

The USPTO's guidance materials concerning the subject matter eligibility requirements of 35 U.S.C. 101, including the above-mentioned memorandum, do not constitute substantive rulemaking and do not have the force and effect of law. These guidance materials set out examination policy on rejections with respect to the Office's interpretation of the subject matter eligibility requirements of 35 U.S.C. 101 in view of decisions by the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). The guidance materials were developed as a matter of internal Office management and are not intended to create any right or benefit, substantive or procedural, enforceable by any party against the Office. Rejections will continue to be based upon the substantive law, and it is these rejections that are appealable. Failure of Office personnel to follow the USPTO's guidance materials is not, in itself, a proper basis for either an appeal or a petition.

Additionally, the USPTO has produced new life science examples. A copy of the examples is available on the USPTO's Internet Web site, again on the patent examination guidance and training materials Web page (<http://www.uspto.gov/patent/laws-and-regulations/examination-policy/examination-guidance-and-training-materials>). The examples provide exemplary subject matter eligibility analysis under 35 U.S.C. 101 of hypothetical claims and claims drawn from case law. The examples are intended as a teaching tool to assist examiners and the public in understanding how the Office would apply the eligibility guidance in certain fact-specific situations.

The USPTO further solicited topics for study under the Topic Submission for Case Studies Pilot Program. *See Request for Submission of Topics for USPTO Case Studies*, 80 FR 79277 (Dec. 21, 2015). The case studies will include a review of consistency of the application of subject matter eligibility analyses under 35 U.S.C. 101 across the examining corps to determine the quality of the work product and indicate where improvements can be made to further improve consistency.

The July 2015 Update included an Appendix 3 containing select eligibility decisions from the Supreme Court and the Federal Circuit. This chart of decisions assists examiners in identifying the types of subject matter courts have previously found to be ineligible. Appendix 3 will continue to be updated with Federal Circuit decisions having opinions (precedential

or non-precedential). While non-precedential decisions are not binding precedent, the opinions provide guidance and persuasive reasoning as outlined in Fed. Cir. R. 32.1(d). Appendix 3 will also continue to be updated with Federal Circuit decisions without opinion (Fed. Cir. R. 36) on appeals originating from the Patent Trial and Appeal Board. Federal Circuit decisions affirming a district court decision without opinion (Fed. Cir. R. 36) will no longer be added to Appendix 3 because they provide little benefit to examiners or the public.

As discussed previously, the memorandum and life science examples are available to the public on the USPTO's Internet Web site. The USPTO is now seeking public comment. The comment period is open-ended, and comments will be accepted on an ongoing basis. When it is determined that the period will close, advance notification will be made on the public comment Web page. The USPTO is particularly interested in public comments addressing the progress the USPTO is making in the quality of correspondence regarding subject matter eligibility rejections.

Dated: May 2, 2016.

**Michelle K. Lee,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R06-OAR-2012-0022; FRL-9946-11-Region 6]

### Approval and Promulgation of Implementation Plans; Louisiana; Permitting of Greenhouse Gases

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to partially approve and partially disapprove a revision to the Louisiana State Implementation Plan (SIP) submitted by the State of Louisiana on December 21, 2011. This revision outlines the State's program to regulate and permit emissions of greenhouse gases (GHGs) in the Louisiana Prevention of Significant Deterioration (PSD) program. We are proposing to approve those provisions to the extent that they

address the GHG permitting requirements for sources already subject to PSD for pollutants other than GHGs. We are proposing to disapprove those provisions to the extent they require PSD permitting for sources that emit only GHGs above the thresholds triggering the requirement to obtain a PSD permit since that is no longer consistent with federal law. The EPA is proposing this action under section 110 and part C of the Clean Air Act (CAA or Act).

**DATES:** Written comments must be received on or before June 6, 2016.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-OAR-2012-0022, at <http://www.regulations.gov> or via email to [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact Ms. Adina Wiley, (214) 665-2115, [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**Docket:** The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available at either location (*e.g.*, CBI). **FOR FURTHER INFORMATION CONTACT:** Adina Wiley, (214) 665-2115, [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). To inspect the hard copy materials, please schedule an appointment with Ms. Wiley or Mr. Bill Deese at 214-665-7253.

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever

“we,” “us,” or “our” is used, we mean the EPA.

## I. Background

On January 2, 2011, GHGs became subject to regulation under the Clean Air Act and thus regulated under the PSD permitting program. *See* 75 FR 17004, April 2, 2010. To establish a process for phasing in the permitting requirements for stationary sources of GHGs under the CAA PSD and title V programs, on June 3, 2010, the EPA promulgated a final rule “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (referred to as the Tailoring Rule). *See* 75 FR 31514. The Louisiana Department of Environmental Quality (LDEQ) adopted revisions to the Louisiana Administrative Code on April 20, 2011, to address the PSD permitting requirements for sources with GHG emissions. These revisions, which included content from the Tailoring Rule, were submitted to the EPA on December 21, 2011, for inclusion in the Louisiana SIP. Specifically, the LDEQ submitted new definitions for “carbon dioxide equivalent emissions (CO<sub>2</sub>e),” “greenhouse gases (GHGs)” and revisions to the existing definitions of “major stationary source” and “significant” at LAC 33:III.509(B). The submittal also included revisions to the general permitting program requirements at LAC 33:III.501(C)(14) to limit the regulation of GHGs under Louisiana’s SIP to match any future changes in federal law or decisions by the Supreme Court or U.S. Court of Appeals for the D.C. Circuit. The December 21, 2011 submittal also included revisions to the Louisiana title V program at LAC 33:III.502 which is not a part of the SIP requirements under section 110 of the Act and will be addressed by the EPA in a separate action at a later date.

## II. The EPA’s Evaluation

In Step 1 of the Tailoring Rule, which began on January 2, 2011, the EPA limited application of PSD and title V requirements to sources only if they were subject to PSD or title V “anyway” due to their emissions of pollutants other than GHGs. These sources are referred to as “anyway sources.” Under its understanding of the CAA at the time, the EPA believed the Tailoring Rule was necessary to avoid a sudden and unmanageable increase in the number of sources that would be required to obtain PSD and title V permits under the CAA because the sources emitted GHGs over applicable major source and major modification thresholds.

In Step 2 of the Tailoring Rule, which began on July 1, 2011, the PSD and title V permitting requirements under the CAA applied to some sources that were classified as major, and, thus, required to obtain a permit, based solely on their GHG emissions or potential to emit GHGs, and to modifications of otherwise major sources that required a PSD permit because they increased only GHG emissions above the level in the EPA regulations. We generally describe the sources covered by PSD during Step 2 of the Tailoring Rule as “Step 2 sources.”

On June 23, 2014, the U.S. Supreme Court issued a decision in *Utility Air Regulatory Group (UARG) v. EPA*, 134 S. Ct. 2427, addressing the application of stationary source permitting requirements to GHG emissions. The Supreme Court held that the EPA may not treat GHGs as an air pollutant for the specific purpose of determining whether a source is a major source (or a modification thereof) and thus require the source to obtain a PSD or title V permit. The Court also said that the EPA could continue to require that PSD permits for emissions of pollutants other than GHGs contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). With respect to PSD, the ruling effectively upheld PSD permitting requirements for GHG emissions under Step 1 of the Tailoring Rule for “anyway sources” and invalidated PSD permitting requirements for Step 2 sources. In accordance with the Supreme Court decision, on April 10, 2015, the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) issued an Amended Judgment vacating the regulations that implemented Step 2 of the Tailoring Rule, but not the regulations that implement Step 1 of the Tailoring Rule. The amended judgment preserves, without the need for additional rulemaking by the EPA, the application of the BACT requirement to GHG emissions from Step 1 or “anyway sources.” With respect to Step 2 sources, the D.C. Circuit’s judgment ordered that the EPA regulations under review (including 40 CFR 51.166(b)(48)(v) and 40 CFR 52.21(b)(49)(v)) be vacated “to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification.”

The EPA promulgated a final rule on August 19, 2015, removing the portions

of the PSD permitting provisions for Step 2 sources from the federal regulations that the D.C. Circuit specifically identified as vacated (40 CFR 51.166(b)(48)(v) and 52.21(b)(49)(v)). *See* 80 FR 50199. We no longer have the authority to conduct PSD permitting for Step 2 sources, nor can we approve provisions submitted by a state for inclusion in their SIP providing this authority.

### A. Evaluation of the Louisiana Automatic Rescission Provisions

Louisiana’s December 21, 2011 SIP submission submittal adds automatic rescission provisions to the State’s PSD regulations at LAC 33:III.501(C)(14). The automatic rescission provisions provide that in the event that there is a change in federal law, or the D.C. Circuit or the U.S. Supreme Court issues an order which limits or renders ineffective the regulation of GHGs under title I of the CAA, then the corresponding provisions of the Louisiana PSD program shall be limited or rendered ineffective to the same extent.

The EPA is proposing to approve the Louisiana automatic rescission provisions. In assessing the approvability of automatic rescission provisions, the EPA considers two key factors: (1) Whether the public will be given reasonable notice of any change to the SIP that occurs as a result of the automatic rescission provisions, and (2) whether any future change to the SIP that occurs as a result of the automatic rescission provisions would be consistent with the EPA’s interpretation of the effect of the triggering action on federal GHG permitting requirements. *See, e.g.*, 79 FR 8130 (February 11, 2014) and 77 FR 12484 (March 1, 2012). These criteria are derived from the SIP revision procedures set forth in the CAA and federal regulations.

Regarding public notice, CAA section 110(l) provides that any revision to a SIP submitted by a State to EPA for approval “shall be adopted by such State after reasonable notice and public hearing.” In accordance with CAA section 110(l), LDEQ followed applicable notice-and-comment procedures prior to adopting the automatic rescission provisions. Thus, the public is on notice that the automatic rescission provisions in the Louisiana PSD program will enable the Louisiana PSD program and the Louisiana SIP to update automatically to reflect any order by a federal court or any change in federal law that limits or renders ineffective the regulation of GHGs under the CAA’s PSD permitting program. Additionally, the EPA interprets this provision to require the

LDEQ to provide notice to the general public and regulated community of the changes to the Louisiana PSD program in the event that the automatic rescission provision is triggered. The EPA invites comment, particularly from the State, regarding this interpretation.

The EPA's consideration of whether any SIP change resulting from Louisiana's automatic rescission provisions would be consistent with the EPA's interpretation of the effect of the triggering action on federal GHG permitting requirements is based on 40 CFR 51.105, which states that "[r]evisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part." To be consistent with 40 CFR 51.105, any automatic SIP change resulting from a court order or federal law change must be consistent with the EPA's interpretation of the effect of such order or federal law change on GHG permitting requirements. We interpret this provision to mean that Louisiana will wait for and follow the EPA's interpretation as to the impact of any federal law change or the D.C. Circuit or the U.S. Supreme Court issues an order before Louisiana's SIP would be changed. In the event of a court decision or federal law change that triggers (or likely triggers) application of Louisiana's automatic rescission provisions, the EPA intends to promptly describe the impact of the court decision or federal law change on the enforceability of its GHG permitting regulation. The EPA invites comment, particularly from the State, regarding this interpretation.

#### *B. Evaluation of the Submitted Revisions to the Louisiana PSD Program*

Prior to the court decisions, the State submitted amended PSD provisions to enable permitting Step 1 and Step 2 sources and the GHG emissions from such sources on December 21, 2011. The EPA has an obligation under section 110 of the CAA to act upon a submitted revision to a state's SIP within 18 months of receipt. The December 21, 2011 SIP revisions have not been withdrawn; therefore, the EPA has an obligation to act on the submitted provisions. We have the authority under section 110(k)(3) of the Act to partially approve and partially disapprove portions of a SIP submittal that are not wholly approvable. Accordingly, we find it appropriate to propose partial approval under section 110(k)(3) of the Act of the submitted provisions that enable the State to permit GHG emissions from Step 1 sources

consistent with federal requirements. Simultaneously, we are proposing disapproval of the provisions that enable the permitting of Step 2 sources under the PSD program.

Our evaluation finds that the revised rules in Louisiana's December 21, 2011 SIP submission achieve the same result as the Step 1 permitting provisions in 40 CFR 51.166 that remain applicable at this time. However, the state rules achieve this result in a manner that differs from the way the EPA's regulations are presently written. The state has not enacted limitations on the meaning of the term "subject to regulation" as reflected in 40 CFR 51.166(b)(48)(iv). Instead, the State has adopted a significance level for GHGs whereby the net emissions increase of GHGs calculated on a mass basis equals or exceeds 0 tpy and the net emission increase of GHGs calculated on a CO<sub>2</sub>e basis is 75,000 tons per year CO<sub>2</sub>e for new major stationary sources or major modifications, which applies to determine whether the BACT requirement applies to GHGs in PSD permitting. Although the Louisiana SIP submission is structured differently than the EPA's federal rules, the primary practical effect of both is the same: The PSD BACT requirement does not apply to GHG emissions from an "anyway source" unless the source emits GHGs at or above the 75,000 ton per year threshold. Therefore, we find this aspect of Louisiana's SIP submissions to be approvable because it is consistent with the relevant provisions of 40 CFR 51.166.

It is important to note, however, that the EPA's proposed approval is not based on determination by either EPA or the state that 75,000 tons per year CO<sub>2</sub>e is an appropriate *de minimis* level for GHGs. The EPA's proposed approval of the significant emissions rate for GHGs in LDEQ's rule is based only on the recognition that Louisiana's rule applies the same applicability level for the GHG BACT requirement that is presently reflected in the EPA's regulations.

In establishing the significance level, the State rulemaking does not establish that 75,000 is a *de minimis* amount of GHG. Nothing in the state's rulemaking record and nothing in this EPA action provide support to substantiate 75,000 tons per year significance level as a *de minimis* level. See *UARG*, 134 S. Ct. 2427, at 2449 (noting that the EPA had not established the 75,000 tons per year level in the Tailoring Rule as a *de minimis* threshold below which BACT is not required for a source's GHG emissions).

Given the deficiencies in the justification for the GHG BACT applicability level in the existing EPA

regulations, the EPA is planning to move forward in a separate, national rulemaking to propose a GHG Significant Emission Rate (SER) that would be justified as a *de minimis* threshold level for applying the BACT requirement to GHG emissions under PSD. In the event that the EPA ultimately promulgates a final GHG SER, Louisiana, like all other SIP-approved states, may be obligated to undertake rulemaking to demonstrate consistency with federal requirements or may be subject to a SIP Call to correct a deficiency in the SIP-approved program.

#### **III. Proposed Action**

Section 110(k)(3) of the Act states that the EPA may partially approve and partially disapprove a SIP submittal if we find that only a portion of the submittal meets the requirements of the Act. We are proposing to approve the revisions to the Louisiana PSD permitting program submitted on December 21, 2011, that provide the State the authority to regulate and permit emissions of GHGs from Step 1 sources in the Louisiana PSD program. The EPA has made the preliminary determination that the revisions are approvable because the submitted rules are adopted and submitted in accordance with the CAA and are consistent with the laws and regulations for PSD permitting of GHGs. Therefore, under section 110 and part C of the Act, the EPA proposes to approve the following specific revisions to the Louisiana SIP for PSD permitting:

- New provisions at LAC 33:III.501(C)(14) adopted on April 20, 2011 and submitted December 20, 2011;
- New definitions of "carbon dioxide equivalent" and "greenhouse gases" at LAC 33:III.509(B) adopted on April 20, 2011 and submitted December 20, 2011; and
- Revisions to the definitions of "major stationary source" paragraphs (a) and (b) and "significant" at LAC 33:III.509(B) adopted on April 20, 2011 and submitted December 20, 2011.

Upon promulgation of a final approval of these proposed revisions, the EPA would also remove the provisions at 40 CFR 52.986(c) under which the EPA narrowed the applicability of the Louisiana PSD program to regulate sources consistent with federal requirements. The provisions at 40 CFR 52.986(c) will no longer be necessary when we finalize approval of the state regulations into the Louisiana SIP.

We are also proposing to disapprove the provisions submitted on December 21, 2011, that would enable the State of

Louisiana to regulate and permit Step 2 sources, under the Louisiana PSD program because the submitted provisions are no longer consistent with federal laws. Specifically, the EPA is proposing to disapprove revisions to the definitions at LAC 33:III.509 for “major stationary source” paragraph (c) “significant” as it pertains to Step 2 sources, as adopted on April 20, 2011 and submitted December 20, 2011. Finalization of this proposed disapproval will not require the EPA to promulgate a Federal Implementation Plan because the Louisiana PSD program would continue to regulate GHG emissions consistent with federal statutory and regulatory permitting requirements. We are proposing this disapproval under section 110 and part C of the Act; as such, we will also not impose sanctions as a result of a final disapproval.

The EPA is also taking the opportunity to correct an omission in our proposed approval of revisions to the Louisiana Major New Source Review program on August 19, 2015. In that action we neglected to specifically identify the revisions submitted on December 20, 2005 to the PSD definition of “major stationary source” at LAC 33:III.509(B) as part of our proposed action. In both the TSD associated with docket EPA–R06–OAR–2006–0131 and in the TSD accompanying today’s action, we have evaluated this submission and found the revised regulations to be consistent with federal requirements at 40 CFR 51.166(b)(1)(iii). As such, we are also proposing approval of the revisions to the definition of “major stationary source” at LAC 33:III.509(B) submitted on December 20, 2005 as subparagraph (e), but was moved to subparagraph (f) in the December 20, 2011 submittal.

#### IV. Incorporation by Reference

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference revisions to the Louisiana regulations as described in the Proposed Action section above. We have made, and will continue to make, these documents generally available electronically through [www.regulations.gov](http://www.regulations.gov) and/or in hard copy at the EPA Region 6 office.

#### V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations.

42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action proposes approval of the portions of the submitted revisions to State law for the regulation and permitting of GHG emissions consistent with federal requirements and proposes disapproval of the portions of the state laws that do not meet Federal requirements for the regulation and permitting of GHG emissions.

#### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

#### B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. There is no burden imposed under the PRA because this action proposes to disapprove submitted revisions that are no longer consistent with federal laws for the regulation and permitting of GHG emissions.

#### C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action proposes to disapprove submitted revisions that are no longer consistent with federal laws for the regulation and permitting of GHG emissions, and therefore will have no impact on small entities.

#### D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. This action proposes to disapprove submitted revisions that are no longer consistent with federal laws for the regulation and permitting of GHG emissions, and therefore will have no impact on small governments.

#### E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the

distribution of power and responsibilities among the various levels of government.

#### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action proposes to disapprove provisions of state law that are no longer consistent with federal laws for the regulation and permitting of GHG emissions; there are no requirements or responsibilities added or removed from Indian Tribal Governments. Thus, Executive Order 13175 does not apply to this action.

#### G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it disapproves state permitting provisions that are inconsistent with federal laws for the regulation and permitting of GHG emissions.

#### H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

#### I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

#### J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action is not subject to Executive Order 12898 because it disapproves state permitting provisions that are inconsistent with federal laws for the regulation and permitting of GHG emissions.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air  
pollution control, Incorporation by  
reference, Nitrogen dioxide, Ozone,

Particulate matter, Reporting and  
recordkeeping requirements, Sulfur  
oxides, Volatile organic compounds.

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

Dated: April 29, 2016.

**Ron Curry,**

*Regional Administrator, Region 6.*

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