

Secretary of State
STATEMENT OF NEED AND JUSTIFICATION
A Certificate and Order for Filing Temporary Administrative Rules
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Department of Environmental Quality
Agency and Division

340
Administrative Rules Chapter Number

Air Quality Greenhouse Gas Permitting - Temporary

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of:

Air Quality Greenhouse Gas Permitting - Temporary

Statutory Authority:

ORS 468.020, 468A.025, 468A.035, 468A.040, 468A.050, 468A.055, 468A.070

Other Authority:

Statutes Implemented:

ORS 468A, 468A.025 and 468A.035

Need for the Temporary Rule(s):

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 in *Utility Air Regulatory Group v. Environmental Protection Agency ET. AL.* 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. However, for EPA and many states, the Court's ruling took effect immediately. The discrepancy between federal and state requirements creates uncertainty for the agency, regulated community and public.

DEQ addresses three primary issues with the 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 rules address the need?

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

Documents Relied Upon, and where they are available:

Document Title

Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from Industrial, Commercial and Institutional Boilers

Document Location

<http://www.epa.gov/nsr/ghgdocs/iciboilers.pdf>

Document Title

Supreme Court of the United States: *Utility Air Regulatory Group v. Environmental Protection Agency ET. AL.*, June 23, 2014.

Document Location

http://www.supremecourt.gov/opinions/13pdf/12-1146_4g18.pdf

Document Title

Document Location

<http://www.epa.gov/nsr/documents/20140724memo.pdf>

Justification of Temporary Rule(s):

Consequences of not taking immediate action

DEQ determined that not promptly amending the rules would cause serious prejudice to the interests of Oregon businesses. Not promptly amending the cause 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 will therefore retain Oregon's current greenhouse gas permitting program; or
2. The permanent rules will follow the Supreme Court's ruling and will eliminate 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 submittign 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 complying with those rules. Any permit applications or parts of applications that facilities submit from now until rule revisions apply 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.

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