

Oregon Department of Environmental Quality

**Nov. 5-6, 2014**

Oregon Environmental Quality Commission Meeting

Temporary Rulemaking Action Item: # ????

**Air Quality Greenhouse Gas Permitting - Temporary**

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| **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.

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|  **Overview** |

Short summary

DEQ proposes temporary rule amendments to remove certain parts of Oregon’s greenhouse gas permitting requirements temporarily while DEQ determines how to recommend EQC take into consideration a recent change to federal greenhouse gas permitting rules. The temporary rules would prevent some facilities from spending thousands of dollars 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 and welfare. 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](http://www.epa.gov/NSR/public.html) 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 and 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, and sources that must obtain permits from EPA or those states do not have to submit applications or parts of applications that would formerly have been required by the now-invalid federal greenhouse gas permitting rules.

The Court didn’t 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 3 percent of greenhouse gas emissions from new and modified facilities.

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|  **Statement of need**  |

What need is DEQ trying to address?

DEQ seeks to address three primary issues with these temporary rules:

* The existing rulesadd to the uncertainty about permitting requirements for greenhouse gases that affected sources and DEQ must deal with until final action on this issue is taken 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, a small number of facilities may incur costs in 2014 that will ultimately be wasted if Oregon’s final rules follow the Supreme Court ruling.

In 2011, EQC adopted rules substantively identical to the federal greenhouse gas permitting rules. In 2014, the Supreme Court invalidated EPA’s authority to impose the federal greenhouse gas permitting requirements. It 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 the facility’s potential greenhouse gas emissions. Consistent with EPA’s understanding of the Court’s decision, EPA will not apply or enforce federal rules that require facilities to get a Title V or Prevention of Significant Deterioration permit solely because the facility emits or has the potential to emit greenhouse gases above the permitting thresholds.

Although the Supreme Court decision invalidates EPA’s authority to impose the federal greenhouse gas permitting requirements, EQC acted under the authority of Oregon law to adopt Oregon’s rules. Those rules still apply to facilities in Oregon and some of those facilities will need to spend thousands of dollars in late 2014 to comply with the rules.

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 how to recommend EQC consider the U.S. Supreme Court decision in a permanent rulemaking.

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|  **Justification** ORS 183.335(5) |

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 early 2015, most likely at the March EQC meeting. DEQ cannot predict the final outcome of the 2015 rulemaking and must consider two possibilities:

1. The final rules in 2015 will not follow the Supreme Court’s ruling and retain Oregon’s current greenhouse gas permitting program; or
2. The final 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 final 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 an application or parts of an application unnecessary, then DEQ will ignore the application or parts of the application. 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. Thus, if EQC adopts the temporary rule now but decides in March 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 final rules do follow the Supreme Court’s ruling, leaving the current rules in place means that affected facilities must continue to comply with those rules until the March EQC meeting. Any permit applications that are submitted from now until the March EQC meeting must comply with the current rules and DEQ must treat them under the current rules. DEQ cannot simply decide not to enforce those rules in the interim, in part because the citizen lawsuit provision of the Title V program would expose affected facilities to potential lawsuits. Thus, any applications or parts of an application that are required by the current greenhouse gas permitting rules must be submitted, but under this second case, the time and, effort and cost to develop the application or parts of the application will be wasted because they will ultimately be ignored in the final permit action. This result will seriously prejudice the interests of such parties.

Although the number of facilities affected by the proposed temporary rule is small, DEQ also believes that not adopting the temporary rule would seriously prejudice the public interest by undermining the efficient operation of state government -it would send a signal that DEQ (and by extension, other state agencies) is willing to allow affected facilities to waste money when such waste can be prevented by timely and appropriate action. DEQ is acutely aware that the cost of complying with environmental regulations can be substantial and tries to avoid making facilities spend money unnecessarily. For these reasons, we conclude that not adopting this temporary rule will seriously prejudice the public interest in having an efficient, effective and predictable DEQ air quality permitting system.

Permitting costs. Existing rules require one known facility to apply for a Title V permit and pay associated permitting costs. These costs would not be necessary if EQC later removes the requirement to apply for a Title V permit on the basis of greenhouse gas emissions alone when EQC considers permanent rules in 2015 although the facility would be required to pay annual fees for a standard Air Contaminant Discharge Permit of $9,216. Preparing a Title V permit application can cost several tens of thousands of dollars. Existing rules require one of the facilities to pay the greenhouse gas Prevention of Significant Deterioration permit modification fee of $43,200. Existing rules require six facilities to pay the annual Title V base fee of $7,787 and the annual Title V emission fee of $57.90 per ton of particulate, nitrogen oxide, sulfur oxide and volatile organic compound emissions.

Control technology costs. Existing rules require one facility to prepare a Best Available Control Technology analysis for controlling greenhouse gas emissions. These control technology costs would not be necessary if EQC later removes the requirement to apply for a Prevention of Significant Deterioration permit on the basis of greenhouse gas emissions alone when EQC considers permanent rules in 2015. A Best Available Control Technology analysis adds several thousands of dollars to the cost of preparing a permit application. A facility’s costs to control emissions and comply with Prevention of Significant Deterioration can vary significantly depending on the facility and the selected emission reduction option.

Affected parties

As noted above, 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 the year. If the proposed temporary rule is not adopted, the application must include a Best Available Control Technology analysis for greenhouse gases. DEQ believes a Best Available Control Technology analysis for greenhouse gases will add up to several tens of thousands of dollars to the cost of the application. If EQC ultimately adopts rules that follow the Supreme Court ruling, this Best Available Control Technology analysis will become unnecessary. DEQ wishes to note that the submittal date for this application can be changed by other means, thereby achieving the same effect as the adoption of the temporary rule.
* Another semiconductor manufacturing facility must submit a Title V permit application by the end of the year. The timing for this application is fixed by rule and unlike the case above, DEQ cannot adjust it. If EQC ultimately adopts rules that follow the Supreme Court ruling, this application will become unnecessary. [Question: no BACT analysis for this one?]

In addition to these, DEQ has recently become aware of some possible new facilities that might need to submit applications before March and are thereby potentially affected. However, DEQ does not currently have sufficient information about these facilities to know if they are or are not 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. What about the facilities that have already applied for TV based on GHG only? Would any of those save annual fees if this temporary rulemaking were to take effect?

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|  Rules affected, authorities, supporting documents |

Lead divisionProgram or activity

 Operations Air Program Operations

Chapter 340 action

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| 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)](http://www.leg.state.or.us/ors/183.html)

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| **Document title** | **Document location** |
| Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from Industrial, Commercial and Institutional Boilers | <http://www.epa.gov/nsr/ghgdocs/iciboilers.pdf> |
| Supreme Court of the United States: Utility Air Regulatory Group *v*. Environmental Protection Agency ET. AL. | <http://www.supremecourt.gov/opinions/13pdf/12-1146_4g18.pdf> |
| 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 *Utility Air Regulatory Group v. Environmental Protection Agency* | <http://www.epa.gov/nsr/documents/20140724memo.pdf> |

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|  Housing costs - [ORS 183.534](http://www.leg.state.or.us/ors/183.html) |

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.

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|  Fees  |

This rulemaking does not involve fees.

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| 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 August 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 Environmental Quality Commission for decision in 2015.

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|  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.

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| 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)