

  
**Division of Air Pollution Control**

**Response to Additional Comments  
Draft Rule Language Comment Period**

**Rule: OAC Rule 3745-31-34, OAC Rule 3745-77-11**

**Agency Contact for this Package**

Division Contact: Mike Ahern, DAPC, 644-3631, [mike.ahern@epa.state.oh.us](mailto:mike.ahern@epa.state.oh.us)

Ohio EPA provided a 30 day comment period which ended on February 11, 2011. This document summarizes comments received from multiple individuals and organizations. All 437 comments were in support of the proposed rule with 424 substantively similar comments in support by members of the public and individuals representing various environmental, planning or scientific organizations. Additional specific suggested text changes to the proposed rules are detailed in this document.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health.

In an effort to help you review this document, the comments are grouped or summarized by topic with the commenter(s) identified at the end of each comment summary. The name of the commenter(s) follow the comment in parentheses.

**General Comments**

Several individuals and organizations applaud Ohio EPA's rules aligning Ohio's permitting programs with the federal greenhouse gas tailoring rule. While some comments indicated concern or disagreement with the federal regulation of greenhouse gases, all comments received by Ohio EPA were in support of the proposed rules that will align Ohio's regulation of greenhouse gases with those mandated by the federal government. The summary of comments and associated responses in this document focus on comments specific to the proposed rule language only.

Several individuals and organizations voiced support for the proposed rules because they believe the rules will spur economic growth in Ohio by supporting decisions to switch to a cleaner, renewable energy source and that the proposed rules will foster manufacturing in Ohio as a part of the developing green, renewable energy market sector. Several commenters also support the proposed rules as a component of reducing the use of coal in Ohio as an energy source (e.g., in the short term shifting more energy supply in Ohio to the natural gas sector), and cited a number of issues not directly related to the proposed rules.

Finally, two commenters submitted studies as part of their support for the proposed rules; one focused on the positive economic benefits of shifting to a cleaner economy, and one focused on the ecological impacts and costs of climate change on Ohio's natural resources.

The general comments of support and ancillary benefit information provided by commenters falls outside the scope of specific changes to the proposed rules and therefore are not specifically addressed in this document.

One issue of conflicting comment arose during review of the comments. One commenter indicated that while they do not endorse permitting of GHG emissions from stationary sources under the current Clean Air Act, or the commencement of such permitting on January 2, 2011, the limitations on GHG permitting as set forth in U.S. EPA's June 3, 2010 "Tailoring Rule" (75 Fed. Reg. 31514) are preferable to the alternatives faced by Ohio businesses. Further the commenter stated that the elements of the proposed OAC rules 3745-31-34 and 3745-77-11 that limit the scope and burdensomeness of GHG permitting in Ohio, including the termination of the effectiveness of these rules simultaneously with any federal legislative, judicial, or executive suspension, postponement, or nullification of the federal GHG permitting requirements established in 2010, are needed and appropriate to protect Ohio citizens and businesses from more adverse federal regulatory consequences.

The proposed rule language concerning a termination clause in both OAC rule 3745-31-34 and OAC rule 3745-77-11 received comments of support and opposition. Therefore, this issue is addressed in the specific comment 1 below summarizing support for and opposition to the proposed rule. **(Porter-Wright<sup>1</sup> and Sierra Club<sup>2</sup>, respectively)**

The remaining comments that are specifically addressed relate to requested additional language or modification to the proposed language in order to provide additional clarity of rule applicability.

---

<sup>1</sup> Porter, Wright, Morris and Arthur on behalf of the Ohio Chemistry Technology Council and its member companies.

<sup>2</sup> Sierra Club Ohio Office on behalf of the Sierra Club, Buckeye Forrest Council, and the Ohio Environmental Council.

## **Specific Comments**

### **Rule 3745-31-34 “Permits to install for major stationary sources and major modifications of sources emitting greenhouse gases”**

### **Rule 3745-77-11 “Title V permits for major sources emitting greenhouse gases”**

#### **Comment 1:**

#### ***In support of the termination clauses***

Elements of the proposed OAC rules 3745-31-34 and 3745-77-11 that limit the scope and burdensomeness of GHG permitting in Ohio, including the termination of the effectiveness of these rules simultaneously with any federal legislative, judicial, or executive suspension, postponement, or nullification of the federal GHG permitting requirements established in 2010, are needed and appropriate to protect Ohio citizens and businesses from more adverse federal regulatory consequences. **(Porter Wright)**

#### ***In opposition to the termination clause***

The Ohio EPA intends to add an invalidation clause to its new rule, automatically suspending the effect of this greenhouse gas rule should Congress enact “federal legislation depriving the administrator of authority, limiting the administrator’s authority, or requiring the administrator to delay the exercise of authority, to regulate greenhouse gases under the Clean Air Act,” a court invalidate the rule; or the president of the United States or the president’s authorized agent “repeal, withdraw, suspend, postpone, or stay” the federal greenhouse gas bill. Prop. Oh. Admin Code § 3745-31-34(c). The Ohio EPA should not include this provision in the final rule because it is contrary to Clean Air Act, Ohio Administrative Procedure Act, and creates a burden on the regulated community.

First, the Clean Air Act mandates that states may alter their state implementation plans only with EPA approval, see, e.g., 42 U.S.C. § 7410; such sudden unilateral action as proposed by these regulations is not consistent with the Clean Air Act. EPA recently advised Georgia on the inappropriateness of a similar provision:

While EPA appreciates Georgia’s interest in such a provision, it raises significant legal issues and is a matter that EPA has previously counseled against in other contexts. EPA’s basis for its concern, ... is ... that is simply not possible to predict the nature of future events that may impact the regulation. In addition, even if a court were to take one of the actions discussed in Georgia’s proposed rule, there could be differences of opinions between EPA and Georgia regarding the interpretation and/or impact of such a decision. ... Given the importance of providing certainty to the general public and regulated community regarding which

regulations are in effect at any given time, EPA urges [Georgia] not to include this automatic invalidation provision in its final regulation.

Letter from Greg M. Morley, Air Permits Section Chief, U.S. Env'tl. Protection Agency to James A. Capp, Air Protection Branch Chief, Georgia Dep't Nat. Resources (Oct. 29, 2010). EPA ultimately formally declined to approve Georgia's proposed invalidation provision. 75 Fed. Reg. 73,017, 73,018 (Nov. 29, 2010).

Second, the Ohio Administrative Procedure Act mandates that before any agency amend or rescind a rule it must first comply with notice and comment requirements. Ohio Administrative Procedure Act states "[i]n the adoption, amendment, or rescission of any rule, an agency shall comply with the following procedure: [r]easonable public notice shall be given in the register of Ohio at least thirty days prior to the date set for a hearing; ... [o]n the date and at the time and place designated in the notice, the agency shall conduct a public hearing at which any person affected by the proposed action of the agency may appear and be heard in person." Oh. Rev. Code § 119-03. The sudden and unilateral action proposed by this automatic invalidation provision is not consistent with state law.

Finally, this provision creates instability in the regulated community. Ohio should not force businesses making permitting decisions to monitor the court decisions and congressional and presidential actions in order to avoid sudden changes in permit regulations. This uncertainty is what prompted Governor Strickland to adopt emergency rules incorporating the terms of the U.S. EPA's Tailoring Rule into Ohio law:

Failure to incorporate the Tailoring Rule thresholds into Ohio's rules will create uncertainty regarding whether tens of thousand of greenhouse gas resources in Ohio that emit greenhouse gases below the Tailoring Rule thresholds, but above the thresholds currently in Ohio EPA regulations for other major pollutant sources must obtain CAA permits. That uncertainty may cause potential investors in new/or expanded facilities in Ohio to choose locations outside of Ohio or to choose to build new or expanded facilities that otherwise would have been sources for jobs for Ohioans.

Ted Strickland, Ohio Governor, Exec. Order 2010-15S. Since it is impossible to predict future events and how different federal and state agencies may interpret those events, this invalidation provision could foster uncertainty in the regulated community costing the state jobs and growth opportunities.

Ohio could, of course, work to alter its own rules in an orderly way if the federal rules were invalidated or rescinded. It should avoid provisions which would precipitously alter its permitting structure based on the existence of a court case,

congressional or presidential action which the EPA and Ohio may interpret differently. **(Sierra Club and Heather Cantino)**

### **Response 1**

The federal greenhouse gas tailoring rule regulates major stationary sources of greenhouse gases. Ohio EPA administers an approved Prevention of Significant Deterioration program and a fully approved Title V permit program. Ohio law requires that the Ohio EPA not regulate air contaminants in a manner that is more stringent than federal law. There is a significant amount of uncertainty at the federal level concerning long term implementation of the federal greenhouse gas tailoring rule. Changes to the scope, thresholds, and authority to implement the permitting requirements are possible based on a wide variety of potential actions including successful court challenge of the federal regulations, action by Congress deferring or eliminating U.S. EPA authority to regulate greenhouse gases, or alternate legislation that replaces the current greenhouse gas tailoring rule. OAC rule 3745-31-34(C) and OAC rule 3745-77-11(D) ensure that Ohio EPA can quickly take the necessary actions that are consistent with whatever federal action occurs. A situation where Ohio's regulations are more stringent than federal regulation would be in direct conflict with portions of Ohio Law. Due to the significant uncertainty of the federal greenhouse gas regulatory requirements, Ohio EPA is proposing the termination mechanisms up-front and through the legislatively mandated processes of Ohio Revised Code Section 119 in order to include the termination provisions as part of the SIP revision and Title V permit program approval requests respectively. This language is similar to the approach incorporated by rule in the State of Colorado at Regulation 3, Section I.B.44.f and being considered by other states.

### **Comment 2**

Failure to regulate carbon released from woody biomass harvesting and incineration could seriously undermine any attempts to meet GHG reduction targets and would incentivize the large-scale destruction of Ohio's forest ecosystems and the vital carbon storage services they perform. Buckeye Forest Council therefore urges OEPA to draft rules that specifically regulate any and all biomass-related GHG emissions that meet the 75,000 and 100,000 tpy thresholds set forth in U.S. EPA's Tailoring Rule. **(Buckeye Forrest Council<sup>3</sup> and Heather Cantino<sup>4</sup>)**

### **Response 2**

The federal greenhouse gas tailoring rule regulates direct emissions of defined greenhouse gases. The federal rule does not set GHG reduction targets for sources. Instead, it sets thresholds that trigger certain permitting requirements, including establishing Best Available Control Technology (BACT). Ohio law requires that the Ohio EPA not regulate air contaminants in a manner that is

---

<sup>3</sup> Additional comments independently submitted from those submitted as part of the comments submitted by the Sierra Club Ohio Chapter and Ohio Environmental Council.

<sup>4</sup> Citizen commenter.

more stringent than federal law and does not set GHG reduction targets. Ohio EPA is not authorized under the Clean Air Act or Ohio law to regulate potential or actual greenhouse gas emissions associated with activities such as harvesting, transporting or processing woody biomass unless those activities meet the definition of a “major stationary source” for a pollutant “subject to regulation”. Consistent with the federal greenhouse gas tailoring rule, OAC rule 3745-31-34 and OAC rule 3745-77-11 regulate greenhouse gas emissions from major stationary sources, consistent with the federal greenhouse gas tailoring rule.

### **Comment 3**

Both proposed OAC 3745-31-34 and OAC 3745-77-11 refer to "greenhouse gases." Two commenters propose that Ohio EPA should be more specific as to these pollutants in the Ohio Administrative Code. Instead of referring to greenhouse gases or relying upon references in federal rules, the Agency should state the six pollutants which federal regulations now require to be considered. Consequently, instead of referencing "greenhouse gases," the Utilities suggest that Ohio EPA state, "carbon dioxide, nitrous oxide, methane, hydro-fluorocarbons, per- fluorocarbons, and sulfur hexafluoride" throughout the rule when referencing these pollutants. (**Shumaker**<sup>5</sup>, **Bott Law**<sup>6</sup>)

### **Response 3**

Ohio EPA defers to the defined term “greenhouse gases” in 40 CFR Section 51.166 in order to ensure complete parity with scope and authority for regulating greenhouse gases at the federal level given the uncertainty at the federal level of the scope (both pollutants and threshold levels) and authority to regulate greenhouse gases and, given the significant uncertainty regarding the scope and applicability of the federal greenhouse gas regulations, to ensure Ohio EPA regulates air contaminants in a manner that is no more stringent than the Clean Air Act (and associated federal regulations). Ohio EPA seeks to avoid any situation where the types of air contaminants Ohio companies are subject to is more (or less) stringent than what is regulated at the federal level. Ohio EPA has added a comment to the beginning of OAC rule 3745-31-34 and OAC rule 3745-77-11 to clarify for readers what pollutants U.S. EPA identifies as comprising the defined term “greenhouse gas”.

### **Comment 4**

O.A.C. 3745-31-34(A) should be modified to explicitly limit the scope of Ohio's permit-to-install major source requirements related to the Six Substances.

---

<sup>5</sup> Shumaker, Loop & Kendrick on behalf of Buckeye Power, Inc.; Columbus Southern Power Company (a unit of AEP); The Dayton Power and Light Company; Duke Energy Ohio; FirstEnergy; Ohio Power Company (a unit of AEP); and Ohio Valley Electric Corporation. Collectively referred to as the “Utility Group”

<sup>6</sup> Bott Law on behalf of Flexible Pavements of the Ohio, Ohio Coal Association, Ohio Aggregates and Industrial Minerals Association and the Ohio Municipal Electric Association

Specifically, this section should make it clear that the requirements of O.A.C. 3745-31-11 (Attainment provisions-ambient air increments, ceilings and classifications); 3745-31-12(C)(4-5) (Attainment provisions-data submission requirements); 3745-31-14 (Attainment provisions-preapplication analysis); 3745-31-16 (Attainment provisions-major stationary source impact analysis); 3745-31-17 (Attainment provisions-additional impact analysis); 3745-31-18 (Attainment provisions-air quality models); 3745-31-19(C)and (D) (Attainment provisions-notice to the United States environmental protection agency) are not applicable requirements for sources deemed major only by virtue of emissions of the Six Substances. The inclusion of this limiting language is consistent with EPA's current position that the requirements listed above do not apply to GHGs and will serve to protect Ohio EPA and Ohio business against future interpretations or changes outside of Ohio's control. See, Tailoring Rule, 75 Fed. Reg. 31514, 31520 (June 13, 2010); U.S. EPA's November 10, 2010 PSD and Title V Permitting Guidance for Greenhouse Gases at 48-49. **(Bott Law)**

#### **Response 4**

Ohio EPA agrees with the commenters and has inserted a new paragraph (E) to specifically address the comment.

#### **Comment 5**

Two commenters suggest that the Proposed Rules should clearly state that Ohio's Best Available Technology requirements are not applicable to greenhouse gases regulated by the proposed rules. One of the commenters suggests that Ohio EPA revise the terms to explicitly state that the six pollutants are regulated only for the purpose of compliance with the federal requirements and that, under Ohio Law, Ohio EPA will not set BAT limits (or any other requirement) for these six pollutants. Ohio EPA would better serve itself and the public by stating the exclusion explicitly. **(Bott Law, Shumaker)**

#### **Response 5**

Ohio EPA agrees with the commenters concerning BAT applicability and has addressed the issue as part of the inserted new paragraph (E) to specifically address the comment. Ohio EPA has added a comment to the beginning of OAC rule 3745-31-34 and OAC rule 3745-77-11 to clarify for readers what pollutants U.S. EPA identifies as comprising the defined term "greenhouse gas".

#### **Comment 6**

One commenter suggests that OAC 3745-31-34(A) could be interpreted to trigger not only consideration of the application of BACT if the thresholds for the pollutants are exceeded, but also many of the other requirements of the PSD program (such as monitoring or modeling requirements) that are included under OAC 3745-31-15 to OAC 3745-31-20. The commenter states that pursuant to the Tailoring Rule, and further confirmed by U.S. EPA's own guidance 2, no additional regulation is required and, thus, the state of Ohio should not require any additional PSD requirements beyond the minimum BACT set forth by

USEPA. As such, the commenter suggests that Ohio EPA should explicitly state that the only requirement triggered by exceeding the threshold is the federal requirement to determine BACT for the six pollutants. **(Shumaker)**

### **Response 6**

There may be exceptions to when BACT is required for GHGs even where a PTI is required under 3745-31-34(A), and the rule should not prejudice or preclude those exceptions. No additional language has been added to the proposed rule concerning BACT requirements. Also see Response 5.

### **Comment 7**

In OAC rule 3745-31-34(A):

1. line 5 of paragraph (A), after "will result in" insert "a significant net increase in emissions of one or more regulated NSR pollutants other than greenhouse gases and also" before "an emissions increase." This will make it more clear that the "modification" must be "major" for regulated NSR pollutants other than GHGs in order for step I PSD permitting applicability for GHGs, as clearly intended and provided by the Tailoring Rule.
2. In line 7 of paragraph (A), after "shall be required" strike "as approved by the administrator of the United States environmental protection agency pursuant to the 'Limitations of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans: Final Rule' and" and after "as provided in this rule" insert "and only to the extent required" before "in 40 CFR Section 51.166." There is no need to include a confusing reference to U.S. EPA's December 30, 2010 "Narrowing Rule," and a premise of that rule is inconsistent with the Director's July 26, 2010 "60-day notice" letter to Region 5 Administrator Susan Hedman in response to the Tailoring Rule. The suggested language makes clear that Ohio EPA is not requiring anything more stringent than the absolute minimum necessary to conform to Part 51 SIP requirements.
3. In line 14 of paragraph (A), after "modifications of existing" insert "major" before "stationary sources." The GHG thresholds that trigger PSD for major modifications do not apply to minor stationary sources under the Tailoring Rule.
4. In line 17 of paragraph (A), after "shall be required" strike "as approved by the administrator of the United States environmental protection agency pursuant to 40 CFR Section 521873(b)" and insert "as provided in this rule and only to the extent required" before "in 40 CFR Section 51.166." The words "as provided" currently before "in 40 CFR Section 51.166" in line 19 should be deleted. These changes, like those above for line 7, avoid any undesirable conflating of the Narrowing Rule with OAC 3745-31-34, and make clear that Ohio EPA is not requiring any GHG permitting beyond the bare minimum mandates of Part 51. **(Porter Wright)**

### **Response 7**

1. Ohio EPA agrees that the suggest changed adds clarity and has inserted the text “a significant net increase in emissions of one or more regulated NSR pollutants other than greenhouse gases and also” as suggested.
2. Ohio EPA has considered the comment and has determined that reference to the federal narrowing rule is not necessary to implement the federal greenhouse gas tailoring rule. All references to the narrowing rule have been removed.
3. Ohio EPA agrees that the requested change provides additional clarity, is consistent with wording related to references to major stationary sources (as defined in OAC rule 3745-31-01(LLL) in other parts of OAC Chapter 3745-31 and has made the requested change accordingly.
4. See response 2 above.

### **Comment 8**

In OAC rule 3745-31-34(B):

1. In line 3 of paragraph (B), after "any existing" insert "major" before "stationary source." This makes clear that the Ohio rule is consistent with and no more stringent than the Tailoring Rule, which does not require PSD permitting of GHGs emitted from minor sources
2. In line 7 of paragraph (B), after "emit below the" insert "greenhouse gas" before "permitting threshold" This adds clarity.
3. In line 13 of paragraph (B), insert "major" before "stationary sources." This maintains consistency with the Tailoring Rule, by excluding all minor sources from PSD permitting for GHG emissions. **(Porter Wright)**

### **Response 8**

Ohio EPA agrees that the requested changes provide additional clarity, is consistent with wording related to references to major stationary sources (as defined in OAC rule 3745-31-01(LLL) in other parts of OAC Chapter 3745-31 and has made the requested changes accordingly.

Ohio EPA has also added the phrase “greenhouse gas” as requested to provide additional clarity concerning what pollutants the rule is referring to with respect to “permitting thresholds” referenced in the rule.

### **Comment 9**

In OAC rule 3745-31-34(D) - In line 3 of paragraph (D), after "be" insert "an air contaminant," and insert a comma after "subject to regulation." This adds clarity that GHGs are not permissible gases in Ohio except as required under OAC 3745-31-34 or 3745-77-11. **(Porter Wright)**

### **Response 9**

Ohio EPA has made the suggested change (note that the paragraph referenced in the comment is now paragraph (F) due to insertion of a new paragraph in response to other comments and associated re-lettering of the paragraphs).

**End of Response to Comments**