

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

6

DECISION

TOPIC

**Final Rule - Chapters 22 and 33:
Air Quality Program Rules – PSD and Title V Greenhouse Gas
Tailoring Rule**

The Department is requesting that the Commission adopt amendments to Chapter 22, “Controlling Pollution,” and Chapter 33, “Special Regulations and Construction Permit Requirements for Major Stationary Sources—Prevention of Significant Deterioration (PSD) of Air Quality,” of the Iowa Administrative Code.

The purpose of this rulemaking is to assure that sources of greenhouse gas emissions in Iowa are regulated in the same manner and at the same levels as specified in recently finalized federal regulations, known as the PSD and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule). The Department provided a brief and a presentation for information to the Commission on June 15, 2010.

Notice of Intended Action was published in the Iowa Administrative Bulletin (IAB) on August 11, 2010, as ARC 8999B. A public hearing was held on September 13, 2010. The Department did not receive any comments at the public hearing. The Department received ten sets of written comments before the close of the public comment period on September 14, 2010. The submitted comments and the Department’s response to the comments are summarized in the attached public responsiveness summary. The Department did not make any changes to the adopted rules from what was published in the Notice.

History of Federal Greenhouse Gas Regulations

On April 2, 2007, the U.S. Supreme Court found that greenhouse gases, including carbon dioxide, are air pollutants covered by the Clean Air Act (*Massachusetts v. EPA*, 549 U.S. 497). The Court found that the U.S. Environmental Protection Agency (EPA) was required to determine whether emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.

In April 2009, EPA responded to the Court by proposing a finding that greenhouse gases contribute to air pollution that may endanger public health or welfare. On December 7, 2009, EPA issued two distinct findings regarding greenhouse gases:

- **Endangerment Finding:** EPA found that the current and projected atmospheric concentrations of the six, key, well-mixed greenhouse gases - carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons

(PFCs), and sulfur hexafluoride (SF₆) - threaten the public health and welfare of current and future generations.

- **Cause or Contribute Finding:** EPA found that the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution, which threatens public health and welfare.

These findings, which were published December 15, 2009, did not impose any requirements on industry or other entities. However, they were a prerequisite to finalizing the greenhouse gas standards for light-duty vehicles and for setting a schedule to regulate greenhouse gases from stationary sources.

On March 29, 2010, EPA completed its reconsideration of the December 18, 2008, memorandum entitled “EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program” – the so-called Johnson memo. The final action confirmed that any new pollutant that EPA may regulate becomes covered under the PSD program on the date when the EPA rule regulating that new pollutant takes effect. This action clarified that for greenhouse gases that date will be January 2, 2011, when the light duty vehicle rule was expected to take effect.

On April 1, 2010, EPA finalized the light duty vehicle rule controlling greenhouse gas emissions. This rule confirmed that January 2, 2011 is the earliest date that a 2012 model year vehicle meeting these rule requirements may be sold in the United States. On that date, Clean Air Act permitting program requirements will apply to stationary sources of greenhouse gases.

EPA’s Greenhouse Gas “Tailoring Rule”

On May 13, 2010, EPA issued the final Tailoring Rule that establishes the approach to addressing greenhouse gas (GHG) emissions from stationary sources under the Clean Air Act permitting programs. EPA published the final Tailoring Rule in the Federal Register on June 3, 2010.

The Tailoring Rule sets thresholds for GHG emissions that specify when permits under the PSD and Title V programs are required for new and existing facilities. This final rule “tailors” the requirements of these permitting programs to limit which facilities will be required to obtain PSD and Title V permits. The Tailoring Rule establishes a schedule that will initially focus air permitting programs on the largest sources that are already subject to PSD and Title V requirements. The Tailoring Rule then expands to cover the largest sources of GHG that may not have been previously covered by the PSD or Title V permitting program for other pollutants.

EPA estimates that facilities responsible for nearly 70 percent of the national GHG emissions from stationary sources will be subject to PSD and Title V permitting requirements under the Tailoring Rule. This includes the nation’s largest GHG emitters, such as power plants, refineries, and cement production facilities, as well as other large industrial or commercial emitters. GHG emissions from smaller industrial or commercial facilities will not be covered by the PSD or Title V programs at this time.

The PSD and Title V emissions thresholds for criteria pollutants such as fine particulate, sulfur

dioxide and nitrogen dioxide are 100 and 250 tons per year (tpy). EPA has determined that while these thresholds are appropriate for criteria pollutants, they are not feasible for GHGs because GHGs are emitted at much higher levels.

Federal Tailoring Rule: Phased-In Implementation

Through the Tailoring Rule, EPA will phase in the GHG permitting requirements in two initial steps outlined below, followed by assessment and rulemaking to phase in appropriate, additional requirements for controlling GHG emissions from stationary sources.

Step 1 (January 2, 2011 – June 30, 2011)

Effective January 2, 2011, only sources currently subject to the PSD permitting program (i.e., sources that are newly-constructed or modified in a way that significantly increases emissions of a pollutant other than GHGs) would be subject to permitting requirements for their GHG emissions under PSD. For these projects, only GHG increases of 75,000 tpy or more of total GHG (based on potential to emit (PTE) and using a specific formula to calculate “tpy CO₂ equivalent emissions (CO₂e)”) would be subject to PSD for their GHG emissions.

Similarly, for the Title V program, only sources currently subject to the program (i.e., newly constructed or existing major sources for a pollutant other than GHGs) would be subject to Title V requirements for GHG.

During this time, no sources would be subject to PSD or Title V permitting requirements due solely to GHG emissions.

Step 2 (July 1, 2011 to June 30, 2013)

In this phase, PSD permitting requirements will, for the first time, cover new construction projects with a GHG PTE of at least 100,000 tpy (CO₂e), even if they do not exceed the permitting thresholds for any other pollutant. Modifications at existing facilities that increase their GHG PTE by at least 75,000 tpy (CO₂e) will be subject to permitting requirements, even if they do not significantly increase emissions of any other pollutant.

In Step 2, Title V operating permit requirements will, for the first time, apply to sources based on their GHG emissions even if they would not apply based on emissions of any other pollutant. Facilities with a GHG PTE at least 100,000 tpy CO₂e will be subject to Title V permitting requirements.

Additional EPA Activities

In the Tailoring Rule, EPA commits to undertake another rulemaking to begin in 2011 and conclude no later than July 1, 2012. The federal rulemaking will take comment on an additional step for phasing in GHG permitting, and may discuss whether certain smaller sources can be permanently excluded from permitting. EPA states that it will not require permitting for smaller sources (those with a GHG PTE below 50,000 tpy) until at least April 30, 2016.

EPA indicates in the Tailoring Rule that EPA will complete a study by the end of April 2015 on remaining GHG permitting burdens that would exist if EPA applied permitting requirements to smaller sources. EPA states that it will complete a rule by April 30, 2016, further addressing

permitting for these facilities. EPA may decide that successful streamlining will allow the phase-in of more sources. EPA may also decide that certain smaller sources need to be permanently excluded from GHG permitting.

Department Rulemaking and Implementation

The Department is presenting to the Commission final rules to amend the state's Title V and PSD air quality rules for GHG emission regulation such that the state rules match the federal Tailoring Rule.

The attached Adopted & Filed rulemaking includes four amendments, two for the Title V Program and two for the PSD program. The amendments to the Title V rules amend the definition of "major stationary source" (Item 1) and add a new definition, "subject to regulation" (Item 2). The amendments to the PSD rules amend the definition of "regulated NSR pollutant" (Item 3) and add a new definition, "subject to regulation" (Item 4). These amendments codify under what limited conditions greenhouse gases are subject to regulation under the Title V and PSD programs and when affected facilities will become subject to these programs.

Phase 1

The first stage of these amendments, if approved, will become effective on January 2, 2011, the same date as the federal Tailoring Rule, and will affect power plants, industrial facilities, ethanol plants, state universities, municipal utilities, and other facilities that are already considered major sources under the current state PSD and Title V programs.

Title V

The Title V program requires that an affected facility obtain an operating permit. The Title V operating permit, which is renewed every 5 years, contains all air emission control requirements that apply to the facility, including the requirements established through construction permitting.

The approximately 280 facilities that are currently subject to the Title V program have already been required to report GHG emissions under current state statute and state rules. As these facilities apply for, renew or modify their Title V permits, they must address GHG requirements, such as calculating and reporting GHG emissions using the CO₂e methodology, and any other applicable requirements.

PSD

New Source Review (NSR) is a federal term for review and preconstruction permitting of new or modified stationary sources of air pollution. The Prevention of Significant Deterioration (PSD) program is a component of NSR that includes procedures to ensure that air quality standards are maintained. In general, the PSD program requires that an affected facility obtain a PSD permit specifying how the facility will control emissions. The permit requires the facility to apply Best Available Control Technology (BACT), which is determined on a case-by-case basis taking into account, among other factors, the cost and effectiveness of the control.

Starting January 2, 2011, facilities already subject to PSD and that also meet the threshold levels for GHG emissions will be impacted. In any given year, the Department receives between 5-20 PSD projects. The specific nature of the project will determine if it is subject PSD requirements

for GHGs. The Department expects very few projects to be affected by the new threshold levels for GHG emissions during this first phase.

The Department received several comments regarding the PSD program requirements for BACT for greenhouse gases. The commenters expressed concern that EPA had not yet issued BACT guidance for greenhouse gases. The commenters recommended that establishing BACT standards or guidance should be a high priority for the Department, and that stakeholders should be included in the BACT guidance development.

These comments are addressed in detail in the attached public responsiveness summary. In summary, EPA's BACT guidance for GHG emissions is meant to assist state agencies in their BACT determinations. The newly-issued GHG BACT guidance will serve as additional guidance for already-established PSD regulations and guidance. Using EPA's guidance will help to ensure national consistency in BACT determinations. As in the past, the Department will establish BACT on a case-by-case basis for each individual PSD project. The Department is confident that it will be able to work with each affected facility to establish BACT for GHG emissions.

Phase 2

If approved, the second phase of the amendments will begin on July 1, 2011, and will affect additional sources of GHG emissions, such as ethanol plants, municipal utilities, some hospitals, and some larger landfills, will be classified as major sources under both the PSD and Title V permitting programs.

Title V

Starting July 1, 2011, the Department estimates that 65 additional facilities will be subject to Title V. These facilities will need to apply for a Title V permit by July 1, 2012. However, it is expected that approximately one third or more of these 65 newly-affected facilities (over 20 facilities) may already have, or may be able to take, enforceable limits in construction permits, such as limits on hours of operation or limits on production throughput, that would potentially reduce GHG emissions below the applicable Title V thresholds.

PSD

Also starting, July 1, 2011, additional facilities that meet the proposed GHG threshold criteria for PSD will become affected. As noted above, the Department receives between 5-20 PSD projects each year. The specific nature of the project will determine if it is subject PSD requirements for GHGs. Additionally, the Department expects that many new or existing facilities may already have, or may be able to take, enforceable limits in construction permits, such as limits on hours of operation or limits on production throughput, that would potentially reduce GHG emissions below the applicable PSD thresholds.

Outreach Activities

The Department is engaging stakeholders on the proposed rulemaking through several initiatives, including:

- Presentation at EPC meeting – June 15, 2010
- Webinar (presentation and Q&A) – June 28, 2010 (additional webinars possible)

- Air Quality listserv article –week of June 28 and ongoing
- Presentation to Resale Power Group of Iowa – July 2010
- Air Quality webpage – ongoing
- Presentation to Iowa Utilities Board – September 2010
- Phone calls to potentially affected municipal utilities – September 2010
- Letters to all potentially affected facilities – September 2010
- Presentation to Iowa Association of Municipal Utilities – October 7, 2010

Title V Fees

The amendments do not make any changes to the rules for Title V fees. At this time, owners or operators of Title V facilities are not required to include GHG emissions in calculating their Title V fee payments.

The Department received several comments regarding Title V fees. In general, the comments stated that the proposed amendments were not clear on whether Title V fees would be assessed on greenhouse gas emissions, and that the Department should revise the final rules to clarify that greenhouse emissions are not included in Title V fee calculations.

These comments are addressed in detail in the attached public responsiveness summary. In summary, if the Department were to amend the definitions as suggested by the commenters, this would result in state regulations that do not match federal regulations, and could result in EPA disapproving Iowa’s implementation of the federal regulations.

EPA’s preamble to the final, federal Tailoring Rule states that EPA is not addressing Title V fees for greenhouse gas emissions at this time. However, EPA recommends “that each program review its resource needs for GHG-emitting sources and determine if the existing fee approach will be adequate.”

EPA’s recommendation is in keeping with the Department’s annual process for establishing the Air Quality Bureau budget and for setting the Title V fee. As part of this annual process, the Department holds several meetings for Title V fee payers and other stakeholders to discuss the budget and Title V fees. In addition to reviewing and discussing the reasonable costs to administer the Title V program, mechanisms for funding the air quality program are discussed each year, such as a fee for construction permits. The Department will continue to undertake a transparent and public process for developing the air quality budget and Title V fees.

Comments Requesting Inclusion of an Automatic Rescission Provision in the Final Rules

Several commenters recommended that the Department place a provision in the adopted and published rules to allow for automatic nullification or rescission if the federal Tailoring Rule were to be vacated. These comments are addressed in detail in the attached public responsiveness summary.

In summary, the Department’s response to these comments is as follows:

The Iowa Administrative Procedures Act, Iowa Code Chapter 17A, specifies how state agencies, including the Department, must undertake rulemakings. An important component of the required

procedures includes public notice and opportunity for public participation. This opportunity for public involvement would be circumvented with an automatic rescission/nullification provision in the final rules, and would be in violation of the Iowa Code requirements. Additionally, Iowa Code 455B.133 set forth the Environmental Protection Commission the decision-making body for the Department of Natural Resources, Environmental Services Division. The Commission's authority and additional public input would be eliminated if the final rules provided for automatic rescission or nullification.

The Department cannot reasonably anticipate all possible federal actions related to greenhouse gases, and how these actions would affect the federal Tailoring Rule. It would be nearly impossible and highly impractical for the Department to describe each possible federal action in the final rules, and further describe the corresponding affect to the state rules. Attempting to do so would likely provide even more regulatory uncertainty for the Department and for regulated entities.

The Iowa Administrative Procedures Act, Chapter 17A, provides several remedies in the event of legal or other federal actions to the federal Tailoring Rule or to related federal greenhouse gas provisions. Chapter 17A sets forth specific provisions under which a state agency may conduct "emergency" rulemaking. The Department believes that a full or partial vacatur of the federal Tailoring Rule regulations would certainly meet the requirements for "emergency" rulemaking. The options allowed under "emergency" rulemaking would significantly shorten the rulemaking schedule, and allow the Department to react to the changes in federal regulations relatively quickly. Additionally, Chapter 17A states that, "An interested person may petition an agency requesting the adoption, amendment or repeal of a rule." This would allow a concerned party to implore the Department to undertake rulemaking if the federal Tailoring Rule or other related federal greenhouse gas regulation was repealed.

The Department may also choose to grant waivers or variances to the state adoption of vacated federal regulations.

Implications of Not Proceeding with the Proposed Rulemaking

Several commenters recommended that the Department suspend finalizing it air quality amendments until the numerous legal challenges to the Tailoring Rule and other federal actions related to greenhouse gases and the Tailoring Rule are completed.

These comments are addressed in detail in the attached public responsiveness summary. In summary, it is not uncommon that EPA regulations are challenged through administrative or legal means. While some challenges are upheld by the courts, resulting in a remand or stay of the federal regulations, some EPA regulations are also upheld by the courts. Many of these legal challenges take years to resolve. As such, the Department cannot wait to undertake rulemakings until the appeals to federal regulations run their course. Iowa's EPA-approved State Implementation Plan (SIP) and Iowa statute obligate the Department to ensure that the Clean Air Act is implemented and that citizens have air quality that is protected and maintained to the greatest extent possible.

Without these amendments to state air quality rules, the current Title V and PSD applicability thresholds of 100 tpy and 250 tpy would apply to GHG emissions. Under these circumstances, the Department estimates that 61,000 facilities in Iowa would be subject to Title V permitting and 410 facilities would be subject to PSD permitting.

As with other federal air quality regulations, EPA may exercise its federal authority over states that do not implement federal air quality regulations. EPA indicates that it plans to take immediate action in states that fail to apply the GHG thresholds in the Tailoring Rule to the states' Title V and PSD programs by January 2, 2011. To avoid these consequences, the Department recommends proceeding with the final rules so that the adopted amendments will be in effect prior to January 2, 2011, and so that Iowa may continue to manage the PSD and Title V programs under state authority.

If the Commission approves the final rules, the Adopted & Filed rulemaking will be published in the Iowa Administrative Code on November 17, 2010, and would become effective on December 22, 2010.

The Department's response to comments and the administrative rule fiscal impact statement are attached.

Christine Paulson
Environmental Specialist Senior
Program Development Section, Air Quality Bureau
Memo date: September 27, 2010

ENVIRONMENTAL PROTECTION COMMISSION [567]

Adopted and Filed

Pursuant to the authority of Iowa Code sections 455B.131, 455B.133, 455B.134, and 455B.152, the Environmental Protection Commission hereby amends Chapter 22, “Controlling Pollution,” and Chapter 33, “Special Regulations and Construction Permit Requirements for Major Stationary Sources—Prevention of Significant Deterioration (PSD) of Air Quality,” Iowa Administrative Code.

The purpose of this rule making is to ensure that sources of greenhouse gas emissions in Iowa are regulated in the same manner and at the same levels as specified in new federal regulations for greenhouse gases, the Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule).

Notice of Intended Action was published in the Iowa Administrative Bulletin (IAB) on August 11, 2010, as ARC 8999B. A public hearing was held on September 13, 2010. The Department did not receive any comments at the public hearing. The Department received ten sets of written comments before the close of the public comment period on September 14, 2010. The submitted comments and the Department’s response to the comments are summarized in the public responsiveness summary available from the Department. The Department did not make any changes to the adopted rules from what was published in the Notice.

On April 2, 2007, the U.S. Supreme Court found that greenhouse gases, including carbon dioxide, are air pollutants covered by the Clean Air Act (*Massachusetts v. EPA*, 549 U.S. 497). The Court found that the U.S. Environmental Protection Agency (EPA) was required to determine whether emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare, or

whether the science is too uncertain to make a reasoned decision.

In April 2009, EPA responded to the Court by proposing a finding that greenhouse gases contribute to air pollution that may endanger public health or welfare. On December 7, 2009, EPA issued two distinct findings regarding greenhouse gases, as follows:

1. Endangerment Finding: EPA found that the current and projected atmospheric concentrations of the six key, well-mixed greenhouse gases that include carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆) threaten the public health and welfare of current and future generations; and

2. Cause or Contribute Finding: EPA found that the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to greenhouse gas pollution, which, in turn, threatens public health and welfare.

These findings, which were published December 15, 2009, did not impose any requirements on industry or other entities. However, these findings were a prerequisite for finalizing the greenhouse gas standards for light-duty vehicles and for setting a schedule to regulate greenhouse gases from stationary sources.

On March 29, 2010, EPA completed its reconsideration of the December 18, 2008, memorandum entitled “EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program,” often called “the Johnson memo.” The final action confirmed that any new pollutant that EPA may regulate becomes covered under the PSD program on the date when the EPA rule regulating that new pollutant takes effect. This action clarified that, for greenhouse gases, the date of PSD program

coverage will be January 2, 2011, the date the light-duty vehicle rule is expected to take effect.

On April 1, 2010, EPA finalized the light-duty vehicle rule controlling greenhouse gas emissions. This rule confirmed that January 2, 2011, is the earliest date that a 2012 model year vehicle meeting these rule requirements may be sold in the United States. On that date, Clean Air Act permitting program requirements will apply to stationary sources of greenhouse gases.

On May 13, 2010, EPA issued the final Tailoring Rule that establishes EPA's approach to addressing greenhouse gas (GHG) emissions from stationary sources under Clean Air Act permitting programs. EPA published the final Tailoring Rule in the Federal Register on June 3, 2010.

The Tailoring Rule for GHG emissions sets thresholds that specify when permits under the PSD and Title V programs are required for new and existing facilities. The Tailoring Rule tailors the requirements of these permitting programs to limit which facilities will be required to obtain PSD and Title V permits. The Tailoring Rule establishes a schedule that will initially focus air permitting programs on the largest sources that are already subject to PSD and Title V requirements. The Tailoring Rule then expands to cover the largest sources of GHG emissions that may not have been previously covered by the PSD or Title V permitting program for other pollutants.

EPA estimates that facilities responsible for nearly 70 percent of the national GHG emissions from stationary sources will be subject to PSD and Title V permitting requirements under the Tailoring Rule, including the nation's largest GHG emitters, such as power plants, refineries, and cement production facilities, as well as other large industrial or commercial emitters. GHG emissions from smaller industrial or commercial facilities will not be covered by

the PSD or Title V programs at this time.

The PSD and Title V emissions thresholds for criteria pollutants such as fine particulate, sulfur dioxide and nitrogen dioxide are 100 and 250 tons per year (tpy). EPA has determined that while these thresholds are appropriate for criteria pollutants, they are not feasible for GHGs because GHGs are emitted at much higher levels.

Through the Tailoring Rule, EPA will phase in the GHG permitting requirements in two initial steps outlined below, followed by assessment and rule making to phase in appropriate, additional requirements for controlling GHG emissions from stationary sources.

Step 1 (January 2, 2011, to June 30, 2011): Effective January 2, 2011, only sources currently subject to the PSD permitting program (i.e., sources that are newly constructed or modified in a way that significantly increases emissions of a pollutant other than GHGs) would be subject to permitting requirements for their GHG emissions under the PSD program. For these projects, only GHG increases of 75,000 tpy or more of total GHG (based on potential to emit (PTE) and using a specific formula to calculate “tpy CO₂ equivalent emissions (CO₂e)” as defined in the Tailoring Rule) would be subject to PSD for their GHG emissions.

Similarly, for the Title V program, only sources currently subject to the program (i.e., newly constructed or existing major sources for a pollutant other than GHGs) would be subject to Title V requirements for GHG.

During this time, no sources would be subject to PSD or Title V permitting requirements due solely to GHG emissions.

Step 2 (July 1, 2011, to June 30, 2013): In this phase, PSD permitting requirements will, for the first time, cover new construction projects with a GHG PTE of at least 100,000 tpy CO₂e

even if the projects do not exceed the permitting thresholds for any other pollutant.

Modifications at existing facilities that increase their GHG PTE by at least 75,000 tpy CO₂e will be subject to permitting requirements, even if the modifications do not significantly increase emissions of any other pollutant.

In Step 2, Title V operating permit requirements will, for the first time, apply to sources based on their GHG emissions even if the requirements would not apply based on emissions of any other pollutant. Facilities with a GHG PTE of 100,000 tpy CO₂e or more will be subject to Title V permitting requirements.

In the Tailoring Rule, EPA commits to undertake another rule making to begin in 2011. The federal rule making will request comments on an additional step for phasing in GHG permitting and may discuss whether certain smaller sources can be permanently excluded from permitting. EPA states that it will not require permitting for smaller sources (those with a GHG PTE below 50,000 tpy) until at least April 30, 2016.

EPA indicates in the Tailoring Rule that EPA will complete a study by the end of April 2015 on remaining GHG permitting burdens that would exist if EPA applied permitting requirements to smaller sources. EPA states that it will complete a rule by April 30, 2016, further addressing permitting for these facilities. EPA may decide that successful streamlining will allow the phase-in of more sources. EPA may also decide that certain smaller sources need to be permanently excluded from GHG permitting.

This rule making amends the state's Title V and PSD air quality rules for GHG emission regulation so that the state rules match the federal Tailoring Rule (see references to the corresponding federal amendments in the item statements below).

Items 1 and 2 amend the definitions applicable to the Title V Operating Permit (Title V) program. In combination, these two amendments codify the limited conditions under which greenhouse gases are subject to Title V regulation.

Title V requires that an affected facility obtain a Title V operating permit. The Title V operating permit, which is renewed every five years, contains all air emission control requirements that apply to the facility, including the requirements established through construction permitting.

Item 1 amends the definition of “major source” in rule 567—22.100(455B) to add the Title V term “subject to regulation.” This proposed change is identical to the amended definition in the final federal Tailoring Rule [see 40 Code of Federal Regulations (CFR) 70.2, definition of “major source,” as amended on June 3, 2010].

Item 2 amends rule 567—22.100(455B) to add the definition of “subject to regulation.” The proposed definition includes definitions for “greenhouse gases (GHGs)” and “tpy CO₂ equivalent emissions (CO₂e)” and further specifies the Title V applicability criteria for stationary sources of GHG emissions. The proposed definition matches the new federal definition in the Tailoring Rule [see 40 CFR 70.2, definition of “subject to regulation,” as amended on June 3, 2010].

Beginning January 2, 2011, power plants, industrial facilities, ethanol plants, state universities, municipal utilities, and other facilities in Iowa that are already considered major sources under the Title V program will be affected under the proposed amendments.

The approximately 280 facilities that are currently subject to the Title V program have already been required to report GHG emissions under Iowa statutes and administrative rules. As

these facilities apply for, renew or modify their Title V permits, they must address GHG requirements, such as calculating and reporting GHG emissions using the CO₂e methodology, and any other applicable requirements.

Beginning on July 1, 2011, additional sources of GHG emissions, such as ethanol plants, municipal utilities, some hospitals, and some larger landfills, will be classified as major sources under Title V.

The Department estimates that 65 additional facilities will become subject to Title V on July 1, 2011. These facilities will need to apply for a Title V permit by July 1, 2012. However, it is expected that at least one third of these 65 newly affected facilities (over 20 facilities) may already have, or may be able to take, enforceable limits in construction permits, such as limits on hours of operation or limits on production throughput, that would potentially reduce GHG emissions below the applicable Title V thresholds.

The amendments do not make any changes to the rules for Title V fees. At this time, owners or operators of Title V facilities are not required to include GHG emissions in calculating their Title V fee payments.

The Department received several comments regarding Title V fees. In general, the comments stated that the amendments as proposed in the Notice were not clear on whether Title V fees would be assessed on greenhouse gas emissions, and that the Department should revise the final rules to clarify that greenhouse emissions are not included in Title V fee calculations.

These comments are addressed in detail in the public responsiveness summary. In summary, if the Department were to amend the definitions as suggested by the commenters, this would result in state regulations that do not match federal regulations, and could result in EPA

disapproving Iowa's implementation of the federal regulations.

EPA's preamble to the final, federal Tailoring Rule states that EPA is not addressing Title V fees for greenhouse gas emissions at this time. However, EPA recommends "that each program review its resource needs for GHG-emitting sources and determine if the existing fee approach will be adequate."

EPA's recommendation is in keeping with the Department's annual process for establishing the Air Quality Bureau budget and for setting the Title V fee. As part of this annual process, the Department holds several meetings for Title V fee payers and other stakeholders to discuss the budget and Title V fees. In addition to reviewing and discussing the reasonable costs to administer the Title V program, mechanisms for funding the air quality program are discussed each year, such as a fee for construction permits. The Department will continue to undertake a transparent and public process for developing the air quality budget and Title V fees.

Items 3 and 4 amend the definitions applicable to the PSD program. In combination, these two amendments codify the limited conditions under which greenhouse gases are subject to PSD program regulation.

New source review (NSR) is a federal term for review and preconstruction permitting of new or modified stationary sources of air pollution. The PSD program is a component of NSR that includes procedures to ensure that air quality standards are maintained. In general, the PSD program requires that an affected facility obtain a PSD permit specifying how the facility will control emissions. The permit requires the facility to apply Best Available Control Technology (BACT), which is determined on a case-by-case basis taking into account, among other factors, the cost and effectiveness of the control.

Item 3 amends subrule 33.3(1) to revise the definition of “regulated NSR pollutant” to clarify that the term “subject to regulation” is now specifically defined for the PSD program. Additionally, language is moved from paragraph “4” to new paragraph “5.” This proposed change matches the amended definition in the final federal Tailoring Rule [see 40 CFR 52.21(b)(50)(iv) and 52.21(b)(50)(v), as amended on June 3, 2010].

Item 4 amends subrule 33.3(1) to add the definition of “subject to regulation” for the PSD program. The proposed definition matches the final federal definition in the Tailoring Rule [see 40 CFR 52.21(b)(49), as amended on June 3, 2010]. The proposed definition includes definitions for “greenhouse gases (GHGs)” and “tpy CO₂ equivalent emissions (CO₂e)” and also specifies the methodology for calculating an emissions increase for GHGs, the applicable thresholds for GHG emissions, and the schedule indicating when the applicability thresholds take effect.

Starting January 2, 2011, facilities already subject to PSD and that also meet the threshold levels for GHG emissions will be impacted. A facility will be subject to PSD permitting requirements if it is a new major stationary source for a regulated NSR pollutant that is not a GHG and also will emit or has the potential to emit 75,000 tpy CO₂e; or, if the facility is an existing major stationary source for a regulated NSR pollutant that is not a GHG, will have an emissions increase of a regulated NSR pollutant, and will have an emissions increase of 75,000 tpy CO₂e.

In any given year, the Department receives approximately 5 to 20 PSD project applications. The specific nature of the project will determine if it is subject to PSD requirements for GHGs. The Department expects very few projects to be affected by the new threshold levels

for GHG emissions during this first phase.

Beginning July 1, 2011, a facility will be subject to PSD permitting requirements if it is a new stationary source that will emit or has the potential to emit 100,000 tpy CO₂e; or if the facility is an existing stationary source that emits or has the potential to emit 100,000 tpy CO₂e and when such stationary source undertakes a physical change or a change in the method of operation that will result in an emissions increase of 75,000 tpy CO₂e or more.

As noted above, the Department receives approximately 5 to 20 PSD project applications each year. The specific nature of the project will determine if it is subject to PSD requirements for GHGs. Additionally, the Department expects that many new or existing facilities may already have, or may be able to take, enforceable limits in construction permits, such as limits on hours of operation or limits on production throughput, that would potentially reduce GHG emissions below the applicable PSD thresholds.

The Department received several comments regarding the PSD program requirements for BACT for greenhouse gases. The commenters expressed concern that EPA had not yet issued BACT guidance for greenhouse gases. The commenters recommended that establishing BACT standards or guidance should be a high priority for the Department, and that stakeholders should be included in the BACT guidance development.

These comments are addressed in detail in the public responsiveness summary. In summary, EPA's BACT guidance for GHG emissions is meant to assist state agencies in their BACT determinations. The newly-issued GHG BACT guidance will serve as additional guidance for already-established PSD regulations and guidance. Using EPA's guidance will help to ensure national consistency in BACT determinations. As in the past, the Department will establish

BACT on a case-by-case basis for each individual PSD project. The Department is confident that it will be able to work with each affected facility to establish BACT for GHG emissions.

Several commenters recommended that the Department place a provision in the adopted and published rules to allow for automatic nullification or rescission if the federal Tailoring Rule were to be vacated. These comments are addressed in detail in the public responsiveness summary.

In summary, the Department's response to these comments is as follows:

The Iowa Administrative Procedures Act, Iowa Code Chapter 17A, specifies how state agencies, including the Department, must undertake rulemakings. An important component of the required procedures includes public notice and opportunity for public participation. This opportunity for public involvement would be circumvented with an automatic rescission/nullification provision in the final rules, and would be in violation of the Iowa Code requirements.

Additionally, Iowa Code 455B.133 set forth the Environmental Protection Commission the decision-making body for the Department of Natural Resources, Environmental Services Division. The Commission's authority and additional public input would be eliminated if the final rules provided for automatic rescission or nullification. Further, Chapter 17A provides for General Assembly review of all rulemakings by the Administrative Rules Review Committee (ARRC). ARRC's review would also be removed from the rulemaking process by including an automatic rescission provision.

The Department cannot reasonably anticipate all possible federal actions related to greenhouse gases, and how these actions would affect the federal Tailoring Rule. It would be

nearly impossible and highly impractical for the Department to describe each possible federal action in the final rules, and further describe the corresponding affect to the state rules.

Attempting to do so would likely provide even more regulatory uncertainty for the Department and for regulated entities.

The Iowa Administrative Procedures Act, Chapter 17A, provides several remedies in the event of legal or other federal actions to the federal Tailoring Rule or to related federal greenhouse gas provisions. Chapter 17A sets forth specific provisions under which a state agency may conduct “emergency” rulemaking. The Department believes that a full or partial vacatur of the federal Tailoring Rule regulations would certainly meet the requirements for “emergency” rulemaking. The options allowed under “emergency” rulemaking would significantly shorten the rulemaking schedule, and allow the Department to react to the changes in federal regulations relatively quickly. Additionally, Chapter 17A states that, “An interested person may petition an agency requesting the adoption, amendment or repeal of a rule.” This would allow a concerned party to implore the Department to undertake rulemaking if the federal Tailoring Rule or other related federal greenhouse gas regulation was repealed.

The Department may also choose to grant waivers or variances to the state adoption of vacated federal regulations.

Several commenters recommended that the Department suspend finalizing it air quality amendments until the numerous legal challenges to the Tailoring Rule and other federal actions related to greenhouse gases and the Tailoring Rule are completed.

These comments are addressed in detail in the public responsiveness summary. In summary, it is not uncommon that EPA regulations are challenged through administrative or

legal means. While some challenges are upheld by the courts, resulting in a remand or stay of the federal regulations, some EPA regulations are also upheld by the courts. Many of these legal challenges take years to resolve. As such, the Department cannot wait to undertake rulemakings until the appeals to federal regulations run their course. Iowa's EPA-approved State Implementation Plan (SIP) and Iowa statute obligate the Department to ensure that the Clean Air Act is implemented and that citizens have air quality that is protected and maintained to the greatest extent possible.

Without these amendments, GHG emission sources would be subject to the current Title V and PSD applicability thresholds of 100 tpy and 250 tpy, which the Department estimates would subject 61,000 facilities in Iowa to Title V permitting and 410 facilities to PSD permitting.

As with other federal air quality regulations, EPA may exercise its federal authority over states that do not implement federal air quality regulations. EPA indicates that it plans to take immediate action in states that fail to apply the GHG thresholds in the Tailoring Rule to the states' Title V and PSD programs by January 2, 2011. To avoid these consequences, the Department is proceeding with the rulemaking so that the adopted amendment will be in effect prior to January 2, 2011, and Iowa may continue to manage the PSD and Title V programs under state authority.

These amendments are intended to implement Iowa Code section 455B.133.

The following amendments are adopted.

These amendments will become effective on December 22, 2010.

Item 1. Amend rule **567—22.100(455B)**, definition of “Major source,” as follows:

“*Major source*” means any stationary source (or any group of stationary sources located on one or more contiguous or adjacent properties and under common control of the same person or of persons under common control) belonging to a single major industrial grouping that is any of the following:

1. A major stationary source of air pollutants, as defined in Section 302 of the Act, that directly emits or has the potential to emit 100 tons per year (tpy) or more of any air pollutant subject to regulation (including any major source of fugitive emissions of any such pollutant). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of Section 302(j) of the Act, unless the source belongs to one of the stationary source categories listed in this chapter.

2. and 3. No change.

Item 2. Adopt the following new definition of “Subject to regulation” in rule **567—22.100(455B)**:

“*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 40 CFR Subchapter C (Air Programs) 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 40 CFR §86.1818-

12(a) (as amended on May 7, 2010) as the aggregate group of six greenhouse gases that includes 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 CO₂ equivalent emissions.

2. The term “tpy CO₂ equivalent emissions (CO₂e)” shall represent an amount of GHGs emitted and shall be computed by multiplying the mass amount of emissions (tpy) for each of the six greenhouse gases in the pollutant GHGs by the associated global warming potential of the gas published at 40 CFR Part 98, Subpart A, Table A-1, “Global Warming Potentials,” (as amended on October 30, 2009) and summing the resultant value for each to compute a tpy CO₂e.

Item 3. Amend subrule **33.3(1)**, definition of “Regulated NSR pollutant,” as follows:

“Regulated NSR pollutant” means the following:

1. Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the Administrator (e.g., volatile organic compounds and NO_x are precursors for ozone);
2. Any pollutant that is subject to any standard promulgated under Section 111 of the Act;
3. Any Class I or Class II substance subject to a standard promulgated under or established by Title VI of the Act; or
4. Any pollutant that otherwise is subject to regulation under the Act; except

that any or all hazardous air pollutants either listed in Section 112 of the Act or added to the list pursuant to Section 112(b)(2) of the Act, which have not been delisted pursuant to Section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under Section 108 of the Act. as defined in 33.3(1), definition of “subject to regulation.”

5. Notwithstanding paragraphs “1” through “4,” the definition of “regulated NSR pollutant” shall not include any or all hazardous air pollutants that are either listed in Section 112 of the Act or added to the list pursuant to Section 112(b)(2) of the Act and that have not been delisted pursuant to Section 112(b)(3) of the Act, unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under Section 108 of the Act.

Item 4. Adopt the following **new** definition of “Subject to regulation” in subrule **33.3(1)**:

“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 40 CFR Subchapter C (Air Programs) 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 40 CFR §86.1818-12(a) (as amended on May 7, 2010) as the aggregate group of six greenhouse gases that includes carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur

hexafluoride, shall not be subject to regulation except as provided in paragraphs “4” and “5.”

2. For purposes of paragraphs “3,” “4,” and “5,” the term “tpy CO₂ equivalent emissions (CO₂e)” shall represent an amount of GHGs emitted and shall be computed as follows:

(a) Multiply the mass amount of emissions (tpy) for each of the six greenhouse gases in the pollutant GHGs by the associated global warming potential of the gas published at 40 CFR Part 98, Subpart A, Table A-1, “Global Warming Potentials,” (as amended on October 30, 2009), and

(b) Sum the resultant value from paragraph (a) for each gas to compute a tpy CO₂e.

3. The term “emissions increase,” as used in this paragraph and in paragraphs “4” and “5,” shall mean that both a significant emissions increase (as calculated using the procedures specified in 33.3(2)“c” through 33.3(2)“h”) and a significant net emissions increase (as specified in 33.3(1), in the definitions of “net emissions increase” and “significant”) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO₂e and shall be calculated assuming the pollutant GHGs are a regulated NSR pollutant, and “significant” is defined as 75,000 tpy CO₂e rather than calculated by applying the value specified in 33.3(1), in paragraph “2” of the definition of “significant.”

4. Beginning January 2, 2011, the pollutant GHGs are subject to regulation if:

(a) The stationary source is a new major stationary source for a regulated NSR pollutant that is not a GHG, and also will emit or will have the potential to emit 75,000 tpy

CO₂e or more, or

(b) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not a GHG, and also will have an emissions increase of a regulated NSR pollutant and an emissions increase of 75,000 tpy CO₂e or more; and

5. Beginning July 1, 2011, in addition to the provisions in paragraph “4,” 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 CO₂e, or

(b) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO₂e, 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 CO₂e or more.

This rule is intended to implement Iowa Code section 455B.133.

Date

Patricia L. Boddy, Interim Director

Administrative Rule Fiscal Impact Statement

Date: June 28, 2010

Agency: Department of Natural Resources

IAC Citation: 567 IAC 22 and 33

Agency Contact: Christine Paulson

Summary of the Rule: The purpose of this proposed rulemaking is to assure that sources of greenhouse gases (GHG) in Iowa are regulated in the same manner and at the same level as specified in recently finalized federal regulations, known as the PSD and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule).

The federal Tailoring Rule sets thresholds for GHG emissions that define when permits under the Prevention of Significant Deterioration (PSD) and Title V Operating Permit programs are required for new and existing industrial facilities. The Tailoring Rule establishes the requirements to limit which facilities will be required to obtain permits. Facilities responsible for the largest portion of GHG emissions from stationary sources will be subject to permitting requirements.

The federal Tailoring Rule has a phased-in approach. The first step is effective on January 2, 2011, and requires facilities already subject to PSD and Title V to comply with the GHG portions of these programs as well. The second step, starting on July 1, 2011, will require additional facilities with GHG emissions to comply with the requirements of the PSD and Title V permitting programs.

The proposed rulemaking will amend the state's Title V and PSD air quality rules for GHG emissions such that the state rules are identical to the federal Tailoring Rule.

Fill in this box if the impact meets these criteria:

- No Fiscal Impact to the State.
 Fiscal Impact of less than \$100,000 annually or \$500,000 over 5 years.
 Fiscal Impact cannot be determined.

Brief Explanation:

Fill in the form below if the impact does not fit the criteria above:

- Fiscal Impact of \$100,000 annually or \$500,000 over 5 years.

* Fill in the rest of the Fiscal Impact Statement form.

Assumptions: Based on existing potential-to-emit (PTE) data, the Department may need to issue between 20 and 65 new Title V permits and possibly up to 10 new PSD permits between January 2, 2011 and June 30, 2013. These numbers are tentative as facilities may also change existing permit limits or processes to reduce emissions and therefore not be subject to the requirements. Additionally, the need for facilities to obtain permitting limits for GHG emissions may result in the Department needing to issue 100-200 new minor source permits or amended minor source permits.

Using existing data, the Department may need up to 7 full-time equivalents (FTEs) to implement the federal requirements at an estimated cost of \$300,000 for the first year (4.0 FTE) and \$525,000 for the second year (7.0 FTE) for personnel excluding overhead expenses. Given the uncertainty of the final number of facilities subject, the Department does not plan to seek additional staff resources at this time.

Describe how estimates were derived:

The Department based the estimates on existing permitted facilities, the frequency of permit projects, EPA data, and staff expertise.

Estimated Impact to the State by Fiscal Year

| | <u>Year 1 (FY 2011)</u> | <u>Year 2 (FY 2012)</u> |
|-------------------------------------|-------------------------|-------------------------|
| Revenue by Each Source: | | |
| GENERAL FUND | 0\$ | 0\$ |
| FEDERAL FUNDS | 0\$ | 0\$ |
| Other (specify) | 0\$ | 0\$ |
| | 0\$ | 0\$ |
| TOTAL REVENUE | | |
| Expenditures: | | |
| GENERAL FUND | \$ | \$ |
| FEDERAL FUNDS | \$ | \$ |
| Other (specify) Air Contaminant Fee | \$300,000 | \$525,000 |
| | \$300,000 | \$525,000 |
| TOTAL EXPENDITURES | | |
| | -\$300,000 | -\$525,000 |
| NET IMPACT | | |

This rule is required by State law or Federal mandate.

Please identify the state or federal law:

40 Code of Federal Regulations 51.166, 52.21 and 70.2

Funding has been provided for the rule change.

Please identify the amount provided and the funding source:

Funding has not been provided for the rule.

Please explain how the agency will pay for the rule change:

The Department will utilize existing resources at this time. Title V fees, also known as air

contaminant fees (Iowa Code 455B.133B), are not changing at this time. In the Clean Air Act (42 USC §7661a) permitting authorities are required to collect fees "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements." EPA is not mandating changes to Title V fee but directs states to use their discretion to adequately fund the new requirements. Greenhouse gas emissions would not be eligible for air contaminant fees without modifications to 567 Iowa Administrative Code Chapter 22.

Using existing staff resources may slow down permit issuance. Construction permits are now issued on average in 30 days could be delayed to 60 or more days. PSD permits that now have an average issuance in 7 months could be delayed up to 12 or more months. Title V operating permits issuance would also experience a delay.

Fiscal impact to persons affected by the rule:

It is difficult to estimate the fiscal impact to businesses and/or individuals based on the uncertainties listed above. The primary source of greenhouse gas emissions is fossil-fuel combustion. A change in fuel source or process may be relatively simple or quite complicated. Pollution control equipment to reduce emissions can have significant startup and operating expenses. The indirect costs will be felt in all sectors as increased costs are passed on to the consumer.

Fiscal impact to Counties or other Local Governments (required by Iowa Code 25B.6):

The Department has delegated authority to the Linn and Polk County Air Quality Divisions to implement the air pollution control program within their jurisdiction. Each county may have approximately 5-15 new facilities to permit. Municipalities operating electric utilities will also be impacted in the same manner as other businesses or individuals as listed above.

* If additional explanation is needed, please attach extra pages.

Agency Representative preparing estimate: Wendy Rains
Telephone Number: 515-281-6061

**PUBLIC PARTICIPATION RESPONSIVENESS SUMMARY
FOR
567 IOWA ADMINISTRATIVE CODE
CHAPTER 22 “CONTROLLING POLLUTION,” AND
CHAPTER 33 “SPECIAL REGULATIONS AND CONSTRUCTION PERMIT
REQUIREMENTS FOR MAJOR STATIONARY SOURCES – PREVENTION OF
SIGNIFICANT DETERIORATION (PSD) OF AIR QUALITY”**

Introduction

The purpose of the amendments is ensure that sources of greenhouse gas emissions in Iowa are regulated in the same manner and at the same levels as specified in the new federal regulations for greenhouse gases, the Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule).

Notice of Intended Action was published in the Iowa Administrative Bulletin (IAB) on August 11, 2010, as ARC 8999B. A public hearing was held on September 13, 2010. The Department did not receive any comments at the public hearing. The Department received ten sets of written comments before the close of the public comment period on September 14, 2010,

from the following parties:

- Sierra Club
- Iowa Farm Bureau (IFB)
- MidAmerican Energy (MidAmerican)
- Alliant Energy/Interstate Power and Light Company (IPL)
- Iowa Association of Business and Industry (ABI)
- Iowa Association of Municipal Utilities (IAMU)
- Renewable Fuels Association (RFA) and Iowa Renewable Fuels Association (IRFA)
- Lesaffre Yeast Corporation/Red Star Yeast Company, LLC
- American Coalition for Clean Coal Electricity (ACCCE)
- National Alliance of Forest Owners (NAFO)

Because several of the commenters submitted similar comments on the proposed rules, the comments and the Department’s response to the comments are grouped by topic and summarized. The actual written comments submitted during the comment period are available from the Department upon request.

Public Comments (Support for Department’s Rulemaking as Proposed)

The Iowa Chapter of the Sierra Club submitted comments in support of the Department’s rulemaking as proposed, and encourages the Department to move forward with final rules.

Department Response

No response needed

Recommended Action

No action recommended

Public Comments (Reasons for Rule Change)

MidAmerican and Alliant submitted comments stating that they support the reasons for the Department's rulemaking, and agree that the proposed rule changes are necessary to avoid state rules with permitting thresholds for greenhouse gas emissions set at 100 and 250 tons per year, and the permitting burden that this could afflict upon the Department and affected stakeholders.

Department Response

No response needed

Recommended Action

No action recommended

Public Comments (Recommending that the Department suspend finalizing its rules)

IRFA and IAMU submitted comments recommending that the Department suspend finalizing its air quality amendments until the numerous legal challenges to the Tailoring Rule and other federal actions related to greenhouse gases and the Tailoring Rule are completed.

Department Response

It is not uncommon that EPA regulations are challenged through administrative or legal means. While some challenges are upheld by the courts, resulting in a remand or stay of the federal regulations, some EPA regulations are also upheld by the courts. Many of these legal challenges take years to resolve. As such, the Department cannot wait to undertake rulemakings until the appeals to federal regulations run their course. Iowa's EPA-approved State Implementation Plan (SIP) and Iowa statute obligate the Department to ensure that the Clean Air Act is implemented and that citizens have air quality that is protected and maintained to the greatest extent possible.

As explained in more detail below, the Department has procedures in place to respond to changes to federal regulations resulting from legal challenges or other federal actions.

Recommended Actions

No action recommended

Public Comments (Recommendation to include provisions to allow automatic nullification or rescission of rules)

IPL, MidAmerican, IRFA, ABI and ACCCE submitted comments recommending that the Department place a provision in the adopted and published rules to allow for automatic nullification or rescission if the federal Tailoring Rule were to be vacated.

Department Response

The Iowa Administrative Procedures Act, Iowa Code Chapter 17A, specifies how state agencies, including the Department, must undertake rulemakings. An important component of the required procedures includes public notice and opportunity for public participation. This opportunity for public involvement would be circumvented with an automatic rescission/nullification provision in the final rules, and would be in violation of the Iowa Code requirements. Additionally, Iowa Code 455B.133 set forth the Environmental Protection Commission (EPC) as the decision-making body for the Department of Natural Resources, Environmental Services Division. Rulemakings are brought before the EPC at least twice and typically also for information, to allow EPC to determine whether a rulemaking should proceed, and to provide further opportunity for public participation. The EPC's authority and additional public input would be eliminated if the final rules provided for automatic rescission or nullification. Further, Chapter 17A provides for General Assembly review of all rulemakings by the Administrative Rules Review Committee (ARRC). ARRC's review would also be removed from the rulemaking process by including an automatic rescission provision.

The Department cannot reasonably anticipate all possible federal actions related to greenhouse gases, and how these actions would affect the federal Tailoring Rule. The federal Tailoring Rule could be retained in full, vacated entirely or in part, remanded back to EPA (but not vacated), stayed (but not vacated) for a set period of time or indefinitely, or some combination of these actions. Further, other federal actions to other greenhouse gas regulations could impact the federal Tailoring Rule in any number of ways. It would be nearly impossible and highly impractical for the Department to describe each possible federal action in the final rules, and further describe the corresponding affect to the state rules. Attempting to do so would likely provide even more regulatory uncertainty for the Department and for regulated entities.

The Iowa Administrative Procedures Act, Chapter 17A, provides several remedies in the event of legal or other federal actions to the federal Tailoring Rule or to related federal greenhouse gas provisions. Chapter 17A sets forth specific provisions under which a state agency may conduct "emergency" rulemaking. The Department believes that a full or partial vacatur of the federal Tailoring Rule regulations would certainly meet the requirements for "emergency" rulemaking. The options allowed under "emergency" rulemaking would significantly shorten the rulemaking schedule, and allow the Department to react to the changes in federal regulations relatively quickly. Additionally, Chapter 17A states that, "An interested person may petition an agency requesting the adoption, amendment or repeal of a rule." This would allow a concerned party to implore the Department to undertake rulemaking if the federal Tailoring Rule or other related federal greenhouse gas regulation was repealed.

The Department may also choose to grant waivers or variances to the state adoption of vacated federal regulations.

Recommended Actions

No action recommended

Public Comments (Title V Fees for greenhouse gas emissions)

MidAmerican, Alliant, ABI, and ACCCE submitted comments that the proposed provisions for the Title V program need clarification because the new definition of “subject to regulation” could lead affected facilities to believe that Title V fees must be paid on greenhouse gas emissions. Commenters suggested additional revisions to state rules to clarify that greenhouse gases are not included in the Title V fee calculation. Commenters also requested opportunity for stakeholder involvement in determining Title V fee adequacy and alternative fee approaches.

Department Response

The purpose of this rulemaking is to amend state air quality rules to match the federal Tailoring Rule. The federal Tailoring Rule adds definitions to PSD and Title V for “subject to regulation.” The federal regulations do not amend the Title V definition of “regulated air pollutant.” If the Department were to amend the definition of “regulated air pollutant,” this would result in state regulations that do not match federal regulations, and could result in EPA disapproving Iowa’s implementation of the federal regulations.

The federal Tailoring Rule does not add a requirement to assess fees for greenhouse gases, nor does it exempt greenhouse gases from Title V fees. Rather, EPA’s preamble to the final, federal Tailoring Rule states that EPA is not addressing Title V fees for greenhouse gas emissions at this time. However, EPA recommends “that each program review its resource needs for GHG-emitting sources and determine if the existing fee approach will be adequate.”

EPA’s recommendation is in keeping with the Department’s annual process for establishing the Air Quality Bureau budget and for setting the Title V fee. As part of this annual process, the Department holds several meetings for Title V fee payers and other stakeholders to discuss the budget and Title V fees. In addition to reviewing and discussing the reasonable costs to administer the Title V program, mechanisms for funding the air quality program are discussed each year, such as a fee for construction permits.

The Department will continue to undertake a transparent and public process for developing the air quality budget and Title V fees. The Department expects the cost of regulating greenhouse gases to be a component of these discussions. Any Department rulemaking to amend Title V fees or to introduce other fee mechanisms will be accompanied by opportunities for oral and written public comment.

Recommended Action

No action recommended

Public Comments (Best Available Control Technology (BACT))

MidAmerican, Alliant, ACCCE, and ABI submitted comments regarding the PSD program requirements for Best Available Control Technology (BACT) for greenhouse gases. The commenters expressed concern that EPA had not yet issued BACT guidance for greenhouse gases. The commenters recommended that the establishing BACT standards or guidance

should be a high priority for the Department, and that stakeholders should be included in the BACT guidance development.

Department Response

Although EPA has not yet issued its BACT guidance for greenhouse gases, EPA has stated that its guidance will be available prior to the January 2, 2011, implementation date for the first phase of the greenhouse gas tailoring rule. Stakeholders have been involved in submitting BACT recommendations through an EPA-assembled panel, and the guidance is currently being reviewed by the White House. EPA stated in a recent press release that it plans to issue the guidance “shortly.”

EPA’s BACT guidance is meant to assist state agencies in their BACT determinations, and the newly-issued GHG BACT guidance will serve as additional guidance for already-established PSD regulations and guidance. Using EPA’s guidance will help to ensure national consistency in BACT determinations. As in the past, the Department will establish BACT on a case-by-case basis for each individual PSD project. The Department is confident that it will be able to work with each affected facility to establish BACT for greenhouse gas emissions.

Recommended Action

No action recommended

Public Comments (Treatment of Biogenic CO₂ Emissions)

IRFA, Red Star Yeast and NAFO submitted comments regarding the federal Tailoring Rule’s treatment of biogenic CO₂ emissions, such as emissions from fermentation and combustion of biomass and biofuels. The commenters are concerned that EPA failed to exclude greenhouse gas emissions from biogenic sources in the final Tailoring Rule, even though emissions from biogenic CO₂ sources are typically accounted for differently than fossil fuel CO₂ emissions in greenhouse gas emissions inventories. Commenters also note that after EPA finalized the Tailoring Rule, EPA issued a call for information to assist the agency in considering its options for addressing biogenic CO₂ emissions under the PSD and Title V programs.

Department Response

EPA is expected to issue guidance on biogenic emissions prior to the January 2, 2011, implementation date for the first phase of the Tailoring Rule. The Department believes that it is appropriate to proceed with final rulemaking, and that the issue of biogenic emissions will be addressed through the Department’s implementation of its EPA-approved PSD and Title V programs. The federal Tailoring Rule does not exclude biogenic emissions, so the Department may not exclude biogenic emissions until such time as EPA takes action to exclude these emissions from the Tailoring Rule. If a state were to exclude biogenic CO₂ emissions from its PSD or Title V review, the PSD or Title V permit would not be federally valid.

The Department further notes that the majority of sources with significant biogenic emissions have potential greenhouse gas emissions from fossil fuel combustion greater than 100,000 tons carbon dioxide equivalent (CO₂e) without including biogenic sources.

Recommended Action

No action recommended

Public Comments (IAMU's Concern for Regulatory Burden on Municipal Utilities)

IAMU submitted comments describing concerns with the regulatory burden of the rule amendments on municipal utilities, and confusion over if and how municipal utilities will be impacted by these rules. IAMU also suggested several methods for how the Department could reduce the burden for municipal utilities.

Department Response

The regulatory burden to municipal utilities of this rulemaking has been greatly reduced or even, in some case, eliminated. The Department believes that nearly all municipal utilities will be able to use existing construction permit limits or will easily be able to obtain construction permit limits so that they will not be subject to the Title V and PSD requirements for greenhouse gases. In response to IAMU's suggestions for reducing the burden to Title V facilities, the Department does not have authority to waive or minimize Title V reporting requirements. However, the Department expects very few, if any, municipal utilities to become subject to Title V due to greenhouse gas emissions.

The Department called each of the individual eleven (11) municipal utilities (out of at least 136 municipal utilities with electricity generation) that the Department identified as having potential emissions that may exceed the greenhouse gas permitting thresholds. The Department also sent letters to all facilities, including municipal utilities, that appear to have potential emissions of CO₂e over the Title V threshold levels in specified in the federal Tailoring Rule and this rulemaking, and offered one-on-one assistance to determine if the facility is subject to the new rules, and what options the facility may have for taking limits so that the facility is not subject to the Tailoring Rule. During these communications, the Department has learned that the majority, if not all, of these eleven municipal utilities may already have enforceable permit limits that would limit their potential greenhouse gas emissions below the Title V thresholds. Further, the Department has clearly explained in numerous forums the circumstances under which a municipal utility would need to apply for a Title V Permit.

Over the past six months, the Department has conducted extensive assistance to reduce the regulatory burden to industries and facilities that may be affected by the Tailoring Rule, including municipal utilities, IAMU, and other electric utility associations. The Department invited all municipal utilities to participate in a live webinar in June 2010 on the Tailoring Rule and currently has the webinar available on the Department's website. The Department has also provided a presentation on the Tailoring Rule to the annual meeting of the Resale Power Group of Iowa and the Iowa Utilities Board.

The Department has made it as easy as possible for municipal utilities to determine how they may be affected under the federal Tailoring Rule and this rulemaking.

Recommended Action

No recommended Action

Public Comments (IFB's concern for the Legality of the Thresholds in the Federal Tailoring Rule and its Concern for the Economic Impact on its Members)

IFB submitted comments describing its view that the thresholds for PSD and Title V applicability in the federal Tailoring Rule will ultimately be overturned. IFB also stated that it does not support the federal regulations or this rulemaking because of perceived severe economic impacts to its members.

Department Response

The Department cannot anticipate whether these thresholds or any other aspect of the Tailoring Rule or associated federal greenhouse gas regulations will be overturned. The Department has an obligation under Iowa Statute and the Clean Air Act to proceed to ensure that its rules are consistent with applicable federal rules and requirements. The Department must proceed with this rulemaking to ensure the PSD and Title V applicability thresholds and compliance schedules for greenhouse gases match those in the federal Tailoring Rule.

IFB also submitted comments speculating how agricultural facilities may be affected by these rules and what the economic consequences could be to certain types of agricultural operations. IFB submitted information for typical agricultural operations in Iowa, such as dairy farms and beef cattle farms. However, IFB's own calculations show that all such operations in Iowa would have potential greenhouse gas emissions well below 100,000 tons per year, and thus would not be subject to Title V or PSD under the federal Tailoring Rule or under this rulemaking.

Recommended Action

No recommended Action

Public Comments (ABI Concerns with Department Staffing Levels Needed to Implement the New Regulations)

ABI submitted comments asking if Department staff is adequately trained to abide by the federal requirements, and also asked what staff positions would be needed that are not currently in place.

Department Response

The Department has staff environmental engineers and environmental specialists that issue construction permits, PSD permits and Title V permits. Staff is trained extensively prior to reviewing and issuing permits. Additionally, the Department plans to take advantage of any EPA-funded training on the Tailoring Rule. EPA-funded training providers offer training through webinars or in central locations so that travel costs are minimized. The Department expects that its air quality staff will be well equipped to implement the new regulations.

The Department's estimates of the fiscal impacts of this rulemaking are described in the Fiscal Impact Statement (FIS) provided to the EPC and filed with the Administrative Code Editor. The FIS is available with the Notice of Intended Action presented to the EPC at <http://www.iowadnr.gov/epc/10jul/15.pdf>. The FIS included a very conservative estimate that implementation of the new rules could require up to seven (7) additional full time equivalents (FTEs) positions. However, since the FIS was prepared, the Department has learned that fewer facilities will be subject to Title V permitting or will need construction permit limits than originally anticipated. It is now expected that fewer FTEs will be needed. However, the true staffing needs will not be known until after the new requirements take affect and facilities begin submitting permitting projects.

Recommended Action

No recommended Action

Public Comments (ABI Questions Concerning the Accelerated State Implementation Plan (SIP) schedule for Implementing the Federal Tailoring Rule)

ABI questioned why states do not have three years to implement changes to their SIP-approved Title V and PSD programs, whether EPA can impose a Federal Implementation Plan (FIP) during that three-year period, and whether the Department expressed concern to EPA about the accelerated timing.

Department Response

Normally, EPA does allow up to three years for states to update their SIPs for SIP-approved programs such as Title V and PSD. However, EPA stated in its proposal for the Tailoring Rule that it had authority to require a much shorter time frame for SIP revisions, and that it also had authority to establish a FIP very quickly in a state that cannot or will not revise its SIP.

The Department did submit comments to EPA's proposed Tailoring Rule that expressed concern with this accelerated schedule. EPA chose to proceed with a final Tailoring Rule that retained the aggressive schedule for SIP revisions incorporating the emissions thresholds and the applicability dates in the federal Tailoring Rule. Therefore, the Department is obligated to proceed with rulemaking as soon as practicable to implement the provisions of the federal Tailoring Rule. If the Department does not proceed with rulemaking, the state will have Title V and PSD rules that are inconsistent with federal regulations, and affected sources would potentially be in violation of federal regulations. Iowa will also face a potential EPA take-over of the greenhouse gas provisions in the Title V and PSD programs, very likely significantly slowing permit review and issuance.

Additionally, the Department recently received information from EPA that approximately 80% of the state air regulatory programs plan to revise their state rules and their SIP to match the federal Tailoring Rule in time for the January 2, 2011, applicability date for the first phase of the federal regulations. The Department is therefore acting consistently with the vast majority of other state air agencies in the country.

Recommended Action
No recommended Action