

Oregon Department of Environmental Quality

**Nov. 5-6, 2014**

Oregon Environmental Quality Commission Meeting

Temporary Rulemaking Action Item: # ????

**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 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. It is illegal to operate a *major industrial source* of air pollution without a federal operating permit known as a Title V permit. A major industrial source has the potential to emit 100 tons per year of any regulated air pollutant. In addition, it is 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 250 tons per year of any air regulated pollutant, and the potential to emit 100 tons per year of any regulated air pollutant for certain types of facilities. A Prevention of Significant Deterioration permit does not prevent a major emitting facility from increasing emissions. Instead, it 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. A facility seeking a Prevention of Significant Deterioration permit must comply with emissions limits that are comparable to the facility using the best available control technology for each pollu­tant.

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. EPA also determined that requiring permits for facilities with the potential to emit of 100 or 250 tons per year or more of greenhouse gases would radically increase the size of the Title V and Prevention of Significant Deterioration permitting programs and make them difficult to administer. On May 13, 2010, EPA addressed this radical increase to the Title V and Prevention of Significant Deterioration permitting programs by providing that facilities with the potential to emit less than 100,000 tons of greenhouse gases per year would not become newly subject to permitting.

On April 21, 2011, EQC adopted rules substantively identical to EPA’s rules. Like EPA, Oregon’s rules exmpt any facility with the potential to emit less than 100,000 tons per year of greenhouse gases from obtaining 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 to their facility that increase their greenhouse gas emissions by at least 75,000 tons per year to obtain a Prevention of Significant Deterioration permit.

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 Prevention of Significant Deteriorization or Title V permit on the sole basis of its greenhouse gas emissions. The Court also determined that EPA reasonably interpreted the Clean Air Act to require facilities that would need a Prevention of Significant Deterioration permit based on their emissions of other regulated pollutants to comply with Prevention of Significant Deterioration permitting requirements for greenhouse gases.

|  |
| --- |
|  **Statement of need**  |

What need is DEQ trying to address?

DEQ is trying to prevent facilities from incurring costs to comply with Oregon’s current greenhouse gas permitting requirements while DEQ considers whether to 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 Prevention of Significant Deteriorization or Title V permit on the sole basis of its 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, the EQC acted under the authority of Oregon law to adopt Oregon’s rules. Those rules still apply to facilities in Oregon and five facilities will need to spend thousands of dollars in late 2014 to comply with the rules.

EPA estimates that the Supreme Court decision validating its authority to impose the Prevention of Significant Deterioration permitting program on facilities based on their emissions of non-greenhouse gas pollutants, means the program would still regulate 83 percent of greenhouse gas emissions from new and modified facilities that trigger Prevention of Significant Deterioration. The invalidated authority to impose the program on facilities based solely on their greenhouse gas emissions, would have meant that the program regulated 86 percent of greenhouse gas emissions from new and modified stationary facilities that trigger Prevention of Significant Deterioration.

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.

|  |
| --- |
|  **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 facilities. Without the proposed temporary rules, some 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. Without the proposed temporary rule amendments, existing rules require one facility to pay the greenhouse gas Prevention of Significant Deterioration permit modification fee of $43,200 and approximately 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. Without the proposed temporary rule amendments, existing rules require one facility to control their greenhouse gas emissions. 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. EPA has developed several studies and guidelines on controlling greenhouse gas emissions from various types of facilities. For example, EPA estimates that costs for a facility to reduce a boiler’s greenhouse gas emissions by 3 to 8 percent are between $3,000 and $2,300,000.

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 and do not currently hold a Title V permit. 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 some 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 divisionProgram 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)](http://www.leg.state.or.us/ors/183.html)

|  |  |
| --- | --- |
| **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> |

|  |
| --- |
|  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.

|  |
| --- |
|  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 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.

|  |
| --- |
|  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.

|  |
| --- |
| 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)