



GHG Regs: Winners, Losers Among Ethanol Producers

By James L. Pray

The U.S. EPA and the U.S. Supreme Court have laid out two divergent paths for the regulation of greenhouse gas (GHG) emissions by ethanol producers. It could create marketplace disparities between very large producers with prevention of significant deterioration permits (PSD) who will be subject to best available control technology or other limitations for GHG emissions, and smaller producers who will mostly escape the impact of upcoming GHG emission regulations.

In 2010, the EPA issued regulations that tailored both PSD and Title V programs to phase in permitting requirements for GHGs, including sources that were not currently holding Title V or PSD permits. During the implementation phase, various parties challenged the tailoring rule in court, with some arguing that the rule was too lax and others that the regulations were overbroad.

Last summer, the U.S. Supreme Court issued its decision in *Utility Air Regulatory Group v. EPA*. The losers are current PSD permit holders and the winners are minor source permit holders that do not have a PSD permit. In the United States, there are both winners and losers among ethanol producers. Oddly, even though some plants are nearly identical, they may end up being treated differently for GHG emissions.

The court first tackled the question of whether a source should be subject to PSD and Title V simply because of the source's potential to emit GHGs. For ethanol plants, this is an important question as ethanol plants produce enormous amounts of GHG. The court held that the term "air pollutant" was narrowly implemented in the Title V and PSD programs and that it would be unreasonable for the EPA to use the more expansive definition to include GHGs as triggers for non-Title V and PSD sources. The court drew from the EPA's own estimate of the catastrophic effect that forcing Title V and PSD regulations would have on both the EPA and industry, essentially 6 million new permit applications, billions of dollars in extra costs, and decade-long delays in getting any plant changes approved. The cost of this regulation also outweighed the benefit as these industries are only responsible for about 3 percent of GHG emissions.

Because the court recognized that an unprecedented level of complexity, cost and economic inefficiency was far beyond the

intention of Congress when it passed the Clean Air Act, it threw out the tailoring rule for these industries. Subsequent to the decision, the EPA now suggests that any sources that changed their permit status to become Title V or PSD solely because of their potential GHG emissions should consider modifying their permit to drop the Title V and PSD aspects of the permit.

The court next addressed the second question: Are sources that are already subject to the PSD program because of other regulated air pollution emissions subject to GHG emission limits under the tailoring rule? The court noted that these sources generate 83 percent of GHG emissions and that there was reason to believe that the regulatory burden of adding GHGs to the permit would not be unreasonable.

What does this mean for the ethanol industry? For minor sources, the decision should come as a great relief. Unless they are situated in a state that allows air rules to exceed EPA requirements, those plants should not be burdened by additional regulatory control over GHG emissions. For ethanol producers currently holding PSD permits, the EPA will be looking to fashion controls over their GHG emissions. What form that will take is not yet clear as the EPA has been slow to provide real guidance on how ethanol plants should be expected to reduce their GHG emissions, though it has made some preliminary suggestions. Meanwhile, it may be important for policymakers to focus on what makes ethanol plants unique. As the industry has already argued many times, most of the carbon dioxide created by ethanol plants is carbon neutral as it originated in corn and other plant material used to create the ethanol in the first place. As much as one-third of a kernel of corn is carbon dioxide by volume. Those plants had only recently captured that carbon dioxide and the ethanol plant is really just borrowing that gas until it is recaptured by next year's crop. In this respect, the ethanol industry is very different than industrial operations that are generating GHGs from fossil fuels. These distinctions need to be articulated while the EPA is still formulating its rules.

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