

October 26, 2010

**VIA U.S. MAIL AND
ELECTRONIC MAIL**

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Subject: Comments of Oglethorpe Power Corporation to the Georgia Environmental Protection Division's September 2010 Proposed Amendments to Georgia's Rules For Air Quality Control, Chapter 391-3-1.

Dear Mr. Capp:

In September 2010, the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources ("DNR") proposed certain changes to its rules for air quality control, found in Chapter 391-3-1 of the Rules and Regulations of the State of Georgia. According to the notice that accompanies the proposed changes, the revisions are intended to incorporate certain provisions of the federal Greenhouse Gas ("GHG") Tailoring Rule,¹ and to make other changes for consistency with the federal rules, including updating the effective dates of the federal provisions incorporated by reference. EPD requests comments on the proposal by October 26, 2010. More specifically, EPD's rules are being revised to incorporate prevention of significant deterioration ("PSD") provisions for fine particulate matter, promulgated by U.S. EPA in 2008,² the GHG Tailoring Rule and various other changes. This rule is also being revised to include the effective date of the provisions of 40 CFR Part 52.21 incorporated by reference. Finally, according to the notice, due to the "legal and political uncertainty regarding the ... [GHG Tailoring Rule] provisions," language was included in the proposal to clarify that regulation of GHGs under Georgia's PSD permitting program stops if it ceases at the federal level.

¹ 75 Fed. Reg. 31514 (June 3, 2010).

² See 73 Fed. Reg. 28321 (May 16, 2010).

I. General Comments

Oglethorpe Power has substantial interests in EPD's proposed rule. The Corporation is the largest electric generation cooperative in the United States, in terms of kilowatt-hour sales, with approximately \$6.5 billion in assets capable of generating approximately 5790 megawatts. Through its Electric Membership Corporation ("EMC") member/owners, Oglethorpe Power generates electric power for approximately 65% of the land area of the State of Georgia. This generated power serves 39 of the 42 EMCs in Georgia, who collectively provide electricity to more than 4.1 million Georgians. As the owner and/or operator of such capacity, much of which is fired by fossil fuels (coal, natural gas and oil), thus emitting substantial quantities of CO₂, the proposed rule presents significant issues for future operations, especially for any modifications that may occur at our plants.

In general, the Corporation's comments are centered on two aspects of the State's adoption of the provisions needed to implement Federal law as it pertains to the Tailoring Rule:

1. The sufficiency of public notice and the opportunity to comment on the State Implementation Plan ("SIP"), under State and Federal law and the consequent effect both have on the validity of the SIP; and
2. The unintended consequences that may result if the SIP fails to mirror state air quality regulations.

Our more specific comments on these points follow.

II. Scope of EPD's Actions for the Tailoring Rule

The Tailoring Rule was promulgated by EPA on June 3, 2010. In the rule, when explaining its approach, EPA states that many states and local issuing authorities will be able to immediately implement the rule and its two step method for regulating GHGs under the Prevention of Significant Deterioration ("PSD") program of the Clean Air Act (the "CAA"),³ by interpreting the term "subject to regulation" in existing state PSD provisions to include GHGs. EPA explains through its rulemaking litany for GHGs how such substances become "subject to regulation" under the CAA (thus triggering the application of the PSD provisions) on January 2, 2011.⁴

In the Tailoring Rule, EPA requests that states submit information to their EPA regional office conveying whether the state will apply the meaning (established in the rule) of the term "subject to regulation" in implementing their PSD and Title V permitting programs going forward and, if so, whether the state intends to do so without undertaking a regulatory or legislative process. If a state must revise its statutes or regulations to implement the Tailoring Rule, EPA further requests

³ 42 U.S.C. §§ 7401, *et seq.*, (CAA §§ 101, *et seq.*).

⁴ *See generally* 75 Fed. Reg. at 31519 – 31522.

that an estimate of the time needed to adopt final regulations be provided in the letter. Finally, in a September 2010 proposed rule to address whether SIPs are adequate to meeting the PSD requirements for GHGs, EPA requested that the states (including Georgia) review their SIP and inform EPA if its SIP does not apply to GHG-emitting sources no later than October 4, 2010.⁵

EPD responded to EPA's first request via letter dated August 2, 2010. There, EPD told EPA that it intends to adopt EPA's definition of the term "subject to regulation" set forth in 40 CFR § 52.21(b)(49) by January 1, 2011. By implication, therefore, EPD informed EPA that a rulemaking change to apply the meaning of the term "subject to regulation" was needed. No mention was made of whether a corresponding change to EPD's SIP was also needed in the August 2, 2010 letter.

EPD did not respond, at least in writing, to EPA on the second request. One could infer from that lack of response that EPD believes that its SIP already conveys the requisite authority needed to regulate GHGs. However, at this point the public does not have a clear understanding of whether EPD interprets its SIP so broadly – *i.e.*, whether the current SIP applies to GHGs, the nature and source for such an interpretation, or what further changes to the SIP are needed for the regulation of GHGs.

SIP revision requirements, governing how (and upon what schedule) EPA can force states to amend their PSD SIPs are found in two subsections of the CAA – §§ 110 (a) and 100 (k)(5). Section 110(k)(5) does not apply when, as here, EPA revises its 40 C.F.R. Part 51 rules (EPA rules that set out prospective new minimum PSD requirements for SIPs). Instead, CAA § 110(a) is automatically triggered, placing states on a three year schedule, from the time EPA's triggering rules are adopted – to submit conforming SIPs.⁶ *See also* 40 C.F.R. § 51.166 (a)(6)(i), which provides that:

Any State required to revise its implementation plan by reason of an amendment to this section [i.e., 40 C.F.R. § 51.166] ... shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register.

Because section 51.166 gives states until June 3, 2013 to submit prospectively applicable PSD SIP revisions that address GHG emissions, EPA's premise that the Tailoring Rule imposes a construction moratorium absent a SIP revision (or a Federal Implementation Plan), beginning on January 2, 2011 is unlawful, and should not be the basis to goad the Division to interpret its SIP in a way never intended by the Director or the Board of Natural Resources.

⁵ 75 Fed. Reg. 53892, 53896 (September 2, 2010).

⁶ Here, Georgia's deadline is June 3, 2013 (three years from EPA promulgation of the Tailoring Rule – June 3, 2010).

The notice that is the subject of these comments does not appear to be a proposal to amend the provisions of Georgia's SIP. However, in the Statement of Rationale that accompanies the notice, EPD states that it is pursuing a path that calls for a revision to its SIP due to the proposed changes in its rules. As we understand it, EPA has in fact reviewed this proposal, both as a rule and as a proposed change to Georgia's SIP, and has responded in writing to the proposal. In light of these issues, Oglethorpe requests that EPD:

1. Make available all decisional documents, including but not limited to all communications between EPD and EPA, pertaining to EPD's SIP for GHGs; and
2. Confirm whether a change to the SIP is required in light of the proposed changes in its rules and whether public notice of such changes (as required under Federal and State law), as well as any decisions made by EPD regarding the scope of its SIP pertaining to GHGs will be provided, and the anticipated schedule for such action.

EPD should be careful to properly amend its SIP pursuant to the requirements of state and federal law,⁷ to avoid any question of whether the provisions of the Tailoring Rule (specifically, the significance provisions for CO₂e) are legally effective in Georgia. Stated another way, and as discussed further below, EPD should ensure that there are no inconsistencies between the provisions in its air quality regulations and the parallel provisions in its SIP.

III. Potential State Inconsistencies

In the proposed rule, EPD includes a sunset provision that would "cease" regulation of GHGs in Georgia (under PSD and Title V) if it "ceases at the federal level." As we understand it, these same sunset provisions were included in the EPA submission as proposals to amend Georgia's SIP. Oglethorpe strongly supports an approach, as proposed by EPD that includes these sunset provisions in both areas of state law. Inclusion of such provisions is essential if EPD is to remove all doubt that if regulation of GHGs ceases at the federal level, it will also stop at the State level.

As we understand it, when EPA reviewed and responded to this proposal, however, it indicated that EPA would not approve these sunset provisions as part of proposed changes to Georgia's SIP. If so, then the sunset provisions would not be part of the Georgia SIP, although they would remain in EPD's PSD and Title V rules. This produces an inconsistency in the State's rules and its SIP, one that could be problematic for the regulated community if actions delay or eviscerate the effect of the Tailoring Rule and its related progeny, for example, if the U.S. Court of Appeals for the District of Columbia Circuit issues a stay of the Tailoring Rule, the light-duty vehicle rule and the PSD interpretive memorandum, pending further proceedings. Should that occur, then regulation of GHGs at the Federal level would effectively "cease." However, if the Georgia SIP were construed to be an independent source of regulation for GHGs, then Georgia could be

⁷ See, e.g., CAA § 110(a)(1); O.C.G.A. § 50-13-4 (2009).

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placed in the unenviable position of being one of the few places in the U.S. where regulation of GHGs (at the 100/250 tpy CO₂ level for new sources and 0 tpy CO₂ threshold for major modifications) would apply, without any relief offered by the CO₂e thresholds in the Tailoring Rule. Since the general rule is that the SIP controls when inconsistent with state regulations,⁸ the existence of the sunset provisions solely in state rules appears to offer no relief from this situation.

Given this, EPA's approval of Georgia's SIP should include the exact same sunset provisions as are included in this proposal.

Oglethorpe Power appreciates the opportunity to comment on EPD's September 2010 proposed rule. If you have any questions about these comments, please do not hesitate to call me at 770-270-7166.

Sincerely,



Douglas J. Fulle
Vice President, Environmental Affairs

DJF:dmc

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⁸ See *U.S. v. Cinergy Corp.*, Nos. 09-3344, 3350 & 3351 (October 12, 2010).