

Oregon Department of Environmental Quality

**November 5-6, 2014**

Oregon Environmental Quality Commission Meeting

Temporary Rulemaking Action Item: #

**Greenhouse Gas Permitting**

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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 requirements from Oregon’s greenhouse gas permitting rules while DEQ determines how to recommend EQC address a recent United States Supreme Court decision in permanent rule amendments. The temporary rules would prevent facilities from spending thousands of dollars in 2014 to comply with current requirements. In early 2015, EQC will consider permanent rules to address the Supreme Court decision, including whether to keep or remove the requirements.

Background

The federal Clean Air Act regulates stationary sources of air pollution to protect public health and welfare. Under the Act, 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 is any stationary source with the potential to emit 100 tons per year of any air pollutant. In addition, it is illegal to construct or modify a major emitting facility located in an attainment area with ambient air quality standards without obtaining a Prevention of Significant Deterioration permit. A major emitting facility is any stationary source with the potential to emit 250 tons per year of any air pollutant, and certain types of stationary sources with the potential to emit 100 tons per year. Stationary sources seeking a permit must comply with emissions limits that reflect the best available control technology for each regulated pollu­tant. The U.S. Environmental Protection Agency administers the Title V permit program and Prevention of Significant Deterioration program and delegated administration of these programs in Oregon to DEQ.

The United States Supreme Court’s 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 any stationary source with the potential to emit greenhouse gases above the threshold for Prevention of Significant Deterioration and Title V permitting is subject to the PSD and Title V permitting requirements. EPA determined that requiring permits for all of these sources would radically expand the permitting programs and render them un-administrable. On May 13, 2010, EPA modified the PSD and Title V permitting programs so that sources with the potential to emit less than 100,000 tons of greenhouse gases per year would not become newly subject to PSD or Title V permitting requirements.

On April 21, 2011, EQC adopted rules substantively identical to EPA’s rules to align Oregon’s Clean Air Act State Implementation Plan and Title V permitting program with EPA requirements. Oregon’s rules require any source with the potential to emit 100,000 tons per year or more of greenhouse gases obtain Title V and Prevention of Significant Deterioration permits.

EPA’s rule was challenged and on June 23, 2014, the U.S. Supreme Court determined that EPA may not treat greenhouse gases as an air pollutant to determine whether a source is a major source required to obtain a PSD or Title V permit. The Court upheld EPA’s rules providing that if a source is a major source due to its emissions of other regulated pollutants then the source’s greenhouse gas emissions are subject to PSD permitting requirements.

On July 20, 2011, EPA deferred for a period of three years the application of PSD and Title V permitting to biogenic CO2 emissions from bioenergy and other biogenic stationary sources. During this three-year period, biogenic CO2 emissions did not count toward applicability of the PSD and Title V permitting programs. This rule was challenged and the Court determined it to be invalid, but the Court did not implement its decision. EPA did not extend the rule, and it expired by its own terms July 21, 2014. Due to the Court’s decision invalidating EPA’s permitting requirement for sources that emit more than 100,000 tons of greenhouse gases per year, the number of biogenic CO2 emissions sources subject to PSD and Title V permitting requirements likely will be significantly reduced.

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| **Statement of need** |

What need is DEQ trying to address?

DEQ is trying to address differences between state and federal greenhouse gas permitting requirements that resulted from the June 23, 2014, the U.S. Supreme Court decision. DEQ is trying to address the differences in temporary rules while DEQ develops a permanent rulemaking proposal.

EQC adopted Oregon rules substantively identical to EPA’s greenhouse gas permitting rules to align Oregon’s Clean Air Act State Implementation Plan and Title V permitting program with federal requirements. However, the June 23, 2014 Supreme Court decision invalidated EPA’s authority to impose the federal greenhouse gas permitting requirements. The Supreme Court determined that EPA may not treat greenhouse gases as an air pollutant for the purposes of determining whether a source is a major source required to obtain a PSD or Title V permit. Consistent with its understanding of the Supreme Court’s decision, EPA will not apply or enforce federal rules that require stationary sources to get a PSD or Title V permit solely because the source emits or has the potential to emit greenhouse gases above the major source thresholds.

Although the Supreme Court decision invalidates EPA’s authority to impose the federal greenhouse gas permitting requirements, Oregon’s rules still apply to businesses in Oregon and Oregon businesses will spend thousands of dollars in late 2014 to comply with them. DEQ is considering whether to retain state permitting requirements for greenhouse gas emissions and is in the process of evaluating public comments on permanent rule amendments that DEQ will present to EQC for decision in early 2015.

How would the proposed rule address the need?

The proposed temporary rules would remove Oregon greenhouse gas permitting requirements temporarily while DEQ determines how to recommend EQC address 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, Oregon businesses will spend thousands of dollars in late 2014 to comply with greenhouse gas permitting rules that are no longer required under federal law and that EQC may or may not remove permanently in a permanent rulemaking in early 2015.

Permitting costs. Without the proposed rule amendments, affected sources will pay the greenhouse gas PSD permit modification fee of $43,200, the annual Title V base fee of $7,657 and the annual Title V emission fee of $57.90 per ton.

Control technology costs. Without the proposed rule amendments, affected sources will pay thousands of dollars to control their greenhouse gas emissions. A source’s costs to comply with PSD can vary significantly depending on the source and the selected emission reduction scenario. EPA has developed several white papers on controlling greenhouse gas emissions from various emission sources. For example, EPA estimates that the capital costs for a source to reduce greenhouse gas emissions from boilers between 3 and 8 percent is between $3,000 and $2,300,000.

Affected parties

The proposed rules would affect sources that emit more than 100,000 tons of greenhouse gases per year and do not currently hold a Title V permit. The proposed rules also affect any source that made modifications to its operations that increased its greenhouse gas emissions above the permitting thresholds over the last three years. DEQ expects affected sources are primarily in the semiconductor, wood products and landfill industries.

How temporary rule would avoid or mitigate consequences

The proposed rules avoid consequences by removing the greenhouse gas permitting requirements temporarily and therefore preventing facilities from spending thousands of dollars to comply with requirements while DEQ determines how to recommend that the EQC permanently address the U.S. Supreme Court decision.

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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 |
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Statutory authority

ORS 468.020, 468.065, 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** |
| Oregon Administrative Rules | <http://www.deq.state.or.us/regulations/rules.htm> |
| Oregon Revised Statutes | <http://www.deq.state.or.us/regulations/statutes.htm> |
| 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 only remove existing requirements temporarily.

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| Fees |

This rulemaking does not involve fees.

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| Public notice OAR 183.355, OAR 137-001-0080 |

Advisory committee

DEQ did not convene an advisory committee. The proposed temporary rules do not add new requirements; they remove existing requirements temporarily.

EQC prior involvement

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

Public notice

DEQ provided notice of the temporary rule in the following ways:

Posted notice on DEQ’s webpage Aug. 26, 2014: <http://www.oregon.gov/deq/RulesandRegulations/Pages/2014/GHGTemp.aspx>.

On Aug. 26, 2014, DEQ emailed notice to:

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

On Aug. 26, 2014, DEQ mailed notice by the U.S. Postal Service to representatives of permit holders not signed up for email notification, comprises 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 commission for decision in early 2015.

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| Implementation |

Notification

If adopted, 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)