



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2018-0257; FRL-9993-98-Region 4]

Air Plan Approval; North Carolina: PSD Requirements for GHGs

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve State Implementation Plan (SIP) revisions dated July 30, 2012, and January 12, 2018, submitted by the State of North Carolina through the North Carolina Department of Environmental Quality (NCDEQ). These SIP revisions are related to the State's Prevention of Significant Deterioration (PSD) permitting program requirements for greenhouse gases (GHGs). This action is being proposed pursuant to the Clean Air Act (CAA or Act).

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-R04-OAR-2018-0257 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be

accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Andres Febres, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S.

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SUPPLEMENTARY INFORMATION:

I. What Action is the Agency Taking?

EPA received two SIP revisions from NCDEQ, dated July 30, 2012, and January 12, 2018, that include changes to North Carolina's SIP-approved air quality rule at 15 North Carolina Administrative Code (NCAC) 02D .0544 – *Prevention of Significant Deterioration Requirements for Greenhouse Gases*.^{1, 2, 3} The 2012 and 2018 revisions include several

¹ EPA notes that the agency received the SIP revisions on August 3, 2012, and February 2, 2018, respectively.

² In the table of North Carolina regulations approved into the SIP at 40 CFR 52.1770(c), 15A NCAC 02D is referred to as “Subchapter 2D Air Pollution Control Requirements.”

³ The PSD permitting 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.” EPA’s regulations governing PSD implementation are located at 40 CFR 51.166 and 52.21.

administrative and typographical changes to the rule, as well as a modification to the date associated with the incorporation by reference (IBR) of 40 CFR 51.166 that was initially meant to capture EPA’s final action entitled “Deferral for CO₂ Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs” (hereinafter referred to as the “Biomass Deferral Rule” and discussed in Section II.B, below). In a March 4, 2019, letter, North Carolina asked EPA to approve changes to the IBR-related paragraph in Section 0544, including the date modification, but to exclude the adoption of the Biomass Deferral Rule from the IBR.⁴

The 2018 submittal also seeks to remove the PSD requirements for major stationary sources based solely on their GHG emissions; add a new paragraph – paragraph (d) – regarding the global warming potential for GHGs; and re-letter several paragraphs in the rule due to the addition of the new paragraph (e.g., changing paragraph (d) in the SIP-approved rule to paragraph (e)).⁵ The revisions removing PSD requirements based solely on GHG emissions are in response to court decisions invalidating and vacating the Federal regulations that applied PSD permitting requirements to major sources based solely on their GHG emissions.⁶ More detail on the court decisions is included in Section II, below.

⁴ The March 4, 2019, supplemental letter is located in the docket for this proposed rulemaking.

⁵ In North Carolina’s January 12, 2018, SIP revision cover letter, the State also mentions changes to rule 15 NCAC 02D Section .0502 – *Applicability*, which relates to title V permitting requirements for GHGs. This rule is mentioned because it was approved, together with Section .0544, by the North Carolina Rules Review Commission, but the redline strikeout changes were not include as part of the January 12, 2018 SIP package. Additionally, North Carolina explains in its letter that they do not wish for EPA to review these changes because they are not part of the SIP but rather part of the State’s title V operating permit program.

⁶ See *Utility Air Regulatory Group (UARG) v. EPA*, 134 S. Ct. 2427 (2014); *Coalition for Responsible Regulation, Inc. v. EPA*, 606 Fed. Appx. 6, 7 (D.C. Cir. 2015).

EPA is proposing to approve the July 30, 2012, and January 12, 2018, SIP revisions as supplemented by the State's March 4, 2019, letter.⁷ EPA's analysis of North Carolina's submittal and the reasoning for proposing approval is included in Section III, below.

II. Background

A. GHG Tailoring Rule

On January 2, 2011, GHG emissions were, for the first time, covered by the PSD and title V operating permit programs.⁸ To establish a process for phasing in the permitting requirements for stationary sources of GHGs under the CAA's PSD and title V programs, on June 3, 2010, EPA published a final rule entitled "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" (hereinafter referred to as the "GHG Tailoring Rule"). *See* 75 FR 31514. In Step 1 of the GHG Tailoring Rule, which began on January 2, 2011, EPA limited application of PSD and title V requirements to sources and modifications of GHG emissions, but only if they were subject to PSD or title V "anyway" due to their emissions of pollutants other than GHGs. These sources and modifications covered under Step 1 are commonly referred to as "anyway sources" and "anyway modifications," respectively.

In Step 2 of the GHG Tailoring Rule, which applied as of July 1, 2011, the PSD and title V permitting requirements extended beyond the sources and modifications covered under Step 1 to apply to sources that were classified as major sources based solely on their GHG emissions or potential to emit GHGs. Step 2 also applied PSD permitting requirements to modifications of

⁷ Pursuant to the State's March 4, 2019, letter, EPA's proposed approval of the IBR date does not include the Biomass Deferral Rule. As discussed in Section III, below, EPA's proposed approval is also based on the State's interpretation of Section .0544(b)(1) included in a December 7, 2018, letter from NCDEQ.

⁸ *See* 75 FR 17004 (April 2, 2010).

otherwise major sources that would increase only GHG emissions above the level in the Federal PSD regulations. EPA generally described the sources and modifications covered by PSD under Step 2 of the Tailoring Rule as “Step 2 sources and modifications” or “GHG-only sources and modifications.”

Subsequently, EPA published Step 3 of the GHG Tailoring Rule on July 12, 2012. *See* 77 FR 41051. In this rule, EPA decided against further phase-in of the PSD and title V requirements for sources emitting lower levels of GHG emissions. Thus, the thresholds for determining PSD and title V applicability based on emissions of GHGs remained the same as established in Steps 1 and 2 of the Tailoring Rule.

On June 23, 2014, the U.S. Supreme Court addressed the application of stationary source permitting requirements to GHG emissions in *Utility Air Regulatory Group (UARG) v. EPA*, 134 S. Ct. 2427 (2014). The Supreme Court upheld EPA’s regulation of GHG Step 1 – or “anyway” sources – but held that EPA may not treat GHGs as air pollutants for the purpose of determining whether a source is a major source (or is undergoing a major modification) and thus require the source to obtain a PSD or title V permit. Therefore, the Court invalidated the PSD and title V permitting requirements for GHG Step 2 sources and modifications.

In accordance with the Supreme Court’s decision, on April 10, 2015, the United States 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 GHG Tailoring Rule, but not the regulations that implement Step 1 of the GHG Tailoring Rule. *See Coalition for Responsible Regulation, Inc. v. EPA*, 606 Fed. Appx. 6, 7 (D.C. Cir. 2015). The Amended Judgment specifically vacated the EPA regulations under review (including 40 CFR 51.166(b)(48)(v) and

40 CFR 52.21(b)(49)(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.” *Id.* at 7-8.

EPA promulgated a good cause final rule on August 19, 2015, entitled “Prevention of Significant Deterioration and Title V Permitting for Greenhouse Gases: Removal of Certain Vacated Elements.” *See* 80 FR 50199 (August 19, 2015) (hereinafter referred to as the “Good Cause GHG Rule”). The rule removed from the Federal regulations the portions of the PSD permitting provisions for Step 2 sources that were vacated by the D.C. Circuit (i.e., 40 CFR 51.166(b)(48)(v) and 52.21(b)(49)(v)). EPA therefore no longer has the authority to conduct PSD permitting for Step 2 sources, nor can the Agency approve provisions submitted by a state for inclusion in its SIP providing this authority. On October 3, 2016, EPA proposed to revise provisions in the PSD permitting regulations applicable to GHGs to address the GHG applicability threshold for PSD in order to fully conform with *UARG* and the Amended Judgment, but those revisions have not been finalized. *See* 81 FR 68110.

B. Biomass Deferral Rule

On July 20, 2011, EPA finalized the Biomass Deferral Rule, which deferred for a period of three years, the application of PSD and Title V permitting requirements to carbon dioxide (CO₂) emissions from bioenergy and other biogenic stationary sources (also known as biogenic CO₂ emissions). *See* 76 FR 43490. During this three-year period, stationary sources that combust biomass and constructed or modified a facility would have avoided the application of PSD to biogenic CO₂ emissions resulting from construction or modification. The deferral

applied only to biogenic CO₂ emissions and did not affect other GHGs emitted from the combustion of biomass fuel and decomposition of biogenic material or non-GHG pollutants. Additionally, the deferral only applied to biogenic CO₂ emissions in the PSD and Title V programs; it did not apply to any other EPA programs, such as the GHG Reporting Program.⁹

On July 12, 2013, the D.C. Circuit vacated the Biomass Deferral Rule, but on November 14, 2013, issued an order delaying the vacatur of the Biomass Deferral Rule until the United States Supreme Court made a final decision in the *UARG* case related to the GHG Tailoring Rule. *See Center for Biological Diversity v. EPA*, 722 F.3d 401. After a final decision was made by the Supreme Court on June 23, 2014, in *UARG*, EPA did not take formal action to remove the Biomass Deferral Rule from the CFR. Although the language of the Biomass Deferral Rule remains in place at 40 CFR 51.166(b)(48)(ii)(a), 52.21(b)(49)(ii)(a), 70.2(2), and 71.2(2), the deferral is no longer operative.

III. Analysis of State's Submittal

The proposed changes to the SIP-approved version of 15 NCAC 02D .0544 in the July 30, 2012, SIP revision include administrative edits to the rule and an update to the IBR date for 40 CFR 51.166 at Section .0544(n) (subsequently re-lettered to paragraph (o) in the January 12, 2018, SIP revision). The administrative changes include the correction of acronyms for New Source Review (NSR) found under paragraphs (a) and (b) of the rule, as well as the clarification of a reference to the “owner or operator” of a facility made in the last subparagraph of paragraph (m) (subsequently re-lettered to paragraph (n) in the January 12, 2018, SIP revision).

The change to the IBR date included in the July 30, 2012, SIP revision seeks to revise the

⁹ See <https://www.epa.gov/ghgreporting> for information on the GHG Reporting Program.

date from August 2, 2010, to July 20, 2011. The State originally included this change to capture the promulgation of the Biomass Deferral Rule. However, because the Biomass Deferral Rule was subsequently vacated but no formal action was taken to remove the language from the Federal PSD regulations after the *UARG* decision, North Carolina decided to withdraw the change to the IBR date paragraph from the July 30, 2012, SIP revision through a letter dated January 16, 2015.^{10, 11}

In its January 12, 2018, SIP revision, as supplemented by its March 4, 2019, letter, North Carolina seeks to make additional changes to Section .0544. Specifically, North Carolina seeks to: 1) modify the language of .0544(a) in order to capture the effects of the *UARG* decision on PSD and title V permitting requirements for GHG-only, or Step 2, sources; 2) add a new paragraph to Section .0544 – paragraph (d) – to automatically incorporate any changes to the Federal GHG global warming potentials; 3) re-letter certain paragraphs in Section .0544 due to the addition of paragraph (d); 4) make administrative edits to the section; and 5) modify the IBR paragraph to, among other things, change the IBR date of 40 CFR 51.166 to July 20, 2011. As discussed above, North Carolina’s March 4, 2019, letter asks EPA to approve changes to the IBR-related paragraph in Section 0544, including the date modification, but to exclude the Biomass Deferral Rule from the IBR.

As previously mentioned, the *UARG* decision invalidated and vacated the PSD and title V permitting requirements for GHG-only, or Step 2, sources and modifications. North Carolina

¹⁰ The January 16, 2015 letter is located in the docket for this proposed rulemaking.

¹¹ In a notice of proposed rulemaking (NPRM) published on April 19, 2013, EPA proposed to approve the IBR-related changes to Section .0544 in North Carolina’s July 30, 2012, SIP revision to capture the Biomass Deferral Rule. EPA never took final action to approve those changes because of the July 12, 2013 vacatur of the Rule. Today’s proposal supersedes the April 19, 2013, NPRM.

had previously adopted the GHG Tailoring Rule through the August 2, 2010, IBR date of 40 CFR 51.166 found in the current SIP-approved version of Section .0544(n). North Carolina's January 12, 2018, SIP revision seeks to add language to Section .0544 to capture the effects of the *UARG* decision. Specifically, North Carolina proposes to add the following language to paragraph (a) of Section .0544 - "A major stationary source or major modification shall not be required to obtain a prevention of significant deterioration (PSD) permit on the sole basis of its greenhouse gases emissions." Given the *UARG* decision and the fact that the State is still being as stringent as the current Federal PSD requirements for GHGs, EPA is proposing to approve these changes.

Additionally, in the January 12, 2018, SIP revision, North Carolina adds paragraph (d) to Section. 0544 in order to automatically incorporate any changes to the Federal GHG global warming potentials into the definition of "subject to regulation" incorporated by reference from 40 CFR 51.166(b)(48) that may occur after the IBR date. In order to determine if a source is subject to regulation for GHGs, a source's total GHG emissions are calculated using the global warming potentials published in Table A-1 of Subpart A of 40 CFR part 98.¹² North Carolina's revision ensures that any future changes EPA makes to Table A-1 are concurrently incorporated into the State's SIP-approved PSD program for greenhouse gases without the need for further SIP revisions. For this reason, EPA is proposing to incorporate paragraph (d) into the SIP. Furthermore, due to the addition of paragraph (d), the State seeks to re-letter the remaining

¹² GHGs, as defined in the definition of "subject to regulation" at 40 CFR 51.166(b)(48), is the aggregate of six different gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. To calculate the total GHG emissions for a source: 1) the mass amount of emissions, in tons per year (tpy), of each individual GHG is multiplied by its global warming potential found in Table A-1 of Subpart A of 40 CFR 98, and 2) the resulting values for each individual GHG are added. This results in the total GHG emissions for the source expressed in tpy of CO₂ equivalent (tpy CO₂e).

paragraphs in the rule (e.g., changing paragraph (e) in the SIP-approved rule to paragraph (f)). EPA is proposing to approve this organizational change.

Originally, the January 12, 2018, SIP revision also sought to re-letter the IBR paragraph at Section .0544(n) to paragraph (o) and revise the IBR date of 40 CFR 51.166 from August 2, 2010, to July 20, 2011, without exception. Because North Carolina had previously asked EPA not to approve the updates to the IBR paragraph submitted in the July 30, 2012, SIP revision, EPA requested clarification from the State on whether they want EPA to incorporate the changes to the IBR-related paragraph into the SIP. Subsequently, on December 7, 2018, North Carolina submitted a letter to EPA stating that it was not requesting that EPA approve paragraph (o) into the SIP because the Biomass Deferral Rule had expired and EPA had not taken action to remove the rule language from 40 CFR 51.166.

However, due to the re-lettering, approving the revisions to Section .0544 into the SIP without paragraph (o) could cause confusion for the general public and would create an inconsistency between the SIP-approved version and the state version of the rule. Therefore, North Carolina submitted the March 4, 2019, letter asking EPA to approve all changes to Section .0544 from its July 30, 2012, and January 12, 2018, SIP revisions, including the adoption of paragraph (o) with the IBR date update, but to exclude the adoption of the Biomass Deferral Rule language from the July 20, 2011, IBR of 40 CFR 51.166. Therefore, EPA is proposing to incorporate paragraph (o) into the SIP with this exclusion.¹³

Finally, the January 12, 2018 SIP revision also seeks to remove the term “immediately”

¹³ If EPA takes final action to approve the July 30, 2012, and the January 12, 2018, SIP revisions, it will place a note in the entry for Section .0544 in the table of North Carolina SIP-approved rules, at 40 CFR 52.1770(c), explaining that the Biomass Deferral Rule is excluded from the July 20, 2011 IBR of 40 CFR 51.166.

from the following subparagraph (Section .0544(b)(1)) in the definition of “baseline actual emissions”:

For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding the date that a complete permit application is received by the Division for a permit required under this Rule. The Director shall allow a different time period, not to exceed 10 years immediately preceding the date that a complete permit application is received by the Division, if the owner or operator demonstrates that it is more representative of normal source operation. . . .

In the December 7, 2018, supplemental letter, the State explained that the term was eliminated as the result of a technical correction from the North Carolina Rules Review Commission to remove extraneous text throughout North Carolina’s rules. North Carolina also stated that it intends to enforce subparagraph (b)(1) as if the term “immediately” were present in the rule. EPA’s proposed action to incorporate the change is based on the State’s interpretation of this subparagraph as explained in its December 7, 2018 letter.

All other changes to Section .0544 consist of administrative and typographical corrections that have no effect on how the PSD provisions for GHG would operate in the State. For all of the reasons discussed above, EPA proposes to incorporate the changes to Section .0544 into the North Carolina SIP from the July 30, 2012 and January 12, 2018, SIP revisions but exclude the Biomass Deferral Rule language from the IBR of 40 CFR 51.166.

IV. Incorporation by Reference

In this document, 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, EPA is proposing to incorporate by reference, under Subchapter 2D, *Air Pollution Control Requirements* of the North Carolina SIP, Section .0544 – “Prevention of Significant Deterioration

Requirements for Greenhouse Gases,” state-effective September 1, 2015.¹⁴ EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 4 office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information).

V. Proposed Action

EPA is proposing to approve North Carolina’s July 30, 2012, and January 12, 2018, SIP revisions that revise the PSD requirements for GHGs under 15 NCAC 02D .0544 – *Prevention of Significant Deterioration Requirements for Greenhouse Gases* as described above. Specifically, EPA is proposing to approve language under paragraph (a) that will prevent the regulation of GHG-only, or Step 2 sources; the adoption of new paragraph (d), regarding the definition of global warming potential for GHGs, and the re-lettering of Section .0544 following the new paragraph (d); the deletion of the term “immediately” from paragraph (b)(1); the adoption of paragraph (o), excluding incorporation of the Biomass Deferral Rule into the July 20, 2011 IBR of 40 CFR 51.166; and adoption of various administrative edits such as the addition of acronyms and typographical corrections throughout the rule. EPA believes that these changes are consistent with the requirements of the CAA.

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. *See* 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. This proposed action merely proposes to

¹⁴ As discussed above, EPA is proposing to exclude the Biomass Deferral Rule from the July 20, 2011 IBR of 40 CFR 51.166, found in Section .0544(o).

approve 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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- 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).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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, 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 10, 2019.

Mary S. Walker,

Acting Regional Administrator,

Region 4.

[FR Doc. 2019-10723 Filed: 5/22/2019 8:45 am; Publication Date: 5/23/2019]