

practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed 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, Intergovernmental relations, and Reporting and recordkeeping requirements.

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

Dated: October 26, 2010.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2010-28009 Filed 11-4-10; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2010-0691-201045, FRL-9222-6]

Approval and Promulgation of Implementation Plans; Kentucky: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a draft revision to the State Implementation Plan (SIP), submitted by Kentucky's Energy and Environment Cabinet, through the Kentucky Division for Air Quality (KDAQ), to EPA on August 5, 2010, for parallel processing. The proposed SIP revision makes two changes impacting the Commonwealth of Kentucky's New Source Review (NSR) Prevention of Significant Deterioration (PSD) program. First, the proposed revision provides the Commonwealth of Kentucky with authority to regulate greenhouse gas (GHG) under its PSD program. Second, the proposed SIP revision establishes appropriate emission thresholds for determining which new stationary sources and modification projects become subject to Kentucky's PSD permitting requirements for their GHG emissions. The first component of the proposed revision is necessary because the Commonwealth of Kentucky is

required to apply its PSD program to GHG-emitting sources, and unless it does so (or unless EPA promulgates a Federal implementation plan (FIP) to do so), such sources will be unable to receive preconstruction permits and therefore may not be able to construct or modify. The second component is necessary because without it, on January 2, 2011, PSD requirements would apply at the 100 or 250 tons per year (tpy) levels provided under the Clean Air Act (CAA or Act), which would overwhelm Kentucky's permitting resources. EPA is proposing approval of the Commonwealth of Kentucky's August 5, 2010, SIP revision relating to PSD requirements for GHG-emitting sources because the Agency has made the preliminary determination that this SIP revision is in accordance with the CAA and EPA regulations regarding PSD permitting for GHGs.

DATES: Comments must be received on or before December 6, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2010-0691, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail:* benjamin.lynora@epa.gov.

3. *Fax:* (404) 562-9019.

4. *Mail:* EPA-R04-OAR-2010-0691, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960.

5. *Hand Delivery or Courier:* Ms. Lynora Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. "EPA-R04-OAR-2010-0691." 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 whose disclosure is restricted by statute. Do not submit

through <http://www.regulations.gov> or e-mail, information that you consider to be CBI or otherwise protected. The <http://www.regulations.gov> Web site 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 <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 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. 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 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 <http://www.regulations.gov> or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Kentucky SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Ms. Bradley's telephone number is (404)

562-9352; e-mail address: bradley.twunjala@epa.gov. For information regarding the Tailoring Rule, contact Ms. Heather Abrams, Air Permits Section, at the same address above. Ms. Abrams' telephone number is (404) 562-9185; e-mail address: abrams.heather@epa.gov.

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I. What action is EPA proposing in today's notice?

On August 5, 2010,¹ KDAQ submitted a draft revision to EPA for approval into the Kentucky SIP to: (1) Provide the Commonwealth with the authority to regulate GHGs under its PSD program; and (2) establish appropriate emission thresholds for determining which new or modified stationary sources become subject to Kentucky's PSD permitting requirements for GHG emissions. Final approval of Kentucky's August 5, 2010, SIP revision will make Kentucky's SIP adequate with respect to PSD requirements for GHG-emitting sources, thereby negating the need for a GHG FIP. Furthermore, final approval of Kentucky's August 5, 2010, SIP revision will put in place the GHG emission thresholds for PSD applicability set forth in EPA's Tailoring Rule (75 FR 31514, June 3, 2010), ensuring that smaller GHG sources emitting less than these thresholds will not be subject to permitting requirements when these requirements begin applying to GHGs on January 2, 2011. Pursuant to section 110 of the CAA, EPA is proposing to approve this revision into the Kentucky SIP.

Because this draft SIP revision is not yet state-effective, Kentucky requested that EPA "parallel process" the SIP revision. Under this procedure, the EPA Regional Office works closely with the state while developing new or revised regulations. Generally, the state submits a copy of the proposed regulation or other revisions to EPA before conducting its public hearing. EPA reviews this proposed state action and

prepares a notice of proposed rulemaking. EPA publishes this notice of proposed rulemaking in the **Federal Register** and solicits public comment in approximately the same time frame during which the state is holding its public hearing. The state and EPA thus provide for public comment periods on both the state and the Federal actions in parallel.

After Kentucky submits the formal state-effective SIP revision request (including a response to all public comments raised during the Commonwealth's public participation process), EPA will prepare a final rulemaking notice for the SIP revision. If changes are made to the SIP revision after EPA's notice of proposed rulemaking, such changes must be acknowledged in EPA's final rulemaking action. If the changes are significant, then EPA may be obliged to re-propose the action. In addition, if the changes render the SIP revision not approvable, EPA's re-proposal of the action would be a disapproval of the revision.

In addition to the above-described changes, Kentucky's August 5, 2010, proposed SIP revision included provisions (*i.e.*, 401 KAR 51:001 Section 1(80)(b) and (c)) to incorporate changes pursuant to EPA's Fugitive Emissions Rule.² 73 FR 77882 (December 19, 2008). Also, Kentucky's submitted changes to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the major NSR source permitting program (*i.e.*, 401 KAR 51:001 Section 1 (118)). In today's proposed rulemaking, EPA is not proposing to take action on Kentucky's changes to its PSD regulations regarding the inclusion of fugitive emissions in NSR applicability determinations, nor is EPA taking any action on Kentucky's provisions to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the major NSR permitting program.

II. What is the background for the action proposed by EPA in today's notice?

Today's proposed action on the Kentucky SIP relates to three Federal

rulemaking actions. The first rulemaking is EPA's "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," Final Rule (the Tailoring Rule). 75 FR 31514 (June 3, 2010). The second rulemaking is EPA's "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," Proposed Rule (GHG SIP Call). 75 FR 53892 (September 2, 2010). The third rulemaking is EPA's "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan," Proposed Rule, 75 FR 53883 (September 2, 2010) (GHG FIP), which serves as a companion rulemaking to EPA's proposed GHG SIP Call. A summary of each of these rulemakings is described below.

In the first rulemaking, the Tailoring Rule, EPA established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources. In the second rulemaking, the GHG SIP Call (which is not yet final), EPA proposed to find that the EPA-approved PSD programs in 13 States (including Kentucky) are substantially inadequate to meet CAA requirements because they do not appear to apply PSD requirements to GHG-emitting sources. For each of these States, EPA proposed to require the State (through a "SIP Call") to revise its SIP as necessary to correct such inadequacies. EPA proposed an expedited schedule for these States to submit their SIP revision, in light of the fact that as of January 2, 2011, certain GHG-emitting sources will become subject to the PSD requirements and may not be able to obtain a PSD permit in order to construct or modify. In the third rulemaking, the GHG FIP (which is not yet final), EPA proposed a FIP to apply in any state that is unable to submit, by its deadline, a SIP revision to ensure that the state has authority to issue PSD permits for GHG-emitting sources. Kentucky is now seeking to revise its SIP to make it adequate with respect to PSD requirements for GHG-emitting sources, thereby negating the need for a GHG FIP. Furthermore, Kentucky is seeking to revise its SIP to put in place the GHG emission thresholds for PSD applicability set forth in EPA's Tailoring Rule, thereby ensuring that smaller GHG sources emitting less than these thresholds will not be subject to permitting requirements when these requirements

¹ While the transmittal letter for Kentucky's submission (the subject of this action) is dated July 15, 2010, EPA did not officially receive Kentucky's request for parallel processing until August 5, 2010.

² On March 31, 2010, EPA stayed the Fugitive Emissions Rule (73 FR 77882) for 18 months to October 3, 2011, to allow the Agency time to propose, take comment and issue a final action regarding the inclusion of fugitive emissions in NSR applicability determinations. Therefore, the 40 CFR Part 51 and Part 52 administrative regulations that were amended for the Fugitive Emissions Rule are stayed through October 3, 2011.

begin applying to GHGs on January 2, 2011.

Below is a brief overview of GHGs and GHG-emitting sources, the CAA PSD program, minimum SIP elements for a PSD program, and EPA's recent actions regarding GHG permitting. Following this section, EPA discusses, in sections III and IV, the relationship between the proposed Kentucky SIP revision and EPA's other national rulemakings as well as EPA's analysis of Kentucky's SIP revision.

A. What are GHGs and their sources?

A detailed explanation of GHGs, climate change and the impact on health, society, and the environment is included in EPA's technical support document for EPA's GHG endangerment finding final rule (Document ID No. EPA-HQ-OAR-2009-0472-11292 at <http://www.regulations.gov>). The endangerment finding rulemaking is discussed later in this rulemaking. A summary of the nature and sources of GHGs is provided below.

GHGs trap the Earth's heat that would otherwise escape from the atmosphere into space and form the greenhouse effect that helps keep the Earth warm enough for life. GHGs are naturally present in the atmosphere and are also emitted by human activities. Human activities are intensifying the naturally occurring greenhouse effect by increasing the amount of GHGs in the atmosphere, which is changing the climate in a way that endangers human health, society, and the natural environment.

Some GHGs, such as carbon dioxide (CO₂), are emitted to the atmosphere through natural processes as well as human activities. Other gases, such as fluorinated gases, are created and emitted solely through human activities. The well-mixed GHGs of concern directly emitted by human activities include CO₂, methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆), hereafter referred to collectively as "the six well-mixed GHG," or, simply, GHGs. Together these six well-mixed GHGs constitute the "air pollutant" upon which the GHG thresholds in EPA's Tailoring Rule are based. These six gases remain in the atmosphere for decades to centuries where they become well-mixed globally in the atmosphere. When they are emitted more quickly than natural processes can remove them from the atmosphere, their concentrations increase, thus increasing the greenhouse effect.

In the U.S., the combustion of fossil fuels (e.g., coal, oil, gas) is the largest

source of CO₂ emissions and accounts for 80 percent of the total GHG emissions by mass. Anthropogenic CO₂ emissions released from a variety of sources, including through the use of fossil fuel combustion and cement production from geologically stored carbon (e.g., coal, oil, and natural gas) that is hundreds of millions of years old, as well as anthropogenic CO₂ emissions from land-use changes such as deforestation, perturb the atmospheric concentration of CO₂, and the distribution of carbon within different reservoirs readjusts. More than half of the energy-related emissions come from large stationary sources such as power plants, while about a third come from transportation. Of the six well-mixed GHGs, four (CO₂, CH₄, N₂O, and HFCs) are emitted by motor vehicles. In the U.S., industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management are also important sources of GHGs.

Different GHGs have different heat-trapping capacities. The concept of Global Warming Potential (GWP) was developed to compare the heat-trapping capacity and atmospheric lifetime of one GHG to another. The definition of a GWP for a particular GHG is the ratio of heat trapped by one unit mass of the GHG to that of one unit mass of CO₂ over a specified time period. When quantities of the different GHGs are multiplied by their GWPs, the different GHGs can be summed and compared on a carbon dioxide equivalent (CO₂e) basis. For example, CH₄ has a GWP of 21, meaning each ton of CH₄ emissions would have 21 times as much impact on global warming over a 100-year time horizon as 1 ton of CO₂ emissions. Thus, on the basis of heat-trapping capability, 1 ton of CH₄ would equal 21 tons of CO₂e. The GWPs of the non-CO₂ GHG range from 21 (for CH₄) up to 23,900 (for SF₆). Aggregating all GHG on a CO₂e basis at the source level allows a facility to evaluate its total GHG emissions contribution based on a single metric.

B. What are the general requirements of the PSD program?

1. Overview of the PSD Program

The PSD program is a preconstruction review and permitting program applicable to new major stationary sources and major modifications at existing stationary sources. The PSD program applies in areas that are designated "attainment" or "unclassifiable" for a national ambient air quality standard (NAAQS). The PSD program is contained in part C of title I of the CAA. The "nonattainment NSR"

program applies in areas not in attainment of a NAAQS or in the Ozone Transport Region, and it is implemented under the requirements of part D of title I of the CAA. Collectively, EPA commonly refers to these two programs as the major NSR program. The governing EPA rules are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, Appendices S and W. There is no NAAQS for CO₂ or any of the other well-mixed GHGs, nor has EPA proposed any such NAAQS; therefore, unless and until EPA takes further such action, the nonattainment NSR program does not apply to GHGs.

The applicability of PSD to a particular source must be determined in advance of construction or modification and is pollutant-specific. The primary criterion in determining PSD applicability is whether the proposed project is sufficiently large (in terms of its emissions) to be a major stationary source or modification, both of which are described below. EPA has implemented these requirements in its regulations, which use somewhat different terminology than the CAA does, for determining PSD applicability.

a. Major Stationary Source

Under PSD, a "major stationary source" is any source belonging to a specified list of 28 source categories that emits or has the potential to emit 100 tpy or more of any air pollutant subject to regulation under the CAA, or any other source type that emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tpy. *See, e.g.*, 40 CFR 52.21(b)(1). We refer to these levels as the 100/250-tpy thresholds. A new source with a potential to emit (PTE) at or above the applicable "major stationary source threshold" is subject to major NSR. These limits originate from section 169 of the CAA, which applies PSD to any "major emitting facility" and defines the term to include any source that emits or has a PTE of 100 or 250 tpy, depending on the source category. Note that the major source definition incorporates the phrase "subject to regulation," which, as described later, will begin to include GHGs on January 2, 2011, under EPA's interpretation of that phrase as discussed in the recent memorandum entitled, "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program." 75 FR 17004 (April 2, 2010).

b. Major Modifications

PSD also applies to existing sources that undertake a "major modification," which occurs when: (1) There is a

physical change in, or change in the method of operation of, a “major stationary source;” (2) the change results in a “significant” emissions increase of a pollutant subject to regulation (equal to or above the significance level that EPA has set for the pollutant in 40 CFR 52.21(b)(23)); and (3) there is a “significant net emissions increase” of a pollutant subject to regulation that is equal to or above the significance level (defined in 40 CFR 52.21(b)(23)). Significance levels, which EPA has promulgated for criteria pollutants and certain other pollutants, represent a de minimis contribution to air quality problems. When EPA has not set a significance level for a regulated NSR pollutant, PSD applies to an increase of the pollutant in any amount (that is, in effect, the significance level is treated as zero).

2. General Requirements for PSD

This section provides a very brief summary of the main requirements of the PSD program. One principal requirement is that a new major source or major modification must apply best available control technology (BACT), which is determined on a case-by-case basis taking into account, among other factors, the cost effectiveness of the control and energy and environmental impacts. EPA has developed a “top-down” approach for BACT review, which involves a decision process that includes identification of all available control technologies, elimination of technically infeasible options, ranking of remaining options by control and cost effectiveness, and then selection of BACT. Under PSD, once a source is determined to be major for any regulated NSR pollutant, a BACT review is performed for each attainment pollutant that exceeds its PSD significance level as part of new construction or for modification projects at the source, where there is a significant increase and a significant net emissions increase of such pollutant.³

In addition to performing BACT, the source must analyze impacts on ambient air quality to assure that sources do not cause or contribute to violation of any NAAQS or PSD increments and must analyze impacts on soil, vegetation, and visibility. In addition, sources or modifications that would impact Class I areas (e.g., national parks) may be

³ EPA notes that the PSD program has historically operated in this fashion for all pollutants—when new sources or modifications are “major,” PSD applies to all pollutants that are emitted in significant quantities from the source or project. This rule does not alter that for sources or modifications that are major due to their GHG emissions.

subject to additional requirements to protect air quality related values (AQRVs) that have been identified for such areas. Under PSD, if a source’s proposed project may impact a Class I area, the Federal Land Manager is notified and is responsible for evaluating a source’s projected impact on the AQRVs and recommending either approval or disapproval of the source’s permit application based on anticipated impacts. There are currently no NAAQS or PSD increments established for GHGs, and therefore these PSD requirements would not apply for GHGs, even when PSD is triggered for GHGs. However, if PSD is triggered for a GHG-emitting source, all regulated NSR pollutants that the new source emits in significant amounts would be subject to PSD requirements. Therefore, if a facility triggers NSR for non-GHG pollutants for which there are established NAAQS or increments, the air quality, additional impacts, and Class I requirements would apply to those pollutants.

Pursuant to existing PSD requirements, the permitting authority must provide notice of its preliminary decision on a source’s application for a PSD permit and must provide an opportunity for comment by the public, industry, and other interested persons. After considering and responding to comments, the permitting authority must issue a final determination on the construction permit. Usually NSR permits are issued by a State or local air pollution control agency that has its own authority to issue PSD permits under a permit program that has been approved by EPA for inclusion in its SIP. In some areas, EPA has delegated its authority to issue PSD permits under Federal regulations to the State or local agency. In other areas, EPA issues the permits under its own authority.

C. What are the CAA requirements to include the PSD Program in the SIP?

The CAA contemplates that the PSD program be implemented in the first instance by the states and requires that states include PSD requirements in their SIPs. CAA section 110(a)(2)(C) requires that—

Each implementation plan * * * shall * * * include a program to provide for * * * regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in part [] C * * * of this subchapter.

CAA section 110(a)(2)(J) requires that—

Each implementation plan * * * shall * * * meet the applicable requirements of

* * * part C of this subchapter (relating to significant deterioration of air quality and visibility protection).

CAA section 161 provides that—

[E]ach applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part [C], to prevent significant deterioration of air quality in each region * * * designated * * * as attainment or unclassifiable.

These provisions, read in conjunction with the PSD applicability provisions as well as other provisions such as the BACT provision under CAA Section 165(a)(4), mandate that SIPs include PSD programs that are applicable to, among other things, any air pollutant that is subject to regulation. As discussed below, this includes GHGs on and after January 2, 2011.⁴

A number of states do not have PSD programs approved into their SIPs. In those states, EPA’s regulations at 40 CFR 52.21 govern, and either EPA or the state as EPA’s delegatee acts as the permitting authority. However, most states have PSD programs that have been approved into their SIPs, and these states implement their PSD programs and act as the permitting authority. Kentucky has a SIP-approved PSD program.

D. What actions has EPA taken concerning PSD requirements for GHG-emitting sources?

1. What are the Endangerment Finding, the Light Duty Vehicle Rule, and the Johnson memo reconsideration?

By notice dated December 15, 2009, and pursuant to CAA section 202(a), EPA issued two findings regarding GHGs that are commonly referred to as the “Endangerment Finding” and the “Cause or Contribute Finding.” “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act,” 74 FR 66496. In the Endangerment Finding, the Administrator found that six long-lived and directly emitted GHGs—CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆—may reasonably be anticipated to endanger public health and welfare. In the Cause or Contribute Finding, the Administrator “defin[ed] the air pollutant as the aggregate group of the

⁴ In the Tailoring Rule, EPA noted that commenters argued, with some variations, that the PSD provisions applied only to NAAQS pollutants, and not GHG, and EPA responded that the PSD provisions apply to all pollutants subject to regulation, including GHG. See 75 FR 31560–62 (June 3, 2010). EPA maintains its position that the PSD provisions apply to all pollutants subject to regulation, and the Agency incorporates by reference the discussion of this issue in the Tailoring Rule.

same six * * * greenhouse gases,” 74 FR at 66536, and found that the combined emissions of this air pollutant from new motor vehicles and new motor vehicle engines contribute to the GHG air pollution that endangers public health and welfare.

By notice dated May 7, 2010, EPA published what is commonly referred to as the “Light-Duty Vehicle Rule” (LDVR), which for the first time established Federal controls on GHGs emitted from light-duty vehicles. “Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule.” 75 FR 25324. In its applicability provisions, the LDVR specifies that it “contains standards and other regulations applicable to the emission * * * of six greenhouse gases,” including CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆. 75 FR at 25686 (40 CFR 86.1818–12(a)).

On December 18, 2008, EPA issued a memorandum, “EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program” (known as the “Johnson Memo” or the “PSD Interpretive Memo,” and referred to in this preamble as the “Interpretive Memo”), that set forth EPA’s interpretation regarding which EPA and state actions, with respect to a previously unregulated pollutant, cause that pollutant to become “subject to regulation” under the Act. Whether a pollutant is “subject to regulation” is important for the purposes of determining whether it is covered under the Federal PSD permitting program. The Interpretive Memo established that a pollutant is “subject to regulation” only if it is subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant (referred to as the “actual control interpretation”). On February 17, 2009, EPA granted a petition for reconsideration on the Interpretive Memo and announced its intent to conduct a rulemaking to allow for public comment on the issues raised in the memorandum and on related issues. EPA also clarified that the Interpretive Memo would remain in effect pending reconsideration.

On March 29, 2010, EPA signed a notice conveying its decision to continue applying (with one limited refinement) the Interpretive Memo’s interpretation of “subject to regulation,” “Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs.” 75 FR 17004. EPA concluded that the “actual control interpretation” is the most appropriate interpretation to apply

given the policy implications. However, EPA refined the Agency’s interpretation in one respect: EPA established that PSD permitting requirements apply to a newly regulated pollutant at the time a regulatory requirement to control emissions of that pollutant “takes effect” (rather than upon promulgation or the legal effective date of the regulation containing such a requirement). In addition, based on the anticipated promulgation of the LDVR, EPA stated that the GHG requirements of the vehicle rule would take effect on January 2, 2011, because that is the earliest date that a 2012 model year vehicle may be introduced into commerce. In other words, the compliance obligation under the LDVR does not occur until a manufacturer may introduce into commerce vehicles that are required to comply with GHG standards, which will begin with model year 2012 and will not occur before January 2, 2011.

2. What is EPA’s Tailoring Rule?

On June 3, 2010 (effective August 2, 2010), EPA promulgated a final rulemaking, the Tailoring Rule, for the purpose of relieving overwhelming permitting burdens that would, in the absence of the rule, fall on permitting authorities and sources. 75 FR 31514. EPA accomplished this by tailoring the applicability criteria that determine which GHG emission sources become subject to the PSD program⁵ of the CAA. In particular, EPA established in the Tailoring Rule a phase-in approach for PSD applicability and established the first two steps of the phase-in for the largest GHG-emitters. Additionally, EPA committed to certain follow-up actions regarding future steps beyond the first two, discussed in more detail later in this notice.

For the first step of the Tailoring Rule, which will begin on January 2, 2011, PSD requirements will apply to major stationary source GHG emissions only if the sources are subject to PSD anyway due to their emissions of non-GHG pollutants. Therefore, in the first step, EPA will not require sources or modifications to evaluate whether they are subject to PSD requirements solely on account of their GHG emissions. Specifically, for PSD, Step 1 requires that as of January 2, 2011, the applicable requirements of PSD, most notably, the BACT requirement, will apply to projects that increase net GHG emissions by at least 75,000 tpy CO₂e,

but only if the project also significantly increases emissions of at least one non-GHG pollutant.

The second step of the Tailoring Rule, beginning on July 1, 2011, will phase in additional large sources of GHG emissions. New sources that emit, or have the potential to emit, at least 100,000 tpy CO₂e will become subject to the PSD requirements. In addition, sources that emit or have the potential to emit at least 100,000 tpy CO₂e and that undertake a modification that increases net GHG emissions by at least 75,000 tpy CO₂e will also be subject to PSD requirements. For both steps, EPA notes that if sources or modifications exceed these CO₂e-adjusted GHG triggers, they are not covered by permitting requirements unless their GHG emissions also exceed the corresponding mass-based triggers in tpy.

EPA believes that the costs to the sources and the administrative burdens to the permitting authorities of PSD permitting will be manageable at the levels in these initial two steps and that it would be administratively infeasible to subject additional sources to PSD requirements at those times. However, EPA also intends to issue a supplemental notice of proposed rulemaking in 2011, in which the Agency will propose or solicit comment on a third step of the phase-in that would include more sources, beginning on July 1, 2013. In the Tailoring Rule, EPA established an enforceable commitment that the Agency will complete this rulemaking by July 1, 2012, which will allow for 1 year’s notice before Step 3 would take effect.

In addition, EPA committed to explore streamlining techniques that may well make the permitting programs much more efficient to administer for GHG, and that therefore may allow their expansion to smaller sources. EPA expects that the initial streamlining techniques will take several years to develop and implement.

In the Tailoring Rule, EPA also included a provision, that no source with emissions below 50,000 tpy CO₂e, and no modification resulting in net GHG increases of less than 50,000 tpy CO₂e, will be subject to PSD permitting before at least 6 years (i.e., April 30, 2016). This is because EPA has concluded that at the present time, the administrative burdens that would accompany permitting sources below this level would be so great that even with the streamlining actions that EPA may be able to develop and implement in the next several years, and even with the increases in permitting resources that EPA can reasonably expect the

⁵ The Tailoring Rule also applies to the title V program, which requires operating permits for existing sources. However, today’s action does not affect Kentucky’s title V program.

permitting authorities to acquire, it would be impossible to administer the permit programs for these sources until at least 2016.

As EPA explained in the Tailoring Rule, the threshold limitations are necessary because without them, PSD would apply to all stationary sources that emit or have the potential to emit more than 100 or 250 tons of GHG per year beginning on January 2, 2011. This is the date when EPA's recently promulgated LDVR takes effect, imposing control requirements for the first time on CO₂ and other GHGs. If this January 2, 2011, date were to pass without the Tailoring Rule being in effect, PSD requirements would apply to GHG emissions at the 100/250 tpy applicability levels provided under a literal reading of the CAA as of that date. From that point forward, a source owner proposing to construct any new major source that emits at or higher than the applicability levels (and which therefore may be referred to as a "major" source) or modify any existing major source in a way that would increase GHG emissions would need to obtain a permit under the PSD program that addresses these emissions before construction or modification could begin.

Under these circumstances, many small sources would be burdened by the costs of the individualized PSD control technology requirements and permit applications that the PSD provisions, absent streamlining, require. Additionally, state and local permitting authorities would be burdened by the extraordinary number of these permit applications, which are orders of magnitude greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities. Permit gridlock would result since the permitting authorities would likely be able to issue only a tiny fraction of the permits requested.

In the Tailoring Rule, EPA adopted regulatory language codifying the phase-in approach. As explained in that rulemaking, many state, local and tribal area programs will likely be able to immediately implement the approach without rule or statutory changes by, for example, interpreting the term "subject to regulation" that is part of the applicability provisions for PSD permitting. EPA has requested permitting authorities to confirm that they will follow this implementation approach for their programs, and if they cannot, then EPA has requested that they notify the Agency so that we can take appropriate follow-up action to narrow Federal approval of their

programs before GHGs become subject to PSD permitting on January 2, 2011.⁶ On July 27, 2010, Kentucky provided a letter to EPA explaining that it cannot interpret its SIP-approved PSD program as applying to GHGs. Kentucky informed EPA that it would undertake a rulemaking to include GHGs in its PSD program and presented EPA with a projected rulemaking schedule. See the docket for this proposed rulemaking for a copy of Kentucky's letter.

The thresholds that EPA established in the Tailoring Rule are based on CO₂e for the aggregate sum of six GHGs that constitute the pollutant that will be subject to regulation, which we refer to as GHG.⁷ These gases are: CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆. Thus, in EPA's Tailoring Rule, EPA provided that PSD applicability is based on the quantity that results when the mass emissions of each of these gases is multiplied by the GWP of that gas, and then summed for all six gases. However, EPA further provided that in order for a source's GHG emissions to trigger PSD requirements, the quantity of the GHG emissions must equal or exceed both the applicability thresholds established in the Tailoring Rule on a CO₂e basis and the statutory thresholds of 100 or 250 tpy on a mass basis.⁸ Similarly, in order for a source to be subject to the PSD modification requirements, the source's net GHG emissions increase must exceed the applicable significance level on a CO₂e basis and must also result in a net mass increase of the constituent gases combined.

3. What is the GHG SIP Call?

By **Federal Register** notice dated September 2, 2010, EPA proposed the GHG SIP Call. In that action, along with the companion GHG FIP rulemaking published at the same time, EPA took

⁶ Narrowing EPA's approval will ensure that for Federal purposes, sources with GHG emissions that are less than the Tailoring Rule's emission thresholds will not be obligated under Federal law to obtain PSD permits during the gap between when GHG PSD requirements go into effect on January 2, 2011 and when either (1) EPA approves a SIP revision adopting EPA's tailoring approach, or (2) if a state opts to regulate smaller GHG-emitting sources, the state demonstrates to EPA that it has adequate resources to handle permitting for such sources. EPA expects to finalize the narrowing action prior to the January 2, 2011 deadline with respect to those States for which EPA will not have approved the Tailoring Rule thresholds in their SIPs by that time.

⁷ The term "greenhouse gases" is commonly used to refer generally to gases that have heat-trapping properties. However, in this notice, unless noted otherwise, we use it to refer specifically to the pollutant regulated in the LDVR.

⁸ The relevant thresholds are 100 tpy for title V, and 250 tpy for PSD, except for 28 categories listed in EPA regulations for which the PSD threshold is 100 tpy.

steps to ensure that in the 13 States that do not appear to have authority to issue PSD permits to GHG-emitting sources at present, either the state or EPA will have the authority to issue such permits by January 2, 2011. EPA explained that although for most states, either the State or EPA is already authorized to issue PSD permits for GHG-emitting sources as of that date, our preliminary information shows that these 13 States have EPA-approved PSD programs that do not appear to include GHG-emitting sources and therefore do not appear to authorize these States to issue PSD permits to such sources. Therefore, EPA proposed to find that these 13 States' SIPs are substantially inadequate to comply with CAA requirements and, accordingly, proposed to issue a SIP Call to require a SIP revision that applies their SIP PSD programs to GHG-emitting sources. In the companion GHG FIP rulemaking, EPA proposed a FIP that would give EPA authority to apply EPA's PSD program to GHG-emitting sources in any State that is unable to submit a corrective SIP revision by its deadline. The Commonwealth of Kentucky is included in the list of areas for which EPA proposed a SIP Call.

III. What is the relationship between today's proposed action and EPA's proposed GHG SIP Call and GHG FIP?

As noted above, by notice dated September 2, 2010, EPA proposed the GHG SIP Call. At the same time, EPA proposed a FIP to apply in any state that is unable to submit, by its deadline, a SIP revision to ensure that the state has authority to issue PSD permits to GHG-emitting sources.⁹ As discussed in section IV of this rulemaking, Kentucky does not interpret its current PSD regulations as providing it with the authority to regulate GHGs, and as such, Kentucky is included on the list of areas for the proposed SIP call. Kentucky's August 5, 2010, proposed SIP revision (the subject of this rulemaking) addresses this authority. EPA will not take final action on the GHG SIP Call for Kentucky if the Commonwealth submits its final SIP revision to EPA prior to the final rulemaking for the GHG SIP Call. Additionally, Kentucky would not be subject to the FIP if EPA finalizes

⁹ As explained in the proposed GHG SIP Call (75 FR 53892, 53896), EPA intends to finalize its finding of substantial inadequacy and the SIP call for the 13 listed states by December 1, 2010. EPA requested that the states for which EPA is proposing a SIP call identify the deadline—between 3 weeks and 12 months from the date of signature of the final SIP Call—that they would accept for submitting their corrective SIP revision.

today's proposed approval of the Commonwealth's SIP revision.

IV. What is EPA's analysis of Kentucky's proposed SIP revision?

On August 5, 2010, KDAQ provided a revision to Kentucky's SIP to EPA for parallel processing and eventual approval. This revision to Kentucky's SIP is necessary because without it: (1) The Commonwealth would not have authority to issue PSD permits to GHG-emitting sources, and as a result, absent further action, those sources may not be able to construct or undertake modifications beginning January 2, 2011; and (2) assuming that the Commonwealth attains authority to issue PSD permits to GHG-emitting sources, PSD requirements would apply, as of January 2, 2011, at the 100- or 250-tpy levels provided under the CAA. This would greatly increase the number of required permits, imposing undue costs on small sources; which would overwhelm Kentucky's permitting resources and severely impair the function of the program.

The Commonwealth's August 5, 2010, proposed SIP revision: (1) Provides the Commonwealth with the authority to regulate GHG under the PSD program of the CAA, and (2) establishes thresholds for determining which stationary sources and modification projects become subject to permitting requirements for GHG emissions under Kentucky's PSD program. Specifically, Kentucky's August 5, 2010, proposed SIP revision includes changes to Kentucky's Air Quality Regulations, 401 KAR 51:001—*Definitions for 401 KAR Chapter 51*,¹⁰ revising Kentucky's regulations by updating the "subject to regulation" provision to provide authority for the Commonwealth to regulate GHG and addressing the thresholds for GHG permitting applicability.

The Commonwealth of Kentucky is currently a SIP-approved state for the PSD program, and has incorporated the EPA's 2002 NSR reform revisions for PSD into its SIP. However, Kentucky does not interpret its current rules, which are generally consistent with the Federal rules, to be automatically updating to include newly designated regulated air pollutants such as GHG.¹¹

¹⁰ Kentucky's submittal also revises definitions for 401 KAR 52:001—*Definitions for 401 KAR Chapter 52*; however, these definitions relate to title V and are not included in the SIP. As such, EPA is not proposing to take action to approve Kentucky's update to these definitions in this rulemaking.

¹¹ On July 23, 2010, Lynora Benjamin, Region 4 EPA Chief of the Regulatory Development Section, confirmed with John Lyons, the Director of KDAQ, that it is the Commonwealth of Kentucky's

In a letter provided to EPA on July 27, 2010, Kentucky notified EPA that the Commonwealth does not currently have the authority to regulate GHG and thus is in the process of revising its regulation (the subject of this proposed action) to provide this authority. To provide this authority, Kentucky is updating the definitions for "regulated NSR pollutant" and "subject to regulation" to explicitly include GHG as a regulated NSR pollutant under the CAA. Specifically, while Kentucky revises its SIP provisions in its August 5, 2010, submittal by establishing its own regulatory language, it adopts relevant GHG definitions as "defined in 40 CFR 51.166 or 52.21" as amended by the Tailoring Rule promulgated on June 3, 2010. EPA has preliminarily determined that this change to Kentucky's regulation is consistent with the CAA and its implementing regulations regarding GHG.

The changes included in Kentucky's PSD program are substantively the same as EPA's Tailoring Rule. The Kentucky rules have been formatted to conform to Kentucky's rule drafting standards for 401 KAR 51:001—*Definitions for 401 KAR Chapter 51*, but in substantive content the rules that address the Tailoring Rule provisions are the same as the Federal rules. As part of its review of the Kentucky submittal, EPA performed a line-by-line review of Kentucky's proposed changes to its regulations and has preliminarily determined that they are consistent with the Tailoring Rule. Furthermore, EPA preliminarily determined that this revision to Kentucky's SIP is consistent with section 110 of the CAA. *See, e.g.*, Tailoring Rule, 75 FR at 31561.

V. Proposed Action

EPA is proposing to approve the Commonwealth of Kentucky's August 5, 2010, SIP revision, relating to PSD requirements for GHG-emitting sources. Specifically, Kentucky's August 5, 2010, proposed SIP revision: (1) Provides the Commonwealth with the authority to regulate GHGs under its PSD program, and (2) establishes appropriate emissions thresholds for determining PSD applicability with respect to new and modified GHG-emitting sources in accordance with EPA's Tailoring Rule. EPA has made the preliminary determination that this SIP revision is approvable because it is in accordance with the CAA and EPA regulations regarding PSD permitting for GHGs.

interpretation that Kentucky does not have the authority to regulate GHG without the revision that is the subject of today's proposed rulemaking.

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 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 CAA. Accordingly, this proposed action merely approves the Commonwealth's law as meeting Federal requirements and does not impose additional requirements beyond those imposed by the Commonwealth's 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 (Pub. L. 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 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 Commonwealth, 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, Incorporation by reference, Intergovernmental relations, and Reporting and recordkeeping requirements.

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

Dated: October 25, 2010.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2010-28017 Filed 11-4-10; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2010-0741-201043; FRL-9222-7]

Approval and Promulgation of Implementation Plans; North Carolina: Prevention of Significant Deterioration; Greenhouse Gas Tailoring Rule Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a draft revision to the North Carolina State Implementation Plan (SIP), submitted by the State of North Carolina, through the North Carolina Department of Environment and Natural Resources' (NC DENR) Division of Air Quality, to EPA on August 11, 2010, for parallel processing. The proposed SIP revision establishes new provisions specific to greenhouse gas (GHG) for North Carolina's New Source Review (NSR) Prevention of Significant Deterioration (PSD) program. Specifically, the proposed SIP revision establishes appropriate emission thresholds for determining which new stationary sources and modification projects become subject to North Carolina's PSD permitting requirements for their GHG emissions. North Carolina's August 11, 2010, SIP revision is necessary because without it, on January 2, 2011, PSD requirements would apply at the 100 or 250 tons per year (tpy) levels provided under the Clean Air Act (CAA or Act), which would overwhelm North Carolina's permitting resources. EPA is proposing approval of North Carolina's August 11, 2010, SIP revision relating to PSD requirements for GHG-emitting sources because the Agency has made the preliminary determination that this SIP

revision is in accordance with the CAA and EPA regulations regarding PSD permitting for GHGs.

DATES: Comments must be received on or before December 6, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2010-0741 by one of the following methods:

1. *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.

2. *E-mail*: benjamin.lynora@epa.gov.

3. *Fax*: (404) 562-9019.

4. *Mail*: EPA-R04-OAR-2010-0741, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960.

5. *Hand Delivery or Courier*: Ms. Lynora Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. "EPA-R04-OAR-2010-0741." 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 whose disclosure is restricted by statute. Do not submit through <http://www.regulations.gov> or e-mail, information that you consider to be CBI or otherwise protected. The <http://www.regulations.gov> Web site 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. 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 electronic docket are listed in the <http://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 <http://www.regulations.gov> or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the North Carolina SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Ms. Bradley's telephone number is (404) 562-9352; *e-mail address*: bradley.twunjala@epa.gov. For information regarding the Tailoring Rule, contact Ms. Heather Abrams, Air Permits Section, at the same address above. Ms. Abrams' telephone number is (404) 562-9185; *e-mail address*: abrams.heather@epa.gov.

SUPPLEMENTARY INFORMATION:

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