sub> requirements,” and requires any state permitting agency “to justify the application of the [surrogate] policy in each specific case.” 75 Fed. Reg. at 6,834. As such, state permitting agencies are likely to be more circumspect before applying the PM<sub>10</sub> surrogate policy even in this interim period, and permit opponents may have a further basis to challenge a state PSD permit.

**Request for Comment.** EPA seeks comment on the following:

- *Lack of PM<sub>2.5</sub> threshold.* EPA recognizes that many approved state PSD rules do not include a PSD significance threshold for PM<sub>2.5</sub>. That could mean that increases below the federal threshold of 10 tons/year in PM<sub>2.5</sub> emissions could trigger PSD review. EPA is seeking comment on whether the lack of a defined PM<sub>2.5</sub> PSD trigger is an obstacle to eliminating the surrogate policy.
- *The harms and benefits of the policy.* Other topics for comment include: (1) the environmental harms and benefits of leaving the PM<sub>10</sub> surrogate policy in place until May 2011; (2) the environmental harms and benefits of immediately prohibiting use of the PM<sub>10</sub> surrogate policy; and (3) the difficulty for state permitting agencies in immediately ending use of the PM<sub>10</sub> surrogate policy.

## **EPA Proposes to Indefinitely Extend Stay of “Fugitive Emissions Rule”**

EPA is proposing to stay indefinitely a rule that was designed to resolve an ambiguity in the way the NSR rules address fugitive emissions.

**Fugitive Emissions and NSR Reform Rules.** Before 2002, EPA only required a source to include fugitive emissions in an NSR applicability review if the source fell within a class of 27 listed source categories. In 2002, EPA issued new rules (the “2002 NSR Reform rules”) that caused confusion because the rules added a requirement that all existing sources count fugitives, while also retaining the pre-existing exemption from NSR applicability. In effect, one section of the rules required fugitive emissions to be counted for modifications at all sources, but another section required consideration of fugitives if a source was within one of the 27 listed categories.

## **Fugitive Emissions Rule – Promulgation and Temporary Stay.**

In December 2008, EPA issued a rule clarifying that only sources in the 27 source categories must include fugitive emissions. On September 30, 2009, however, EPA announced that it is implementing a three-month administrative stay of the “Fugitive Emissions Rule,” in essence reinstating the original 2002 NSR Reform rule with respect to fugitives.

**Proposed Indefinite Stay.** On February 11, 2010 EPA proposed to extend the stay of the December 2008 rule indefinitely. EPA is soliciting comments on whether a different time period for the stay should be established such as 12 months or 24 months. EPA is not soliciting comments on the substance of the December 2008 Fugitive Emissions Rule or its decision to stay that rule. As such, so long as the stay remains in effect, it would remain uncertain whether all sources must consider fugitives when making NSR determinations or only those 27 source categories listed by rule.

**If you have any questions regarding this update, please contact the lawyers listed below or the Sidley lawyer with whom you usually work.**

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