

West Virginia's Greenhouse Gas "Tailoring Rule"

Implementation Guidance

December 2010

Synopsis

The U.S. Environmental Protection Agency (EPA) has identified January 2, 2011 as the date that greenhouse gases (GHG) will become subject to regulation under the federal Prevention of Significant Deterioration (PSD) Permitting Program and the Title V Operating Permit Program [see 75 *Federal Register* 31514, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*]. Therefore, DAQ is pursuing non-routine rule changes to our permitting rules 45CSR14 and 45CSR30 to address GHG. We anticipate that there will be an interim period between the time GHG permitting requirements become applicable and the time EPA approves the changes to 45CSR14 as a revision to the State Implementation Plan (SIP). Similarly, there will also be an interim period between the time GHG permitting requirements become applicable and the time EPA approves the changes to 45CSR30 as a revision to the Title V Operating Permit Program. These periods will overlap but will likely be unequal in duration because of the differing procedural mechanisms DAQ will employ to effect the changes (see below). During these interim periods, DAQ will adopt policy consistent with EPA's new GHG permitting policy and rules.

Background

EPA has chosen to regulate GHG under the Clean Air Act (see *Mass. v. EPA*) and has finalized an Endangerment Finding (74 FR 66496) and a rule that regulates GHG from cars and light duty trucks (75 FR 25324). According to EPA, the net effect dictates regulation of GHG under the entire Clean Air Act. This creates serious consequences for the two major national air permitting programs, *Prevention of Significant Deterioration* (PSD) permits and *Title V Operating* permits. GHG are emitted in amounts much greater than conventional pollutants, thereby potentially triggering "major-source" thresholds and permit applicability for thousands to millions of sources nationally.

EPA has recognized the GHG permitting problem, maintaining it would yield "absurd results" and has crafted a solution elucidated in two additional rules, *Reconsideration of Regulations That Determine Pollutants Covered by the Clean Air Act* (75 FR 17004) and *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (75 FR 31514). In the latter, EPA lays out a mechanism which it asserts many states could adopt, possibly without regulatory changes. The key lies in the definition of the term "*subject to regulation*" that confines permitting applicability to GHG at thresholds of 75,000 - 100,000 tons per year instead of the otherwise applicable thresholds of 100-250 tons per year.

DAQ's GHG Permitting Implementation

DAQ has many concerns about EPA's approach but we believe that action must be taken to preserve state permitting authority and prevent unworkable permitting loads.

For PSD: During the interim period, DAQ intends to apply the meaning of the term *subject to regulation* as defined in 40 CFR §51.166(b)(48) to PSD rule 45CSR14 in the same manner as EPA's final tailoring rule. Because DAQ has adopted this reading of the counterpart regulations, new or modified greenhouse gas sources in West Virginia which fall below the specified cutoffs would not be emitting pollutants *subject to regulation* within the definition of *regulated NSR pollutant* and therefore would not be subject to PSD permitting requirements.

The current language of 45CSR14 also includes the term "regulated NSR pollutant" (§2.66), which is further modified at §2.66.d as:

"Any pollutant that otherwise is subject to regulation under the CAA..."

DAQ believes this regulatory language may be reasonably interpreted to include GHG as regulated in EPA's tailoring rule. Further, DAQ will apply EPA's GHG definitions, significance levels and permitting thresholds as detailed in the federal counterparts 40 CFR §51.166 and 40 CFR §52.21.

In addition to interpretation and application of the term *subject to regulation* during the interim period, DAQ intends to seek modification of its PSD rule 45CSR14 during the 2011 Legislative session to include revision to the existing definition *regulated NSR pollutant*, and include the definition of the term *subject to regulation* as now defined in 40 CFR §51.166(b)(48). If approved by the West Virginia Legislature, the revisions to the rule should become effective in June 2011.

For Title V: DAQ will adopt an interpretation of the terms *major source* or any of its component terms - *a major stationary source*, *any air pollutant*, or *subject to regulation*, or the numerical thresholds - that is consistent with EPA's regulatory interpretation of these terms as codified at 40 CFR §70.2. Under EPA's long established policy, states historically have interpreted the term *any air pollutant* under the Title V definition of *major source* to mean any pollutant *subject to regulation* under the Clean Air Act. Thus, as a matter of established interpretation, EPA and states effectively read the definition of *major source* under Title V to include a source "... that directly emits or has the potential to emit, 100 tpy or more of any air pollutant *subject to regulation* under the Act." (emphasis added)

In addition to interpretation and application of the terms *major source* or any of its component terms - *a major stationary source*, *any air pollutant*, or *subject to regulation*, DAQ intends to revise its Title V rule 45CSR30 in late December 2010, by emergency rule. Timing is dictated by the fact that a state emergency rule can only last for fifteen months such that it must be supplanted by conventional legislative rule. The emergency rule will contain revision to the definition of *major source* to include the term *subject to regulation*, as well as adding the definition of *subject to regulation* as defined in 40 CFR §70.2 and become effective in early February 2011. The legislative rule that follows and sunsets the emergency rule will likely become effective May 2012.

Additional Resources

EPA has developed a number of GHG permitting resources which provide a comprehensive informational background, links to the tailoring rule, general guidance and industry-specific “white-papers.”

The main web-page may be accessed at:

<http://www.epa.gov/nsr/ghgpermitting.html>

Specific pages that may be of general interest include:

Fact Sheet outlining the available documents and tools:

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

EPA’s PSD and Title V Permitting Guidance For Greenhouse Gases:

<http://www.epa.gov/nsr/ghgdocs/epa-hq-oar-2010-0841-0001.pdf>

EPA’s Clean Air Act Permitting for Greenhouse Gases:

Guidance and Technical Information Questions and Answers

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