



# Oregon Department of Environmental Quality

**Nov. 5-7, 2014**

**Oregon Environmental Quality Commission meeting  
Temporary rulemaking, Action item: E**

## **Air Quality Greenhouse Gas Permitting - Temporary**

### **DEQ recommendation to the EQC**

DEQ recommends that the Environmental Quality Commission:

Determine that failure to act promptly would result in serious prejudice to the public interest or the interests of the parties concerned as provided under the Justification section of this staff report.

Adopt temporary rule amendments as proposed in Attachment A as part of chapter 340 of the Oregon Administrative Rules to be effective upon filing with the Secretary of State.

### **Overview**

#### **Short summary**

DEQ proposes rule amendments to remove certain parts of Oregon's greenhouse gas permitting requirements temporarily while DEQ determines how to respond to a recent change to federal greenhouse gas permitting rules. The temporary rules would prevent some facilities from spending thousands of dollars in 2014 to comply with Oregon's current requirements until EQC considers permanent rules in 2015.

#### **Background**

The federal Clean Air Act regulates pollution-emitting facilities to protect public health. Under the Act, certain facilities are required to obtain permits and install technology to control or reduce emissions.

A federal Title V operating permit is designed to administer federal health standards, air toxic requirements and other regulations to protect air quality and ensure that pollution-emitting facilities comply with state and federal air emissions standards. A Prevention of Significant Deterioration permit is designed to protect public health and welfare; preserve, protect, and enhance the air quality in areas of natural, recreational, scenic, or historic value; ensure that economic growth will occur in a manner consistent with the preservation of existing clean air resources; and assure that any decision to permit increased air pollution in any area is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process.

It is illegal to operate a major industrial source of air pollution without a Title V permit. A major industrial source is any facility with the potential to emit 100 tons per year of any regulated air pollutant. It is also illegal to construct or modify a major emitting facility without obtaining a Prevention of Significant Deterioration permit. A major emitting facility has the potential to emit 100 tons per year of any regulated air pollutant for certain listed facilities or the potential to emit 250 tons per year of any air regulated pollutant for non-listed facilities.

A facility seeking a Title V or Prevention of Significant Deterioration permit can incur thousands of dollars in permitting and control technology costs. Title V permit holders pay an annual base fee regardless of emission quantities, emission fees per ton of particulate, nitrogen oxide, sulfur oxide and volatile organic compound emissions per calendar year, and specific activity fees for permit modifications. A facility seeking a Prevention of Significant Deterioration permit pays a permit fee of \$43,200 and must install emissions controls to comply with emissions limits that are comparable to similar facilities using the Best Available Control Technology.

The U.S. Environmental Protection Agency is responsible for adopting rules to implement the Clean Air Act's Title V and Prevention of Significant Deterioration permitting programs. The U.S. Supreme Court's April 2, 2007, decision in *Massachusetts v. EPA* held that the Clean Air Act definition of air pollutant includes greenhouse gases. In response to the Court's decision, EPA determined that every facility with the potential to emit greenhouse gases above the Clean Air Act's thresholds for Title V and Prevention of Significant Deterioration permitting is subject to the permitting requirements.

However, EPA determined that requiring permits for all facilities with the potential to emit 100 or 250 tons per year or more of greenhouse gases would radically increase the size of the permitting programs and make them difficult to administer. On May 13, 2010, EPA mitigated this radical increase to the programs by limiting the applicability of permits on the basis of greenhouse gas emissions alone to facilities with the potential to emit 100,000 tons of greenhouse gases per year or more.

On April 21, 2011, EQC adopted rules substantively identical to EPA's rules. Like EPA, Oregon's rules require any facility with the potential to emit 100,000 tons per year or more of greenhouse gases to obtain a Title V permit. Oregon's rules also require any new facility with the potential to emit 100,000 tons per year or more of greenhouse gases and any existing facility that makes modifications that increase its greenhouse gas emissions by at least 75,000 tons per year and has total greenhouse gas emissions of 100,000 tons per year or more after the modification to obtain a Prevention of Significant Deterioration permit.

At the federal level, the Utility Air Regulatory Group and numerous other parties, including several states, challenged EPA's rule and on June 23, 2014, the U.S. Supreme Court determined that the Clean Air Act neither compels nor permits EPA to adopt rules requiring a facility to obtain a Title V or Prevention of Significant Deterioration permit on the sole basis of its potential greenhouse gas emissions. Oregon's rules were not affected by the Supreme Court's decision and remain in effect, whereas for EPA and many states, the Court's ruling took effect immediately. For EPA and those states, there is no uncertainty about the greenhouse gas permitting requirements. Facilities regulated by EPA or those states no longer need to submit applications that would formerly have been required by the now-invalid federal greenhouse gas permitting rules.

The Court did not completely invalidate EPA's authority to require permitting for greenhouse gases; it determined that EPA reasonably interpreted the Clean Air Act to require facilities to comply with Prevention of Significant Deterioration permitting requirements for greenhouse gases if they were required to apply for a Prevention of Significant Deterioration permit based on emissions of other regulated pollutants. EPA estimates that the Supreme Court decision means the Prevention of Significant Deterioration program will still regulate 83 percent of greenhouse gas emissions from new and modified facilities that trigger Prevention of Significant Deterioration for other pollutants. The invalidated authority to impose the program on facilities based solely on greenhouse gas emissions would have meant that the program regulated an additional three percent of greenhouse gas emissions from new and modified facilities.

## Statement of need

What need is DEQ trying to address?

In 2011, EQC adopted rules substantively identical to the federal greenhouse gas permitting rules. The 2014 Supreme Court decision invalidates EPA's authority to impose the federal greenhouse gas permitting requirements. Oregon's rules were not affected by the Supreme Court's decision and remain in effect, whereas for EPA and many states, the Court's ruling took effect immediately. The discrepancy between federal and state requirements create uncertainty for the agency, regulated community and public.

DEQ seeks to address three primary issues with the proposed temporary rules:

- Oregon's existing rules add to the uncertainty about permitting requirements for greenhouse gases that affected facilities and DEQ must deal with until final action on this issue is taken by EQC in early 2015;
- The existing rules may cause harm to DEQ because they send a signal that DEQ is unwilling to take timely and appropriate action to prevent unnecessary costs; and
- Due to timing of the permitting requirements in existing rules, a small number of facilities may incur unnecessary costs in 2014 if Oregon's final rules in 2015 follow the Supreme Court ruling.

DEQ is in the process of evaluating public comments on permanent rule amendments that DEQ plans to present to EQC for decision in 2015.

How would the proposed rule address the need?

The proposed temporary rules would address the need by removing certain Oregon greenhouse gas permitting requirements temporarily while DEQ determines a final recommendation to EQC regarding the 2014 U.S. Supreme Court decision in a permanent rulemaking.

### Consequences of not taking immediate action

DEQ determined that failure to amend the proposed rules promptly would result in serious prejudice to the interests of Oregon businesses. Failure to amend the proposed rules promptly would result in continued uncertainty about current and future permitting for greenhouse gases. DEQ is engaged in a permanent rulemaking process that will resolve this uncertainty in a 2015 EQC meeting.

DEQ cannot predict the final outcome of the 2015 rulemaking and must consider two possibilities:

1. The permanent rules in 2015 will not follow the Supreme Court's ruling and therefore retain Oregon's current greenhouse gas permitting program; or
2. The permanent rules will follow the Supreme Court's ruling and eliminate the comparable parts of Oregon's greenhouse gas permitting program.

In the first case, assuming the permanent rules do not follow the Supreme Court's ruling and Oregon retains the current rules, the only effect of the proposed temporary rules is a short delay before facilities must submit the necessary applications or parts of applications. Permitting rules have long been interpreted as follows: applications must comply with the rules in effect when the application is submitted, and the permit must comply with the rules in effect when the permit is issued. If the rules change between application submittal and permit issuance in a way that makes any part of an application unnecessary, then DEQ will ignore the unnecessary parts. If the rules change in a way that requires the permit to address additional requirements, then the applicant must submit the necessary additional information when the rules become effective. If EQC adopts the temporary rule now but decides later to retain the current greenhouse gas permitting rules, the only negative effect is a short delay in each facility's submittal of the necessary applications or parts of applications.

In the second case, assuming the permanent rules follow the Supreme Court's ruling, leaving the current rules in place between now and a 2015 EQC action means that affected facilities must continue to comply with those rules. Any permit applications or parts of applications that facilities submit from now until rule revisions are applicable must comply with the current rules and DEQ must process them under the current rules. However, under this second case, the time, effort, and cost for those facilities to develop the applications would be wasted because portions of the applications would ultimately be ignored by DEQ in the final permit action. This result would seriously prejudice the interests of affected facilities.

Although the number of facilities affected by the proposed temporary rules is small, DEQ also believes that not adopting the temporary rules would seriously prejudice the public interest by undermining the efficient operation of state government. It would send a signal that DEQ is willing to allow affected facilities to waste money when such waste can be prevented by timely and appropriate action. DEQ is very aware that the cost of complying with environmental regulations can be substantial and tries to avoid making facilities spend money unnecessarily.

For these reasons, DEQ concludes that not adopting the temporary rules would seriously prejudice the public interest by failing to have an efficient, effective and predictable state air quality permitting system.

Affected parties

The number of facilities that DEQ knows with certainty are directly and immediately affected by the proposed temporary rule amendments is small.

- One semiconductor manufacturing facility must submit a permit application by the end of 2014. If the proposed temporary rules are not adopted, the facility’s application must include a Best Available Control Technology analysis for greenhouse gases. DEQ believes a Best Available Control Technology analysis for greenhouse gases will increase costs by up to several tens of thousands of dollars to the \$43,200 cost of the facility’s application. If EQC ultimately adopts rules that follow the Supreme Court ruling, this Best Available Control Technology analysis would become unnecessary and the facility would pay a lower application fee.
- Another semiconductor manufacturing facility must submit a Title V permit application by the end of 2014. If EQC ultimately adopts rules that follow the Supreme Court ruling, this application will become unnecessary and the facility will continue to pay only the Air Contaminant Discharge Permit fees of \$9,216 rather than the annual Title V base fee of \$7,787 and the annual Title V emission fee of \$58.88 per ton of particulate, nitrogen oxide, sulfur oxide and volatile organic compound emissions.

In addition to these facilities, DEQ has recently become aware of some possible new facilities that may need to submit applications before a 2015 EQC decision and are thereby potentially affected. However, DEQ does not currently have sufficient information about these facilities to determine if they will be affected.

How temporary rule would avoid or mitigate consequences

The proposed temporary rules would avoid consequences by removing the greenhouse gas permitting requirements temporarily. This would prevent at least two facilities from spending thousands of dollars to comply with permitting requirements before EQC considers permanent rules that take into consideration the U.S. Supreme Court decision. If the proposed temporary rules expire or EQC does not remove the requirements in the permanent rulemaking, these facilities would ultimately have to comply with the greenhouse gas permitting requirements of obtaining a Title V permit or a Prevention of Significant Deterioration permit for new or modified facilities.

Rules affected, authorities, supporting documents

Lead division	Program or activity
Operations	Air Program Operations
Chapter 340 action	
Amend	ORS 340-200-0020, 340-216-8010, 340-224-0010

Statutory authority

ORS 468.020, 468A.025, 468A.040, 468A.050 and 468A.310

Other authority

None

Statute implemented

ORS 468A.025, 468A.035, 468A.040, 468A.050 and 468A.310

Documents relied on for rulemaking ORS 183.335(2)(b)(C)

Document title	Document location
Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from Industrial, Commercial and Institutional Boilers	<a href="http://www.epa.gov/nsr/ghgdocs/iciboilers.pdf">http://www.epa.gov/nsr/ghgdocs/iciboilers.pdf</a>
Supreme Court of the United States: Utility Air Regulatory Group v. Environmental Protection Agency <small>ET. AL.</small>	<a href="http://www.supremecourt.gov/opinions/13pdf/12-1146_4g18.pdf">http://www.supremecourt.gov/opinions/13pdf/12-1146_4g18.pdf</a>
EPA Memo: Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in <i>Utility Air Regulatory Group v. Environmental Protection Agency</i>	<a href="http://www.epa.gov/nsr/documents/20140724memo.pdf">http://www.epa.gov/nsr/documents/20140724memo.pdf</a>

## Housing costs - ORS 183.534

DEQ determined the proposed rules would have no effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-square-foot detached, single-family dwelling on that parcel.

The proposed rules do not add new requirements; they remove existing requirements temporarily.

## Fees

This rulemaking does not involve fees.

## Public notice OAR in, OAR 137-001-0080

EQC prior involvement

DEQ emailed information about the proposed temporary rule revisions to EQC in August 2014.

## Public notice

DEQ provided notice of the temporary rule Aug. 26, 2014, in the following ways:

Posted notice on DEQ's webpage:

<http://www.oregon.gov/deq/RulesandRegulations/Pages/2014/GHGTemp.aspx>

Emailed notice to:

- U.S. Environmental Protection Agency, Region 10, Seattle.
- Approximately 6,883 interested parties through GovDelivery, comprised of subscribers of the groups rulemaking, air quality permits and the Title V permit program.
- 406 representatives of permit holders, comprised of Simple and Standard air contaminant discharge permits and Title V operating permits

Mailed notice by the U.S. Postal Service to 47 representatives of permit holders not signed up for email notification, comprised of simple and standard air contaminant discharge permits and Title V operating permits.

## Public comment

DEQ did not accept public comment on the temporary rule. DEQ accepted public comment during development of the permanent rule amendments, which DEQ plans to bring to the Oregon Environmental Quality Commission for decision in 2015.

# Implementation

## Notification

The proposed rules would become effective upon filing with the Secretary of State, approximately Nov. 7, 2014. DEQ would notify affected parties by mail and email.

# Five-year review

## Requirement [ORS 183.405](#)

The state Administrative Procedures Act requires DEQ to review **new** rules within five years of the date the EQC adopts the proposed rules. Though the review will align with any changes to the law in the intervening years, DEQ based its analysis on current law.

## Exemption

The following APA exemption from the five-year rule review applies to all of the proposed rules:

- Amendments or repeal of a rule. ORS 183.405 (4)