



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2014-0049; FRL-9906-42-Region-8]

Approval and Promulgation of Air Quality Implementation Plans; South Dakota; Prevention of Significant Deterioration; Greenhouse Gas Tailoring Rule Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to partially approve and partially disapprove revisions to the South Dakota State Implementation Plan (SIP) submitted by the South Dakota Department of Environment and Natural Resources (DENR) to EPA on June 20, 2011. The proposed SIP revisions address the permitting of sources of greenhouse gases (GHGs). Specifically, we propose to approve revisions to the State's Prevention of Significant Deterioration (PSD) program to incorporate the provisions of the federal PSD and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule). The proposed SIP revisions incorporate by reference the federal Tailoring Rule's emission thresholds for determining which new stationary sources and modifications to existing stationary sources become subject to South Dakota's PSD permitting requirements for their GHG emissions. EPA is proposing to disapprove a related provision that would rescind the State's Tailoring Rule revision in certain circumstances. EPA will take separate action on an amendment to the chapter Construction Permits for New Sources or Modifications in the June 20, 2011 submittal, regarding permits for minor sources. EPA is proposing this action under section 110 and part C of the Clean Air Act (the Act or CAA).

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R08-OAR-2014-0049, by one of the following methods:

- Federal Rulemaking Portal: *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- E-mail: ostendorf.jody@epa.gov
- Fax: (303) 312-6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- Mail: **Carl Daly**, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop St., Denver, Colorado 80202-1129.
- Hand Delivery: **Carl Daly**, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop St., Denver, Colorado 80202-1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R08-OAR-2014-0049. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through <http://www.regulations.gov> or e-mail, if you believe that it is CBI or otherwise protected from disclosure. The <http://www.regulations.gov> website is an “anonymous

access” system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment along with any disk or CD-ROM submitted. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses. For additional information about EPA’s public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop St., Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jody Ostendorf, Air Program, Mailcode 8P-AR, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop St., Denver, Colorado

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SUPPLEMENTARY INFORMATION: Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. Information is organized as follows:

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I. Background for Our Proposed Action

CAA section 110(a)(2)(C) requires states to develop and submit to EPA for approval into the state SIP preconstruction review and permitting programs applicable to certain new and modified stationary sources of air pollutants. There are three separate new source review (NSR) programs: PSD, Nonattainment New Source Review (NNSR), and Minor NSR. The PSD program is established in part C of title I of the CAA and applies in areas that meet the National Ambient Air Quality Standards (NAAQS) – “attainment areas” – as well as areas where there is insufficient information to determine if the area meets the NAAQS – “unclassifiable areas.” The NNSR program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – “nonattainment areas.” The Minor NSR program (1) addresses construction or modification activities that do not emit, or have the potential to emit, beyond certain major source thresholds and thus do not qualify as “major,” and (2) applies regardless of the designation of the area in which a source is located. EPA regulations governing the criteria

that states must satisfy for EPA approval of the NSR programs as part of the SIP are contained in 40 CFR sections 51.160 - 51.166.

On June 20, 2011, South Dakota submitted revisions for approval by EPA into the South Dakota SIP, including some regulations specific to the South Dakota PSD permitting program. The submittal proposes to revise the PSD major source definition so that it applies to any air pollutant “subject to regulation as required by EPA” (Section 74:36:01:08(2)). The submittal also proposes to add the six GHGs designated by EPA as regulated air pollutants to the definition of regulated air pollutant (Section 74:36:01:15(6)). These definitions may also be applied to permitting synthetic minor GHG sources, therefore, we are proposing to approve both of those changes in South Dakota’s air program Definitions. Outside of the PSD program, the SIP submittal proposes in Section 74:36:01:01, Definitions, to add “(73) “Subject to regulation” as defined in 40 CFR Section 70.2 (July 1, 2009), as revised in publication 75 FR 31607 (June 3, 2010), in accordance with EPA requirements.” We are not taking action on that part of the submittal because it applies to the title V operating permit program which is not part of the SIP.

The State generally implements the PSD program by incorporating by reference (with certain modifications) the federal PSD program in 40 CFR 52.21. (See Chapter 74:36:09:02, Prevention of Significant Deterioration). The submittal revises the State’s PSD program by incorporating by reference revisions to 40 CFR 52.21 promulgated by EPA in the “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,” 75 FR 31514 (June 3, 2010). Specifically, the revision cites the regulatory changes on pages 31606 and 31607 in the Tailoring Rule, which contain (among other things) the revisions to 40 CFR 52.21 promulgated in the Tailoring Rule. We propose to approve that revision.

The PSD section of the State rule includes a rescission clause that states, “If EPA stays or withdraws the regulation of greenhouse gases as identified in publication 75 FR 31606 and 31607 (June 3, 2010), or a court issues an order vacating or otherwise invalidating EPA’s regulation of greenhouse gases for any reason, the regulation of greenhouse gases by Article 74:36 are void as of the date of such administrative or judicial action and shall have no further force and effect.” (Section 74:36:09:02(8)). As explained below, EPA proposes to disapprove this language as inconsistent with the CAA.

These proposed revisions 1) establish that GHG is a regulated pollutant under South Dakota’s PSD program, and 2) establish emission thresholds for determining which new stationary sources and modification projects become subject to South Dakota’s PSD permitting requirements for their GHG emissions consistent with the Tailoring Rule. Today’s proposed action presents our rationale for approving these regulations as meeting the minimum federal requirements for the adoption and implementation of PSD SIP permitting programs, and for disapproving the submitted rescission clause language.

II. History of EPA’s GHG-Related Actions

This section briefly summarizes EPA’s recent GHG-related actions that provide the background for this action. Please see the preambles for the identified GHG-related rulemakings for more information.

Beginning in 2010, EPA undertook a series of actions pertaining to the regulation of GHGs that established the overall framework for today’s proposed action on the South Dakota SIP. These actions include, as they are commonly called, the “Endangerment Finding” and

“Cause or Contribute Finding,” which EPA issued in a single final action,¹ the “Johnson Memo Reconsideration,”² the “Light-Duty Vehicle Rule,”³ and the “Tailoring Rule.”⁴ Taken together and in conjunction with the CAA, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis. EPA took this last action in the Tailoring Rule, which, more specifically, established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources.

At the same time, EPA recognized that many states had approved SIP PSD programs that do apply PSD to GHGs, but that do so for sources that emit as little as 100 or 250 tons per year (tpy) of GHG, and that do not limit PSD applicability to GHGs to the higher thresholds in the Tailoring Rule. Therefore, EPA issued the GHG PSD SIP Narrowing Rule,⁵ under which, EPA converted its previous full approval of the affected SIPs, including South Dakota’s, to a partial approval and partial disapproval, to the extent those SIPs covered GHG-emitting sources below the Tailoring Rule thresholds. EPA based its action primarily on the “error correction” provisions of CAA section 110(k)(6). Many of those states have since submitted SIP revisions

¹ “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act.” 74 FR 66496 (December 15, 2009).

² “Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs.” 75 FR 17004 (April 2, 2010).

³ “Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule.” 75 FR 25324 (May 7, 2010).

⁴ “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule.” 75 FR 31514 (June 3, 2010).

⁵ “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting Sources in State Implementation Plans,” 75 FR 82536 (December 30, 2010).

that have established the Tailoring Rule thresholds, and EPA has approved those SIP revisions and rescinded the partial disapprovals.

III. EPA's Analysis of the State's Submittal

South Dakota is currently a SIP-approved state for the PSD program, and has incorporated EPA's 2002 NSR reform revisions for PSD into its SIP. The June 20, 2011 revisions to South Dakota's SIP will make the approved PSD program rules consistent with the GHG PSD SIP Narrowing Rule. As described above, in the Narrowing Rule EPA withdrew its previous approval of the South Dakota PSD program to the extent that it applied to permitting of new or modified major sources below the thresholds set out in the Tailoring Rule. By approving the changes in the June 20, 2011 submittal, the approved PSD program rules will explicitly conform with the SIP as approved under the Narrowing Rule. Specifically, the June 20, 2011 revisions establish thresholds consistent with the Tailoring Rule and Narrowing Rule for determining which stationary sources and modification projects become subject to permitting requirements for GHG emissions under South Dakota's NSR PSD program.

South Dakota has adopted and submitted regulations that adopt the federal requirements for the permitting of GHG-emitting sources subject to PSD. The proposed revisions incorporate the Tailoring Rule into South Dakota's PSD Permitting Program, and support synthetic minor permitting at stationary sources seeking federally enforceable limits to avoid major source or major stationary source applicability thresholds specific to GHG. The changes revise the definitions of major source and regulated air pollutant, and make the Tailoring Rule effective January 2, 2011. The submittal makes no other changes to the State's approved PSD program. We propose to conclude that the revisions are consistent with the requirements of

40 CFR 51.166, in particular, requirements set out in EPA's final GHG Tailoring Rule, and that the revisions should be approved into South Dakota's SIP.

However, EPA proposes to disapprove the portion of the revision that adds a rescission clause to the SIP. In assessing the approvability of this clause, EPA considered two key factors: (1) Whether the public will be given reasonable notice of any change to the SIP that occurs as a result of the automatic rescission clause, and (2) whether any future change to the SIP that occurs as a result of the automatic rescission clause would be consistent with EPA's interpretation of the effect of the triggering EPA or federal court action (e.g., the extent of an administrative or judicial stay). These criteria are derived from the SIP revision procedures set forth in the CAA and federal regulations.

EPA's consideration of whether any SIP change resulting from the proposed automatic rescission clause would be consistent with EPA's interpretation of the effect of the triggering action on federal regulations is based on 40 CFR 51.105. Under 40 CFR 51.105, "[r]evisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part." *See* 40 CFR 51.105. However, the South Dakota rescission clause takes effect immediately upon certain judicial actions without any EPA intervention. The effect of this is that EPA is not given the opportunity to determine the effect and extent of the judicial action; instead, the SIP is modified without EPA's approval. This violates 40 CFR 51.105.

The provision is also insufficient with regard to providing adequate notice to the public. While the State followed applicable notice-and-comment procedures prior to adopting the automatic rescission clause, the public would not receive adequate notice of the modification of the SIP after a triggering judicial action. Without intervening notice by EPA to the public of the

effect and extent of the judicial action, its effect and extent (and indeed whether the judicial action triggered the provision at all) would be unclear to the public.

IV. Proposed Action

EPA proposes to approve in part, and disapprove in part, the June 20, 2011 submittal that addresses the permitting of sources of greenhouse gases for incorporation into the South Dakota SIP. Specifically, EPA proposes to approve revisions to Chapter 74:36:09 that incorporates the Tailoring Rule into the State's definitions and requirements for PSD. EPA is proposing to disapprove the provision that would rescind the State's Tailoring Rule revision in certain circumstances. EPA will take separate action on an amendment in the June 20, 2011 submittal to Chapter 74:36:20, Construction Permits for New Sources or Modifications, regarding permits for minor sources.

EPA proposes to approve changes to Definitions, Section 74:36:01:08(2), which revises the major source definition so that it applies to any air pollutant "subject to regulation as required by EPA," and Section 74:36:01:15(6), which adds the six GHGs designated by EPA as regulated air pollutants to the definition of regulated air pollutant. EPA is not taking action on the addition of "(73) "Subject to regulation" as defined in 40 CFR Section 70.2 (July 1, 2009), as revised in publication 75 FR 31607 (June 3, 2010), in accordance with EPA requirements," because it applies to the title V permitting program which is not part of the SIP.

V. Statutory and Executive Orders Review

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action

merely approves state law that meets federal requirements and disapproves state law that does not meet federal requirements; when finalized, this action would not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, and Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 29, 2014.

Shaun L. McGrath,
Regional Administrator,
Region 8.