One of the issues is the extent to which the Clean Air Act’s GHG controls are rele-
vant to the permitting of new stationary sources of air pollution. There is an impor-
tant Supreme Court case for the Desert Power plant, a proposed coal plant in Utah. In
November 2008, the Environmental Appeals Board for the Administrative Review
Board issued a decision on a proposed prevention of significant deterioration permit under the
Clean Air Act for that power plant. The prin-
cipal question in the case was whether GHGs are pollutants “subject to regulation” under the
Clean Air Act, because if they are, then they need to impose the best available control technology. However, there is a real question about just what the best available control technology for GHGs might be. The Environmental Appeals Board issued a decision basically saying that is an important and – and open question. That decision had a chilling effect on permitting applications for many other facilities around the country because it cast a lot of questions about what the Clean Air Act’s requirements would be. In December 2008, the administrator of EPA, Stephen Johnson issued a membran-
dum stating that GHGs are not pollutants “subject to regulation.” Under the new EPA administrator, Lisa Jackson, sent out a letter to the Sierra Club stating that the new administration will take another look at the decision.

Desert Rock is another appeal that is rais-
ing largely the same issue. These cases arise in situations where there is not an EPA permit or there are to implement relevant provisions of the
Clean Air Act. Some states have delegated authority under the Clean Air Act and those states it is up to the state environmental-
tal agencies and courts how to apply the law. The EPA’s lack of an action on this permis-
sion has finally brought the march done the road of GHG regulation. One of the ques-
tions is how long can or must they take. In most instances, there are a number of inter-
mediate rulemaking steps that have to be fol-
lowed and these can take several months before they are finished.

Editor: How much GHG is enough to trig-
ger the requirement for a permit?

Gerrard: Under the text of the Clean Air Act you need a permit if you are generating at least 100,000 tons per year of CO2 – which is a considerable amount for those chemicals, but not very much in terms of GHG. While 200 tons per year of SO2 would apply to a very small facility – an apartment building, for instance – for GHGs, EPA has clearly indicated that they do not have an appetite for regulating every small facility that generates 250 tpy of GHG.

Editor: What is happening in Congress regarding GHGs?

Gerrard: In April, Congressmen Henry Waxman and Edward Markey introduced a major bill in the House that would set up a national cap-and-trade system, under the Kyoto Protocol. Furthermore, the document states that the combined effect of GHGs is a considerable amount for those chemicals, but not very much in terms of GHG emissions. While 250 tons per year of SO2 would also apply to a very small facility – an apartment building, for instance – for GHGs, EPA has clearly indicated that they do not have an appetite for regulating every small facility that generates 250 tpy of GHG.

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