



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2015-0274; FRL-9928-77-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Prevention of Significant Deterioration; Plantwide Applicability Limits for Greenhouse Gases

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a May 12, 2014 State Implementation Plan (SIP) revision submitted for the Commonwealth of Virginia by the Virginia Department of Environmental Quality (VADEQ). This revision will add Plantwide Applicability Limit (PAL) provisions for Greenhouse Gases (GHGs) to Virginia's Prevention of Significant Deterioration (PSD) program. This action is being taken under the Clean Air Act (CAA).

DATES: Written 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 Number EPA-R03-OAR-2015-0274 by one of the following methods:

- A. www.regulations.gov. Follow the on-line instructions for submitting comments.
- B. E-mail: campbell.dave@epa.gov.
- C. Mail: EPA-R03-OAR-2015-0274, David Campbell, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch

Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2015-0274. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means 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 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 and with any disk or CD-ROM you submit. 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, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other

information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the Commonwealth's submittal are available at the Virginia Department of Environmental Quality, 629 E. Main Street, Richmond, Virginia, 23219.

FOR FURTHER INFORMATION CONTACT: David Talley, (215)814-2117, or by e-mail at talley.david@epa.gov.

SUPPLEMENTARY INFORMATION: On May 12, 2014, VADEQ submitted a proposed revision to the Virginia SIP.

I. Background

The proposed SIP revision incorporates amendments to Chapter 85 under Article 9 of the Virginia Administrative Code (9VAC5). In a June 3, 2010 final rulemaking action, EPA promulgated regulations known as “the Tailoring Rule,” which phased in permitting requirements for GHG emissions from stationary sources under the CAA PSD and title V permitting programs. *See* 75 FR 31514. For Step 1 of the Tailoring Rule, which began on January 2, 2011, PSD or title V requirements applied to sources of GHG emissions only if the sources were subject to PSD or title V “anyway” due to their emissions of non-GHG pollutants. These sources are referred to as “anyway sources.” Step 2 of the Tailoring Rule, which began on July 1, 2011, applied the PSD and title V permitting requirements under the CAA to sources that were classified as major, and, thus, required to obtain a permit, based solely on their potential

GHG emissions and to modifications of otherwise major sources that required a PSD permit because they increased only GHGs above applicable levels in the EPA regulations.

Subsequently, on May 13, 2011, EPA took final action to approve a revision to Virginia's PSD SIP, incorporating preconstruction permitting requirements for major stationary sources and major modifications of GHGs, consistent with the Federal PSD requirements at the time. *See* 76 FR 27898.

In a June 12, 2012 final rulemaking action entitled "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits,"¹ (hereafter, Tailoring Rule Step 3), EPA promulgated a number of streamlining measures intended to improve the administration of GHG PSD permitting programs. Included in that rulemaking were provisions to allow sources to obtain GHG PALs on a carbon dioxide equivalent (CO₂e)² basis, rather than strictly on a mass basis. A PAL is an emissions limitation for a single pollutant expressed in tons per year (tpy) that is enforceable as a practical matter and is established source-wide in accordance with specific criteria. *See* 40 CFR 52.21(aa)(2)(v). PALs offer an alternative method for determining major New Source Review (NSR) applicability: If a source can maintain its overall emissions of the PAL pollutant below the PAL level, the source can make a change without triggering PSD review. Virginia's May 12, 2014 submittal incorporates PAL provisions into Virginia's PSD program, consistent with EPA's Tailoring Rule Step 3.

On June 23, 2014, the United States Supreme Court, in *Utility Air Regulatory Group v.*

¹ *See* 77 FR 41051.

² CO₂e is defined as the mass of the specific GHG (in tons), multiplied by its Global Warming Potential, as codified in 40 CFR part 98.

Environmental Protection Agency,³ issued a decision addressing the Tailoring Rule and the application of PSD permitting requirements to GHG emissions. The Supreme Court said that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). The Supreme Court decision effectively upheld PSD permitting requirements for GHG emissions under Step 1 of the Tailoring Rule for “anyway sources” and invalidated PSD permitting requirements for Step 2 sources.

In accordance with the Supreme Court decision, on April 10, 2015, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an amended judgment vacating the regulations that implemented Step 2 of the Tailoring Rule, but not the regulations that implement Step 1 of the Tailoring Rule.⁴ The amended judgment preserves, without the need for additional rulemaking by the EPA, the application of the BACT requirement to GHG emissions from sources that are required to obtain a PSD permit based on emissions of pollutants other than GHGs (i.e., the “anyway” sources). The D.C. Circuit’s judgment vacated the regulations at issue in the litigation, including 40 CFR 51.166(b)(48)(v), “to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification.”⁵

³ See 134 S.Ct. 2427.

⁴ *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 09-1322, 06/26/20, judgment entered for No. 09-1322 on 04/10/2015.

⁵ *Id.*

EPA may need to take additional steps to revise federal PSD rules in light of the Supreme Court decision and recent D.C. Circuit judgment. In addition, EPA anticipates that many states will revise their existing SIP-approved PSD programs. EPA is not expecting states to have revised their existing PSD program regulations at this juncture. However, EPA is evaluating PSD program submissions to assure that the state's program correctly addresses GHGs consistent with both decisions.

Virginia's currently approved PSD SIP continues to require that PSD permits (otherwise required based on emissions of pollutants other than GHGs) contain limitations on GHG emissions based on the application of BACT when sources emit or increase GHGs in the amount of 75,000 tpy, measured as CO₂e. Although Virginia's SIP may also currently contain provisions that are no longer necessary in light of the D.C. Circuit's judgment or the Supreme Court decision, this does not prevent the EPA from approving the submission addressed in this rule. Virginia's May 12, 2014 SIP submission does not add any GHG permitting requirements that are inconsistent with either decision.

Likewise, the GHG PAL provisions included in Virginia's May 12, 2014 submittal include some provisions that may no longer be appropriate in light of both the D.C. Circuit judgment and the Supreme Court decision. Since the Supreme Court has determined that sources and modifications may not be defined as "major" solely on the basis of the level of GHGs emitted or increased, PALs for GHGs may no longer have value in some situations where a source might have triggered PSD based on GHG emissions alone. However, PALs for GHGs may still have a role to play in determining whether a modification that triggers PSD for a pollutant other than GHGs should also be subject to BACT for GHGs. These provisions, like the other GHG

provisions discussed previously, may be revised at some future time. However, these provisions do not add new requirements for sources or modifications that only emit or increase GHGs above the major source threshold or the 75,000 tpy GHG level in §52.21(b)(49)(iv). Rather, the PAL provisions provide increased flexibility to sources that wish to address their GHG emissions in a PAL. Since this flexibility may still be valuable to sources in at least one context described above, EPA believes that it is appropriate to approve these provisions into the Virginia SIP at this juncture.

II. Summary of SIP Revision

The proposed revision includes amendments to 9VAC5-85: “Permits for Stationary Sources of Pollutants Subject to Regulation.” Specifically, 9VAC5-85-40: “Prevention of Significant Deterioration Area Permit Actions,” and 9VAC5-85-50: “Definitions” are being amended. Additionally, 9VAC5-85-55: “Actual plantwide applicability limits,” is being added to the SIP. The proposed amendments are consistent with the GHG PAL provisions of 40 CFR 52.21 as promulgated by EPA on July 12, 2012. *See* 77 FR 41072-41075.

III. Proposed Action

EPA’s review of this material indicates the proposed SIP revision is consistent with the CAA and the Federal PSD regulations at 40 CFR 52.21. EPA is proposing to approve Virginia’s May 12, 2014 submittal as a revision to the Virginia SIP, in accordance with CAA section 110. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Incorporation by Reference

In this proposed rulemaking action, EPA is proposing to include in a final EPA rule, regulatory

text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference Virginia's GHG PAL regulations, as discussed in section II of this preamble. The EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and/or in hard copy at the appropriate EPA office (see the ADDRESSES section of this preamble for more information).

V. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a

privilege to documents and information “required by law,” including documents and information “required by Federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.”

Virginia’s Immunity law, Va. Code Sec. 10.1 1199, provides that “[t]o the extent consistent with requirements imposed by Federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General’s January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently

of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA 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 CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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 CAA; 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 proposed rule, relating to Virginia's PSD program, 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, Volatile organic compounds.

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

Dated: May 26, 2015.

William C. Early, Acting
Regional Administrator,
Region III.

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