

## EPA: The usual suspects aren't lining up to block agency's pending 'tailoring rule'

Jessica Leber, E&E reporter

Opponents of climate regulations have long warned that a court is sure to strike down U.S. EPA's "tailoring" rule, which offers a reprieve to small businesses that would otherwise need greenhouse gas emissions permits next year.

But first, someone would have to pull the trigger with a lawsuit. With EPA soon due to release its final rule, many of the usual suspects point the other way.

The challenge won't likely come from the mainstream environmental community. National groups such as the Sierra Club have said that claims that they would sue are simply meant to raise alarm.

The Center for Biological Diversity, a group that has fired off a barrage of lawsuits and petitions to pressure more stringent climate actions from the Obama administration, is also not opposed to the rule's general goal.

"We agree with the concept that you need to start somewhere, and starting first with the mega-large sources makes sense," said Bill Snape, the group's senior legal counsel.

He said he believes industry groups might bring a self-fulfilling challenge to a rule they say is doomed to fail. "It is a knee-jerk reaction," he said. "They have sued EPA at every single juncture of the greenhouse pollutant regulatory process."

Indeed, industries, free-market groups, climate science skeptics and more than a dozen states have all lined up to challenge EPA's declaration that greenhouse gases are pollutants, a finding that imposes no direct regulation. And a coalition of industry groups has also sued EPA for its plan to make stationary sources subject to regulation beginning this January, warning of dire consequences.

### A different species of rule

The tailoring rule, however, is different because it limits the scope of regulations. Large industries and states have a lot more to lose should a challenge succeed in nullifying the rule, as they themselves have so consistently warned.

Without the tailoring rule, hospitals, schools and a host of unregulated businesses would suddenly need permits next year. Air regulators would also be buried under a pile of paperwork that could grind all permit reviews to a halt, states have said.

The White House is now reviewing the final rule, which EPA Administrator Lisa Jackson has said will avoid these dire scenarios by initially raising the trigger threshold to 75,000 tons of emissions a year, about 750 times what is written in the letter of the Clean Air Act.

"What EPA is proposing helps industry, helps state and local governmental

agencies, and helps the environmental community," said Bill Becker, executive director of the National Association of Clean Air Agencies.

Jeff Holmstead, an industry attorney who headed EPA's air office during the George W. Bush administration, said it certainly won't be his clients who line up to challenge that.

Still, Holmstead said he expected that when EPA releases the rule, the first lawsuit would be in before the day was out.

Among other potential challengers, groups ideologically opposed to EPA's foray into climate change regulation might want to prove their point, Holmstead said. Becker, too, said that only someone who wanted this program to fail might sue.

### Free-market groups may hang back

The Competitive Enterprise Institute, an industry-funded free-market think tank that is among the most strident opponents of EPA's climate regulations, does not want to sue, according to Senior Fellow Marlo Lewis. "Similarly, I can't see one of the free-market groups mounting a litigation challenge, which would be like asking for more regulation," he said.

Lewis instead saw the lurking lawsuit threat in unwieldy activist groups that oppose large chain development, such as Wal-Mart or McDonald's.

“Once they realize that lawfully you must apply the [Clean Air] Act as it’s written to carbon dioxide, they will see this as the perfect avenue to prevent that kind of development,” Lewis said.

The Center for Biological Diversity’s Snape did not, however, rule out his group’s opposition on narrower grounds.

The group is pressing EPA to ensure the

tailoring rule does not exempt offshore oil and gas drilling air permits.

Direct emissions from these activities could fall below EPA’s final threshold, he said. But once the fossil fuels are extracted and burned, he said, the emissions would be far larger, and EPA should include those.

“If it’s a hospital ... the tailoring rule

makes sense, but not if it’s a fossil fuel extraction rig on the Chukchi Sea,” Snape said. Given the ongoing Gulf of Mexico oil spill disaster, he said, now is not the time to give drillers a free pass in the region most vulnerable to climate change. “An oil spill in the Arctic would be completely and utterly catastrophic on many levels,” Snape said.

