

October 26, 2010

Mr. James A. Capp, Branch Chief
Air Protection, Georgia Environmental Protection Division
4244 International Parkway, Suite 120
Atlanta, Georgia 30354

VIA Electronic Mail (EPDComments@dnr.state.ga.us) and Hand Delivery

Re: Comments on the Proposed Amendments to the Rules of the Department of Natural Resources (DNR) Environmental Protection Division (EPD) Relating To Air Quality, Chapter 391-3-1-.02(7) Prevention of Significant Deterioration of Air Quality (PSD), and -.03(10) Title V Operating Permits (Title V)

Dear Mr. Capp:

Herein are consolidated comments from the Georgia Industry Environmental Coalition (GIEC), with one member company abstaining; the Georgia Chemistry Council (GCC); the Georgia Industry Association (GIA); the Georgia Mining Association (GMA); and the Georgia Paper and Forest Products Association (GPFPA). We thought it would be useful and helpful for your review to consolidate these comments into one consensus document.

Each of our organizations represents companies with an employee base in the tens of thousands. Combined, our member companies represent the largest employers in the State. The currently Proposed Amendments to Georgia's Air Quality Control Rules, specifically the provisions thereof designed to incorporate portions of the federal Greenhouse Gas Tailoring Rule (EPD's Proposed GHG Rules), present many of our member companies with potentially significant issues for permitting of future operations and major modifications.

GIEC, GCC, GIA, GMA, and GPFPA appreciate the opportunity to provide comments on the Proposed GHG Rules. We thank EPD for the work that went into the expedited preparation of the Proposed GHG Rules. In addition, we appreciate the three public Greenhouse Gas Workshops that EPD has planned for November 9, 10 and 19, 2010 (GHG Workshops). As indicated on EPD's event registration website, the first two GHG Workshops are at full capacity, with over 120 registrants and a waiting list of at least 17. We believe that this response evidences the intense interest and uncertainty in the regulated community regarding the proposed permitting and regulation of greenhouse gases in Georgia.

Due to the significance of this rulemaking, we request that the public comment period for the GHG Rules be extended through EPD's November GHG Workshops. Based on our review of the agenda, we believe that there will likely be useful information that will be shared by EPD and the attendees at the GHG Workshops. We understand that several stakeholders registered to attend who have a number of key questions that they expect will be addressed during the GHG Workshops. Depending upon the input and information sharing at the GHG Workshops, we urge EPD to keep open the possibility of one or more additional stakeholder meetings.

In its Synopsis of the Proposed GHG Rules, EPD indicates that there is "legal and political uncertainty" regarding the federal Greenhouse Gas Tailoring Rule. We agree. The legal and political uncertainty foreshadows that there are certain procedural and substantive issues and questions surrounding the Proposed GHG Rules that should be further considered and addressed in this rulemaking, as discussed below.

1. The Proposed GHG Rules should focus on the adoption of the elevated PSD and Title V permitting thresholds in the Tailoring Rule and avoid the proposed adoption of the new definition of "subject to regulation", which codifies highly controversial administrative interpretations by U.S.EPA.

In its Synopsis of the Proposed GHG Rules (Statement of Rationale), EPD explains that, the U.S. EPA has put EPD and other state permitting authorities "in a very difficult situation" by its administrative and regulatory actions regarding the regulation and permitting of greenhouse gases from stationary sources under the Clean Air Act. Under the federal Clean Air Act, the statutory thresholds for PSD and Title V permitting are 100 or 250 tons per year (tpy) of emissions of regulated air pollutants. These thresholds have been in place for years with regard to traditional air pollutants like volatile organic compounds (VOCs) and nitrogen oxides (NOx).

However, the 100 and 250 tpy permitting thresholds do not work for greenhouse gas emissions, such as carbon dioxide (CO₂), that are emitted in much higher quantities than traditional air pollutants like VOCs and NOx. In EPA's own words, application of the Clean Air Act statutory permitting thresholds to greenhouse gases produces "absurd results." As EPD further explains in its Synopsis, about six million additional sources nationally would be subject to the Title V permitting program and about 20,000 additional sources to the PSD permitting program. Some of these additional sources could be mere office buildings and residential dwellings.¹

Therefore, in an effort to reduce the impact of its administrative and regulatory actions regarding greenhouse gases, U.S. EPA has promulgated the Tailoring Rule, with significantly higher permitting thresholds, such as 75,000 and 100,000 tpy, which are orders of magnitude higher than the statutory permitting thresholds in the Clean Air Act. Of course, U.S. EPA's administrative and regulatory actions regarding greenhouse gases, including the Tailoring Rule, are under several legal challenges by numerous parties. As mentioned above, we agree with Georgia EPD that there is "legal uncertainty" about the outcome of these challenges.

GIEC, GCC, GIA, GMA, and GFPPA generally understand that, if the permitting and regulation of greenhouse gases under the Clean Air Act proceeds according to EPA's current theory, without consideration of other arguments that "absurd results" can be avoided via reasonable interpretations of the Act, then the elevated PSD and Title V permitting thresholds would appear to be necessary in order to avoid "absurd results." **To that extent, we would be**

¹ The "absurd results" occasioned by U.S. EPA's administrative and regulatory actions regarding the regulation and permitting of greenhouse gases under the Clean Air Act are one indication that Congress never intended that the Clean Air Act reach the regulation and permitting of greenhouse gases. We would like to clarify that nothing in these comments or the submittal of these comments is intended to indicate that GIEC, GCC, GIA, GMA, and GFPPA, or any of their members, individually or collectively, necessarily support the regulation of greenhouse gases under the federal Clean Air Act or similar state or local laws. GIEC, GCC, GIA, GMA, and GFPPA, and their members, continue to evaluate the recent administrative and regulatory actions by U.S. EPA to begin the regulation of greenhouse gases under the federal Clean Air Act, and do not waive any or all of their respective rights to disagree with or challenge the legality of any particular U.S. EPA rule or action.

generally supportive of incorporating the elevated thresholds in the Tailoring Rule through the Proposed GHG Rules.

However, the Proposed GHG Rules appear to go beyond the adoption of the elevated PSD and Title V permitting thresholds in the Tailoring Rule. The Proposed GHG Rules adopt by reference the entirety of the U.S. EPA's new definition of the term "*subject to regulation*," as follows:

(iv) The definition and use of the term "subject to regulation" in 40 CFR, Part 52.21, as amended June 3, 2010, is hereby incorporated by reference²

U.S. EPA's new definition of *subject to regulation*, as it appears in the Tailoring Rule, includes the following language, in addition to the elevated permitting thresholds:

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 subchapter C of this chapter, 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

40 C.F.R. § 52.21(b)(49).

U.S. EPA explains in the preamble to the federal Tailoring Rule that, by adopting the above-quoted definition, they are "codifying" their own prior interpretive memoranda about applicability of Clean Air Act permitting and regulatory requirements to greenhouse gases. As a result, the Proposed GHG Rules may have the effect of affirmatively adopting into Georgia's regulations U.S. EPA's interpretation of the Clean Air Act's applicability to greenhouse gases, as codified in the above-quoted new definition of *subject to regulation*.

U.S. EPA's Clean Air Act permitting and regulatory applicability interpretation about greenhouse gases, as codified in the new definition of *subject to regulation*, is highly controversial. It is currently being challenged in at least two federal cases; one that challenges the Tailoring Rule and another that challenges the so-called Light-Duty Vehicle Rule.³ The Georgia Attorney General has filed a Motion to Intervene in the Light-Duty Vehicle Rule case, presumably to join the challenge to U.S. EPA's applicability interpretation about greenhouse gases. That the Proposed GHG Rules include the new definition of *subject to regulation*, which codifies U.S. EPA's applicability interpretation about greenhouse gases—the very same interpretation that is being challenged in the Light-Duty Vehicle Rule case—raises significant questions and potential legal concerns.

² This quoted section of the Proposed GHG Rules goes on to include provisions clarifying that, if any part of the term, *subject to regulation*, is determined to be invalid, unconstitutional, stayed, or is repealed or revoked, the same automatically occurs in the Georgia rules. GIEC, GCC, GIA, GMA, and GFPPA support inclusion of such severability provisions in the Proposed GHG Rules, to the extent that the Proposed GHG Rules are adopted in Georgia. Further, we suggest that consideration be given to expanding such severability provisions to cover all of Georgia's Air Quality Control Rules, not just the Proposed GHG Rules.

³ U.S. EPA's Light-Duty Vehicle Rule is described in EPD's Synopsis of the Proposed GHG Rules (Statement of Rationale). EPD's Synopsis also describes U.S. EPA's endangerment finding regarding greenhouse gases, which also is being challenged.

By adopting the Proposed GHG Rules as written, would Georgia be eroding the potential success of its own Motion To Intervene and, if granted, positions taken in the Light-Duty Vehicle Rule case? Is it possible that Georgia's adoption of the Proposed GHG Rules could be interpreted by a court as effectively waiving Georgia's ability to litigate the Light-Duty Vehicle Rule and the propriety of U.S. EPA's overall approach to greenhouse gas regulation under the Clean Air Act? These questions involve potentially serious legal implications, and, if they have not been carefully evaluated and vetted in consultation with the Georgia Attorney General's office, then that should probably occur before the Proposed GHG Rules are adopted.

We recommend that the following approach to the Proposed GHG Rules:

- a) **Revise the Proposed GHG Rules so as to avoid adopting the entirety of the new definition, *subject to regulation*, and only adopting the elevated PSD and Title V permitting thresholds and severability provisions (see footnote 2 above); and**
 - b) **Include in the regulatory record an express reservation of rights and statement of non-waiver with respect to the Proposed GHG Rules and Georgia's Motion To Intervene, and if granted, positions taken in the Light-Duty Vehicle Rule case, as well as in any other future challenges, proceedings, permitting actions, or other matters in which Georgia is involved.**
2. **Based upon its decision not to respond to a September 2 solicitation from U.S.EPA, EPD should publicly clarify its position about its authority under existing State laws to apply the PSD permitting program to greenhouse gas-emitting sources, and explain the basis for its apparent conclusion that the elevated permitting thresholds in the federal Tailoring Rule need to be adopted through new rulemaking to be effective in Georgia.**

On September 2, 2010, U.S. EPA initiated additional rulemaking related to the regulation of greenhouse gases under the Clean Air Act. U.S. EPA proposed two new rules to "fill the gap" for any state that cannot make any necessary changes by January 2011 to its PSD permitting program regarding the Tailoring Rule.⁴ In the "fact sheet" for its Proposed SIP Gap Filling Rules, U.S. EPA explains that:

The Clean Air Act (CAA) requires states to develop and follow state implementation plans (SIPs) that include requirements for issuing PSD permits. When federal permitting requirements change, as they did under the Tailoring Rule, states *may need* to modify these plans."

See Fact Sheet at www.epa.gov/nsr/documents/20100810SIPFIPFactSheet.pdf (emphasis added).

⁴ *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation*, 75 Fed. Reg. 53883 (Sept. 2, 2010), and *Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 53892 (Sept. 2, 2010) (the "Proposed SIP Gap Filling Rules").

U.S. EPA further explains in its Proposed SIP Gap Filling Rules that some of the states already have existing authority to regulate greenhouse gas emissions and to implement the Tailoring Rule under their state laws. In such states, no further state-level regulatory action would be required. Other states would have to change their laws. In its Proposed SIP Gap Filling Rules, U.S. EPA published two lists that it had developed indicating which states did or did not have such authority. U.S. EPA indicated that it based these lists upon "preliminary research," including the 60-day letters that it received from the states in response to their solicitation for comments in the Tailoring Rule. The Georgia EPD responded to U.S. EPA with such a 60-day letter on or about August 2, 2010.

In its September 2 Proposed SIP Gap Filling Rules, U.S. EPA included Georgia in the list of states that, according to "preliminary research," do have authority under their existing state laws to apply the PSD program to greenhouse gases. U.S. EPA requested of each such state including Georgia that it confirms this finding and informs U.S. EPA by October 4 if it was listed correctly. Specifically, U.S. EPA made the following request of Georgia and other states:

We request that each State with an approved PSD SIP (see table IV-2) that is not also one of the 13 States for which we propose a SIP Call review its PSD provisions to confirm that it applies the PSD program to GHG sources. We request that each of these states inform us if it has a SIP PSD applicability provision that does not by its terms apply to pollutants "subject to regulation" or similar language, or otherwise apply to GHG sources. In addition, we request that each of these states inform us if it has another State law provision or legal interpretation that may have the effect of limiting PSD applicability to air pollutants covered by EPA's PSD program as of a certain date, and therefore does not include GHGs. For any State whose PSD program, for any of these reasons, may not apply to GHG-emitting sources, we request the same information described in section IV.E.1 of this preamble as soon as possible during the comment period. Once we receive this information, if we believe it shows that the State's SIP PSD program does not apply to GHG sources, we will finalize a finding of substantial inadequacy and a SIP Call on the same schedule as any of the states for which we are proposing a finding and SIP Call.

75 Fed. Reg. 53901 (Sept. 2, 2010).

It is our understanding that Georgia chose not to respond in writing to the above-quoted request for confirmation from U.S. EPA. Although EPA's request could be interpreted to require a response from a State only if the State's PSD program is inadequate, EPD's lack of response to U.S. EPA's request adds to the uncertainty surrounding the Proposed GHG Rules. For example, it is possible that Georgia's existing laws already may authorize EPD to not only regulate greenhouse gases under the PSD program, but to apply the elevated permitting thresholds in the Tailoring Rule without the need for further rulemaking. Georgia's PSD regulations already include the Clean Air Act term "regulated NSR pollutant," which is defined to include the following:

... (iv) Any pollutant that otherwise is *subject to regulation* under the Act as defined in paragraph (b)(49) of this section. (Emphasis added.)

40 C.F.R. § 51.21(b)(50)(iv).

"Paragraph (b)(49)," as referenced in the above quote, is the current Tailoring Rule definition of *subject to regulation*. It is possible that the definition of *subject to regulation* and the elevated permitting thresholds in the federal Tailoring Rule may have automatically been incorporated into Georgia's regulations through previously adopted PSD regulations and the term "regulated NSR pollutant." See Ga. Comp. R. & Regs. 391-3-1-.02(7)(a)(2). There undoubtedly are other implications and issues to be considered.

As a result, we request that EPD provide some clarification in this area, including responding to the following questions:

- a) Was Georgia properly listed by U.S. EPA as one of the states that already had existing authority to regulate greenhouse gases under state law?
- b) Has EPD determined that it already has such authority? If so, was this determination made in consultation with the Georgia Attorney General's Office?
- c) Does EPD's decision to adopt the Proposed GHG Rules represent a conclusion by EPD that the definition of *subject to regulation* and the elevated permitting thresholds in the federal Tailoring Rule need to be adopted through new rulemaking to be effective in Georgia and are not already incorporated into Georgia's regulations, for example, through the existing term "regulated NSR pollutant."
- d) With respect to the Tailoring Rule, did the Georgia Attorney General's Office participate and concur with any of the above determinations and decisions, including EPD's apparent determination that existing State law did not already authorize implementation of the Tailoring Rule in Georgia, including the elevated permitting thresholds, and that the Proposed GHG Rules were necessary?
- e) What is EPD's understanding as to U.S. EPA's present position with respect to Georgia's decision not to respond to their request for confirmation by October 4? Does U.S. EPA view Georgia's decision not to respond as confirmation that EPD has determined that it has authority to regulate greenhouse gases under existing Georgia law?

GIEC, GCC, GIA, GMA, and GPFPA are concerned that, without such answers and clarification, the opportunity to provide meaningful comments during the public notice and comment period for the Proposed GHG Rules may have been limited. Hopefully, the relevant information can be provided by EPD during the November GHG Workshops. Because of the complexity of the legal questions that are involved, we suggest consultation with the Georgia Attorney General's office.

3. EPD should make full public disclosure of the circumstances surrounding any request of and plans by U.S. EPA for expedited review and approval of the Proposed GHG Rules into the Georgia SIP, including but not limited to, opportunities for public notice and comment regarding any partial approval or no-action decision by U.S.EPA.

If the Proposed GHG Rules are adopted, then we would expect that they will be proposed by U.S. EPA for adoption into Georgia's SIP. We understand that Georgia EPD may have requested U.S. EPA to expedite the SIP approval process regarding the Proposed GHG Rules. We assume that, if such request was made, it was upon invitation by U.S. EPA and in light of U.S. EPA's January 2011 effective date for greenhouse gas regulation.

However, we have no better information or details regarding any such expedited SIP approval process. For example, it is unclear whether such expedited process is in parallel to or merged with EPD's public notice and comment period for the Proposed GHG Rules.

As a result, we respectfully request more information from EPD regarding:

- a) Any request by EPD of U.S. EPA for an expedited SIP approval process, involving simultaneous review by U.S. EPA of the Proposed GHG Rules as a proposed SIP revision;
- b) Whether or not U.S. EPA has undertaken any such expedited SIP approval process, and, if so, will there be a single, merged State-level notice and comment period;
- c) Any information received by EPD that U.S. EPA has decided not to approve the entirety of the Proposed GHG Rules as currently written; and
- d) If the U.S. EPA does not approve into the Georgia SIP the entirety of the Proposed GHG Rules, will there be opportunity for public notice and comment on that decision? Will there be a separate opportunity for notice and comment on the Georgia SIP decision other than the State notice and comment period that is scheduled to close today?
- e) Any implications and the practical effect of any such U.S. EPA decision not to approve the entirety of the Proposed GHG Rules.

Because of the complexity of the legal questions being raised here, we again suggest that any related evaluations and conclusions should be reached in consultation with the Georgia Attorney General's office.

4. EPD should try to quantify the cost impact of the Proposed GHG Rules to the agency, to the regulated sources and to the broader Georgia economy and allow public comment on the results.

In its Synopsis for the Proposed GHG Rules, EPD summarizes the U.S. EPA estimates of costs under the Tailoring Rule, as follows

With the Tailoring Rule thresholds in place, the combined impact of the PSD and Title V permitting requirements to state permitting authorities drops down to \$36 million nationally. This amount reflects a 42% increase in cost (direct costs only) over the current program. In addition to the direct administrative burdens calculated by U.S. EPA, permitting authorities will incur other burdens, including significant support and outreach activities by permitting and public affairs staff for the many newly regulated sources as well as increased compliance activity by state environmental agencies. The remaining impact to regulated industry was more difficult to calculate because U.S. EPA did not calculate it directly. However, U.S. EPA's estimated administrative costs to industry are approximately 2.5 times greater than the administrative costs to the state permitting authorities. Therefore, the additional cost to industry, with the Tailoring rule thresholds in place, are approximately \$90 million nationally (this does not include the cost of additional air pollution controls or additional compliance costs). As described above, the costs without the Tailoring rule on regulated industry and state permitting authorities are \$55 billion and \$22 billion, respectively.

See Synopsis of the Proposed Amendments (Statement of Rationale) at 3-4.

As indicated above, the nationwide costs of implementing the Tailoring Rule are substantial; for example, a “42% increase in cost (direct costs only) over the current program.” And these are admittedly partial costs only and do not include the cost of additional air pollution controls or additional compliance costs. What share of these costs will land on Georgia is unclear, as is the cost to Georgia industry of additional air pollution controls and compliance issues.

EPD does not provide in the Synopsis any cost estimates for Georgia with respect to the Proposed GHG Rules. Instead, the Synopsis includes the following concluding statements:

In conclusion, the costs imposed by regulating greenhouse gases under this proposed rule change are no more than that of the federal rule. And, the provisions of the Greenhouse Gas Tailoring Rule will provide cost savings and increased regulatory certainty to the regulated industry compared to the expected costs and lack of regulatory certainty that would result from not adopting the federal Greenhouse Gas Tailoring Rule. No direct costs will be imposed on local governments or the general public.

Id. at 5.

EPD’s above-quoted conclusory statement about the relative costs to Georgia of adopting or not adopting the Tailoring Rule may be correct. Nevertheless, it begs the question about how much it will cost Georgia to adopt the Proposed GHG Rules. We request that EPD quantify cost-impacts to the agency, to the regulated sources, and to the broader state economy and to seek public comment on the resulting cost estimates.

5. Consideration should be given to keeping the public notice and comment period open until after the November 9, 10 and 19 GHG Workshops.

On EPD’s public registration webpage for the GHG Workshops, the following statements are made:

Georgia EPD is in the process of beginning to develop practical and enforceable regulations to incorporate these new federal requirements. As part of this process, a GHG Workshop is being conducted for representatives from potentially impacted sources, in order to discuss how EPD will implement the new GHG permitting requirements.

* * *

There will be many opportunities to ask questions and to otherwise provide input to EPD.” (Emphasis added.)

The above-quoted statements suggest that the GHG Workshops are intended to be part of the process for developing regulations, with opportunity for parties to ask questions and provide input. Although the registration webpage indicates that the GHG Workshops are “not intended to supercede the official rulemaking process,” and that “a public hearing to take comments” was scheduled for October 19, we believe that a fair reading of EPD’s public registration webpage is that the GHG Workshops are part of the public regulatory process regarding the Proposed GHG Rules.

Regardless, the November GHG Workshops are a very good idea, and the overwhelming registration is indicative of the level of public interest in the Proposed GHG Rules. Although the Proposed GHG Rules are, apparently, being advanced without a written public participation plan or stakeholder identification and involvement, the November GHG Workshops offer a perfect opportunity, as EPD states, to answer questions and receive input from stakeholders and other interested parties. We again request that the notice and comment period open in order to take advantage of the opportunity offered by the November GHG Workshops for greater involvement by stakeholders and interested parties.

Without more meaningful information from EPD related to the many questions and comments described above in this correspondence, the ability of interested parties to comment on the Proposed GHG Rules is limited.

GIEC, GCC, GIA, GMA, and GPFPA appreciate the opportunity to provide comments on the Proposed GHG Rules. Our hope is that these comments help guide us all towards a resolution regarding how best to deal with U.S. EPA's Tailoring Rule in an expeditious but appropriate manner that ensures, to the greatest extent possible, both a continuation of the protection of the environment and renewed economic prosperity in Georgia.

Sincerely,

GEORGIA INDUSTRY ENVIRONMENTAL COALITION

GEORGIA CHEMISTRY COUNCIL

GEORGIA MINING ASSOCIATION

GEORGIA PAPER AND FOREST PRODUCTS ASSOCIATION

GEORGIA INDUSTRY ASSOCIATION

Please direct responses to these comments to Deborah Phillips, Executive Director, Georgia Industry Environmental Coalition, 3200 Town Point Drive, Suite 100, Kennesaw, Georgia 30144 or dphillips@giec.org.