

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.

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 is trying to prevent facilities from incurring costs to comply with certain parts of Oregon’s greenhouse gas permitting requirements while DEQ considers whether to recommend EQC retain the requirements in a permanent rulemaking. DEQ is in the process of evaluating public comments on permanent rule amendments that DEQ plans to present to EQC for decision in 2015.

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. Without the proposed temporary rules, two Oregon facilities will spend thousands of dollars in late 2014 to comply with greenhouse gas permitting rules that EQC may remove in a permanent rulemaking in 2015.

Permitting costs. Existing rules require six facilities 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. 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 the six facilities to pay the annual Title V base fee of $7,657 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

The proposed rules would affect six facilities that have the potential to emit more than 100,000 tons of greenhouse gases per year, four of which have already submitted Title V permit applications. DEQ expects affected facilities are primarily in the semiconductor, chemical, liquefied natural gas exporting and polystyrene foam industries.

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 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.

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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 on 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)