Georgia Department of Natural Resources

Environmental Protection Division • Air Protection Branch
4244 International Parkway • Suite 120 • Atlanta • Georgia 30354
404/363-7000 • Fax: 404/363-7100
Judson H. Turner, Director

Georgia EPD – Air Protection Branch

Implementation Policy on GHG Tailoring Rule

July 2, 2014

Background

On June 23, 2014, the United States Supreme Court ruled that the June 2, 2010 amendments to 40 CFR 52.21 and 40 CFR Part 70 (aka "GHG Tailoring Rule") were partially invalid. Specifically, the Court ruled that GHGs may not be considered when determining major source status. In addition, the Court called into question the validity of the existing 75,000 ton per year *de minimis* threshold.

Georgia currently implements GHG permitting under state rules by incorporating by reference the term "subject to regulation" as defined in 40 CFR 52.21 ("PSD") and 40 CFR Part 70 ("Part 70") into the Georgia Rules for Air Quality Control ("Georgia Rules") at Rule 391-3-1-.02(7)(a)2(iv) and Rule 391-3-1-.03(10)(a)4(iii), respectively. The Georgia Rules specify that if any portion of that term is declared or adjudged to be invalid or unconstitutional, stayed, or withdrawn by US EPA, it also becomes invalid under the Georgia Rules upon the date such action becomes final and effective. The text of Georgia Rule 391-3-1-.02(7)(a)2(iv) (which is identical to the text of Rule 391-3-1-.03(10)(a)4(iii) except that the reference to the CFR is to section 70.2) is below - key phrase underlined:

From 391-3-1-.02(7)(a)2 -

> *(iv) The definition and use of the term "subject to regulation" in 40 CFR, Part 52.21, as amended June 3, 2010, is hereby incorporated by reference; provided, however, that in the event all or any portion of 40 CFR, Part 52.21 containing that term is:*
>
> *(I) declared or adjudged to be invalid or unconstitutional or stayed by the United States Court of Appeals for the Eleventh Circuit or for the District of Columbia Circuit; or*
>
> *(II) withdrawn, repealed, revoked or otherwise rendered of no force and effect by the United States Environmental Protection Agency, Congress, or Presidential Executive Order.*
>
> *Such action shall render the regulation as incorporated herein, or that portion thereof that may be affected by such action, as invalid, void, stayed, or otherwise without force and effect for purposes of this rule upon the date such action becomes final and effective; provided, further, that such declaration, adjudication, stay, or other action described herein shall not affect the remaining portions, if any, of the regulation as incorporated herein, which shall remain of full force and effect as if such portion so declared or adjudged invalid or unconstitutional or stayed or otherwise invalidated or effected were not originally a part of this rule. The Board declares that it would have incorporated the remaining parts of the federal regulation if it had known that such portion thereof would be declared or adjudged invalid or unconstitutional or stayed or otherwise rendered of no force and effect;*

In the GHG Tailoring Rule finalized into PSD and Title V, GHGs become "regulated pollutants" per the definition:

From the definition of "subject to regulation" in 40 CFR 52.21(b)(49) -

> *(iv) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:*
>
> *(a) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_{2e} or more; or*
>
> *(b) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_{2e} or more; and, [Cornwell note: "Anyway" sources]*
>
> *(v) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(49)(iv) of this section, the pollutant GHGs shall also be subject to regulation*
>
> *(a) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_{2e}; or*
>
> *(b) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_{2e}, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_{2e} or more. [Cornwell note: "non-anyway" sources]*

From the definition of "subject to regulation" in 40 CFR 70.2 –

> *Subject to regulation means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:*
>
> *(1)Greenhouse gases (GHGs), the air pollutant defined in § 86.1818-12(a) of this chapter as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tpy CO[2] equivalent emissions.*

For 40 CFR 52.21(b)(49), the Supreme Court ruling invalidates subparagraph (v), "non-anyway sources," and calls into question, but does not invalidate, the *de minimis* potential to emit ("PTE") of 75,000 tpy in subparagraphs (iv)(a) and (b). Similarly, for 40 CFR 70.2, the Supreme Court ruling invalidates the requirements for "non-anyway" sources in subparagraph (1), beginning with "unless, as of July 1, 2011, the GHG…." The Appeals Court must now reconcile its decision with the Supreme Court ruling. Thus, for all intents and purposes:

1) Adopted subparagraph 40 CFR 52.21(b)(49)(v) (regarding PSD) is no longer applicable for Georgia.

2) Adopted subparagraph (1) in the definition of "Subject to Regulation" from 40 CFR 70.2 (regardingTitle V) beginning with "unless, as of July 1, 2011, the GHG…" is no longer applicable for Georgia.

Implementation

Per the Georgia Rules for PSD, subparagraph (v) of the GHG Tailoring Rule in 40 CFR 52.21(b)(49) is no longer in force. Per the Georgia Rules for Title V, subparagraph (1) beginning with "unless, as of July 1, 2011, the GHG . . ." of the GHG Tailoring Rule in the definition of "Subject to Regulation" in 40 CFR 70.2 is no longer in force. Georgia EPD will not apply these provisions of the Tailoring Rule when issuing air quality permits.

Existing sources that were permitted as "non-anyway" sources may apply to remove GHG- related requirements after the Appeals Court vacates this portion.

This path forward includes those biomass sources relying on the July 20, 2011 "biomass deferral" to remain PSD minor; the deadline to begin actual construction by July 20, 2014 is no longer applicable.

Existing sources that received Title V Permits solely due to being "major for GHG" under the Tailoring Rule may apply to become Title V minor after the Appeals Court vacates this portion.

Regarding the Supreme Court's questioning of the 75,000 tpy *de minimis* level, Georgia EPD will continue to implement subparagraph 40 CFR52.21(b)(49)(iv) of the Tailoring Rule at the 75,000 tpy threshold while we await revision of the rule by US EPA.