



Tailoring Rule

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On June 23, 2014, the U.S. Supreme Court issued its decision in [Utility Air Regulatory Group v. Environmental Protection Agency](#), 12-1146, invalidating portions of the June 2, 2010 amendments to 40 CFR 52.21 and 40 CFR Part 70 (the Tailoring Rule). In response to the Court's decision, U.S. EPA issued a preliminary guidance memorandum, [Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in Utility Air Regulatory Group v. Environmental Protection Agency](#) ("guidance memorandum"). Pursuant to the Supreme Court's decision and U.S. EPA's guidance, the Indiana Department of Environmental Management (IDEM) does not intend to require Prevention of Significant Deterioration (PSD) or Title V permits for sources based solely on greenhouse gas (GHG) emissions, and will continue to apply a threshold of 75,000 tpy (tons per year) to determine when Best Available Control Technology (BACT) applies for Title V sources ("anyway sources").

Step 1/Anyway Sources vs. Step 2/GHG-only sources

The Step1/Step 2 distinction among sources stems from a two step phase-in of the regulation at issue. When promulgating the Tailoring Rule, U.S. EPA first required BACT for those sources already subject to PSD/BACT requirements based on their emissions of conventional pollutants, if those sources also emitted at least 75,000 tpy carbon dioxide equivalent (CO₂e). Because they would still be subject to PSD BACT absent their GHG emissions, sources subject to BACT for GHGs under Step 1 are referred to as "anyway sources." In its guidance memorandum, U.S. EPA stated "[w]ith respect to new 'anyway sources,' the U.S. EPA intends to continue applying the PSD BACT requirement to GHG emissions if the source emits or has the potential to emit 75,000 tpy or more of GHG on a CO₂e basis. With respect to modified 'anyway sources,' the U.S. EPA intends to continue applying the PSD BACT requirements to GHG if both of the following circumstances are present: (1) the modification is otherwise subject to PSD for a pollutant other than GHG; (2) the modification results in a GHG emission increase and a net GHG emissions increase equal to or greater than 75,000 tpy CO₂e and greater than zero on a mass basis."

Step 2 of the Tailoring Rule's phase-in occurred from July 1, 2011 to June 30, 2012. During this time period, sources with the potential to emit at least 100,000 tpy CO₂e were subject to PSD and Title V, and modifications of sources that resulted in an increase of CO₂e by at least 75,000 tpy were subject to PSD permitting. Since these permitting requirements were triggered solely by the sources' GHG emissions, sources regulated under Step 2 are referred to as "GHG-only sources." In its guidance memorandum, U.S. EPA stated "In order to act consistent with its understanding of the Supreme Court's decision pending judicial action to effectuate the final decision, the U.S. EPA will no longer require PSD or title V permits for Step 2 sources."

Effect of Supreme Court ruling on 326 IAC 2-2-1(zz)

The Supreme Court summarized its findings on the Tailoring Rule: "We hold that U.S. EPA exceeded its statutory authority when it interpreted the Clean Air Act (CAA) to require PSD and Title V permitting for stationary sources based on their greenhouse-gas emissions. Specifically, the Agency may not treat GHGs as a pollutant for purposes of defining a 'major emitting facility' (or a "modification" thereof) in the PSD context or a 'major source' in the Title V context. To the extent its regulations purport to do so, they are invalid. U.S. EPA may, however, continue to treat greenhouse gases as a 'pollutant subject to regulation

under this chapter' for purposes of requiring BACT for 'anyway' sources." The Supreme Court also instructed U.S. EPA to revisit and justify the threshold of 75,000 tpy CO₂e for "anyway" sources.

The Indiana Environmental Rules Board adopted the GHG regulations required by U.S. EPA at 326 IAC 2-2-1(zz), pursuant to Ind. Code § 13-14-9-8(h) (Section 8 rulemaking). A rule, or part of a rule, adopted under Section 8 is automatically invalidated when the corresponding federal rule, or part of the rule, is invalidated. Therefore, as a result of the Supreme Court decision partially invalidating the Tailoring Rule, 326 IAC 2-2-1(zz) is invalid as it applies to "GHG-only" sources. Pending further action by the D.C. Circuit Court and U.S. EPA, 326 IAC 2-2-1(zz) arguably remains in effect with respect to "anyway" sources emitting GHGs greater than 75,000 tpy.

Permitting for "Anyway Sources"

IDEM disagrees that U.S. EPA has the authority to require PSD BACT for GHGs prior to promulgating a *de minimis* threshold. However, IDEM intends to continue to require new or modified "anyway sources" to utilize BACT for GHGs. Until U.S. EPA promulgates a revised threshold, IDEM will continue to apply a threshold of 75,000 tpy CO₂e in determining whether to apply BACT for GHGs to "anyway sources."

Permitting for "GHG-Only Sources"

Pursuant to the Supreme Court ruling and U.S. EPA guidance, IDEM will not enforce GHG BACT limitations and supporting terms and conditions for "GHG-only sources" permitted during Step 2 of the Tailoring Rule's effectiveness. "GHG-only sources" permitted during this time may apply to have their permits modified to remove the BACT requirements.

Links

- [U.S. Supreme Court decision: *Utility Air Regulatory Group v. Environmental Protection Agency*](#)
- [U.S. EPA Memorandum: Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in *Utility Air Regulatory Group v. Environmental Protection Agency*](#)
- [326 IAC 2](#)
- [Ind. Code § 13-14-9](#)

Submit requests to modify permits to:

Indiana Department of Environmental Management
Office of Air Quality Air Permits Administration MC 61-53
100 North Senate Avenue IGCN 1003
Indianapolis, IN 46204-2251

Disclaimer

IDEM is providing this information to assist permittees in determining IDEM's position on GHG permitting in light of the Supreme Court decision on the Tailoring Rule. This guidance may not be appropriate for all situations, and IDEM retains the discretion to approach individual issues differently than provided above. This guidance does not change any applicable rule or law.