



Steven L. Beshear
Governor

**Energy and Environment Cabinet
Department for Environmental Protection**

Leonard K. Peters
Secretary

Division for Air Quality
200 Fair Oaks Lane, 1st Floor
Frankfort, Kentucky 40601-1403
www.air.ky.gov

December 18, 2009

EPA Docket Center, EPA West (Air Docket)
Attention: Docket ID No. EPA-HQ-OAR-2009-0517
U.S. Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Comments on Proposed Rule Published in the *Federal Register*, October 27, 2009 (74 FR 55292), Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule

To Whom It May Concern:

The Cabinet is authorized by the Kentucky General Assembly under KRS 224 and by the U.S. Environmental Protection Agency (EPA) under 40 CFR 51.166 and 40 CFR Part 70, as the state air pollution control agency and reviewing authority responsible for carrying out the Prevention of Significant Deterioration of Air Quality (PSD) and Title V Operating Permit Programs in the Commonwealth of Kentucky.

The Cabinet is pleased to provide the following comments, pursuant to the request for public comment published in the *Federal Register* on October 27, 2009 (74 FR 55292), for EPA's proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule). The Cabinet generally agrees that the proposed greenhouse gas (GHG) regulation for mobile sources published in the *Federal Register* on September 28, 2009 (74 FR 49454), will likely result in the application of PSD to the emissions of carbon dioxide and other GHGs at non-mobile industrial sources. However, the Cabinet has substantial concerns with the regulatory approach EPA has provided in the Tailoring Rule and has determined it is unwise to proceed with this action as proposed.

The Cabinet has tentatively identified 108 existing sources in Kentucky that do not currently hold Title V permits and would, under the proposed scenario, be required to submit applications for Title V permits within one year. While this is probably a manageable population of sources, the Cabinet has no way of predicting the potentially large number of sources not on our radar that will suddenly become subject to Title V permitting. Equally obscured are the large number of significant

modifications that are possible among these newly regulated sources and among sources that already have Title V permits. Such inevitable consequences of combining the proposed Tailoring Rule and mobile source GHG regulation have not been adequately considered by EPA. The overwhelming administrative burden that will likely result must be addressed to avoid the tremendous workload that will potentially cripple EPA, state and local reviewing authorities, and the regulated community.

For reasons explained in detail in the following comments, the Cabinet recommends that EPA delay action on this proposal and allow sufficient time to not only carefully consider the impacts of this rulemaking, but also to develop a proposal that provides for an orderly transition to address GHG emissions. EPA has already articulated the intention of proceeding in such a manner in the preamble to the Mandatory Reporting of Greenhouse Gases rule (74 FR 56260, October 30, 2009), by clearly stating that the intent of the reporting rule is to “gather GHG information to assist EPA in assessing how to address GHG emissions and climate change under the Clean Air Act” (74 FR 56265).

Comment

Since the consequences of the proposed Tailoring Rule are likely to be counterproductive to our shared implementation goals, the Cabinet implores EPA to recognize the peril that may result if this rulemaking goes forward. We encourage EPA to delay or withdraw the rule and lay a statutory groundwork that will enable a reasonable and orderly transition for incorporation of GHG emissions into the existing PSD and Title V programs. State and local permitting authorities must be given adequate time to transition into this program and to modify existing programs, promulgate regulations, and seek the legislative changes needed to secure a feasible implementation of PSD and Title V permitting for GHG sources. The legislative changes required to modify the thresholds for GHGs would be closer to two years instead of the seventy-five days EPA proposes. Even if EPA promulgates GHG requirements into a federal implementation plan (FIP) for each state, this will not make GHG requirements enforceable by states like Kentucky. It is the individual environmental regulation legally adopted in the Commonwealth that is enforceable by the Cabinet rather than the regulations that are approved into a SIP or FIP.

Comment

EPA has issued an endangerment finding for six greenhouse gases; therefore, the agency must now list the six GHGs as criteria pollutants and then issue criteria documents and promulgate National Ambient Air Quality Standards (NAAQS) for these six GHGs, as mandated by Congress in Title I of the Clean Air Act. EPA is circumventing the process by which the emissions of a “regulated NSR pollutant” are regulated under the SIP and must now proceed cautiously by following the statutory framework set out in the Clean Air Act to promulgate and implement GHG regulations. The only proper manner for such an action is for EPA to clearly make GHG requirements federally enforceable in regulations to be included in each state implementation plan (SIP) and to issue a SIP Call accordingly.

Comment

While GHGs will become, by definition, “regulated NSR pollutants” after the Light Duty Vehicle regulation becomes final, GHGs are not “regulated air pollutants,” as defined in 40 CFR 70.2 for purposes of Title V permitting, until after the source becomes subject to a PSD review – this occurs when a new source has the potential for emissions above an applicable threshold or for an existing source that proposes a modification that will result in a significant net emissions increase. It is

therefore clear that existing sources whose emissions exceed the proposed 25,000 tpy threshold do not automatically become subject to Title V with GHGs becoming regulated NSR pollutants; nor would these sources be mandated by Title V requirements to submit an application for a Title V operating permit within one-year as the preamble to the Tailoring Rule indicates. Instead, existing sources with GHG emissions at and above the GHG threshold will not be covered under Title V until and unless the source has a significant modification that is subject to PSD for GHG or some other regulated NSR pollutant.

Not having a legal avenue to require Title V applications for GHGs creates a problem for regulating facilities that are currently not subject to Title V, but have the potential to emit over the major source threshold for a GHG, regardless of what the threshold is ultimately determined to be. If such a source makes a significant modification, it may wish to take a synthetic minor permit limit in order to avoid PSD. This will be impossible as the source will not hold a Title V permit nor is there a federal (or state) requirement under Title V for the source to apply for a Title V permit prior to the source being required to undergo new source review for PSD. There would be no legal basis for requiring a Title V permit unless there is a PSD significant modification.

Because EPA has not followed the legally established procedure for merging GHG requirements into the Title V operating permit program, problems will also ensue for activities that are identified as insignificant under Title V and that suddenly become significant for GHG. Under Title V, an "Insignificant Activity" is defined as the potential to emit five (5) tpy or less of a nonhazardous regulated air pollutant. Under the proposed rule, thousands of pieces of equipment and processes currently listed as insignificant activities in the Commonwealth's air permits may become significant and require additional permitting consideration.

The Cabinet recommends that the solution to this problem is for EPA to handle GHGs implementation through the established SIP call process. This will allow the Commonwealth and all other states the time necessary to prepare a transition and merge the GHGs requirements into their Title V operating permit program in a legally established manner, as envisioned by the Act.

Comment

EPA has acknowledged that a major increase in workload will be associated with the promulgation of the Tailoring Rule. The majority of the workload would occur at the time of the Tailoring Rule becoming final; therefore, a presumptive minimum for Title V permit fees that includes the additional cost related to the inclusion of GHGs in Title V permits should be developed in conjunction with the promulgation of this rule.

Comment

The proposed Tailoring Rule will cause technical problems for permitting programs because there are no reliable emission factors for many categories of industry and their activities that emit GHGs. The ability to calculate potential to emit (PTE) is essential in developing a permit. We recommend delaying implementation for industries for which emission factors are not available to allow time to develop these emission factors.

Comment

The Cabinet recommends the inclusion of additional tiers of applicability in the Tailoring Rule. There should be different emission levels for establishing a Title V major source and a Title V PSD

major source, since it is apparent that many sources will become subject to PSD permitting under the Tailoring Rule, and that many of these will have minimal experience with air quality permitting. Additional time beyond one year should be allowed for existing sources that become subject to Title V for the first time due to the Tailoring Rule. The Cabinet further recommends additional phases in fully implementing the Tailoring Rule. During the initial implementation phase, the first applicable emission threshold level of GHGs (currently 25,000 tpy) should be established at a quantity that captures only the top 10 to 15% of GHGs emitters. Other emitters could be brought in at renewal of their current permits with additional phases established to capture increasing percentages of GHGs emitters that do not currently hold permits. Those sources that already hold Title V permits (or some other form of permit) will be much better equipped to comply with the new requirements and the issues related to having PSD status rather than sources with minimal air quality experience. This problem could be further mitigated by exempting certain source categories.

Comment

As proposed, the Tailoring Rule brings very small sources (perhaps ones with only natural gas boilers or furnaces) into PSD/Title V permitting because of GHGs emissions. It is therefore clear that under the Tailoring Rule, an otherwise small source would have to perform multiple PSD BACT analyses for small modifications (e.g., increases of 40 tpy of VOC or 15 tpy of PM₁₀, etc.) that would not otherwise bring them to an overall level that would be considered major for that criteria pollutant but is significant for GHGs. Furthermore, larger sources that are already major PSD sources for another regulated NSR pollutant, but not major for GHGs, could trigger the requirement for PSD BACT analysis with the modification/addition of a relatively small natural gas boiler or furnace (25mmBTU/hr). The resulting cost and processing time burdens of PSD analysis will undoubtedly impede timely permit issuance and deter growth in many industries.

Comment

The PTE definition in the tailoring rule is in flux and may be revised after the initial implementation phases. Small sources captured in the program under the initial definition and subjected to PSD/Title V permitting requirements, might not later be considered a PSD/Title V source with a revision of the definition for PTE. Under EPA's own guidance, the accepted tenet for PSD sources is "once in, always in," so that sources that probably should not be subjected to the requirements of PSD/Title V in the first place would not be able to remove themselves from the program. Additionally, there are some small sources (e.g., emergency generators, auxiliary boilers, etc.) that may have the potential of reaching a major GHGs threshold that actually produce less than 50% of the 24hrs/7days a week potential emissions due to seasonal use only. Because of these considerations, the Cabinet recommends that Permits-by-Rule should be allowed to exempt sources from NSR pollutant requirements for PSD.

Comment

The current schedule for implementing the Tailoring Rule in March 2010 will result in application of PSD/Title V status to hundreds, if not thousands, of sources that would likely prefer to make emissions reductions in order to avoid PSD/Title V applicability. Since physical changes at a plant to reduce emissions would take time and emission controls and suggested reduction avenues are not established for many GHG emitting processes, sources that want to reduce their emissions will be captured by the proposed program revisions and will remain PSD under EPA's tenet of "once in, always in". The Cabinet recommends it would be more reasonable to use a three (3) to five (5)-year phase-in of the Tailoring Rule to allow sources the time necessary to make emissions reductions and

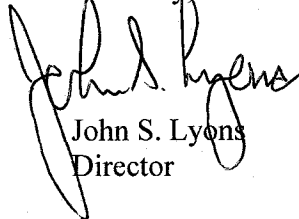
avoid PSD applicability. This approach will also allow EPA time to publish Control Technology Guidelines (CTGs) for source categories in advance of changing the PSD rule, so that sources will be provided with some idea of what approaches are feasible for reducing GHG emissions. States, and the sources they regulate, will not have the resources/contacts necessary to take on the burden of researching and gathering information about best control/efficiency practices from the United States and around the world, so the process of establishing CTGs would best be performed by EPA.

Comment

The threshold levels for PSD major source designation and significant emissions increase proposed in the Tailoring Rule potentially cause conflicts with criteria pollutant BACT requirements for certain types of sources. For example, a Title V major source modifies with a resulting increase of fifty (50) tons of VOC, and BACT for that VOC is a thermal oxidizer. The addition of the BACT required equipment may cause a significant level increase for GHGs. This would require a BACT analysis for the selected control equipment to meet BACT (the thermal oxidizer). Any combustion-based BACT has the potential for causing this conflict. The Cabinet recommends that EPA set the PSD significance level for GHGs at a level much higher than 10,000/25,000 tpy or else provide exemptions for industries using combustion techniques for controlling regulated NSR Pollutants.

In summary, the Cabinet encourages EPA to give serious consideration to the issues raised by the Commonwealth and other states concerning the deleterious effects implementation of the proposed Tailoring Rule will have on state permitting programs and the regulated community. We reiterate our recommendation that EPA delay this action until after the proper legal groundwork has been established for regulating GHGs as a criteria pollutant, as a "regulated NSR pollutant" pursuant to 40 CFR 51.166, and as a "regulated air pollutant" pursuant to 40 CFR 70.2. The Cabinet looks forward to continuing to work with EPA in developing a comprehensive and effective climate change policy that will achieve environmental goals without imposing unmanageable or unnecessary burdens on EPA, state and local permitting agencies, and our struggling economy. Thank you for the opportunity to provide comments and recommendations on this proposal. If you have questions or require further information, please contact Millie Ellis at (502) 564-3999 or email: millie.ellis@ky.gov.

Sincerely,



John S. Lyons
Director

JSL/me

- c. Dick Schutt, U.S. EPA, Region 4, Air Planning Branch Chief
- Gregg Worley, U.S. EPA, Region 4, Air Permits Section Chief