Mr. Karl Brooks  
Regional Administrator, Region VII  
United States Environmental Protection Agency  
901 North 5th Street  
Kansas City, KS 66101

Re: Response Regarding Greenhouse Gas Tailoring Rule

Dear Administrator Brooks:

The Missouri Department of Natural Resources (Department) submits the following response in accordance with the U.S. Environmental Protection Agency (EPA) final rule Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, which was promulgated on June 3, 2010 ("tailoring rule" or "final rule"). Within the federal register notice accompanying the tailoring rule, EPA requested information regarding the state’s permitting program and its planned response to the tailoring rule. EPA’s final rule warns that failure to submit this letter by August 2, 2010 will lead to a narrowing of approval by EPA for the state’s existing State Implementation Plan (SIP) or Title V programs. The Department intends to fully comply with the requirements outlined in EPA’s final rule as described below in order to maintain fully approvable Title V and Prevention of Significant Deterioration (PSD) programs, subject to applicable state law regarding the rulemaking process, which includes the approval of the Missouri Air Conservation Commission. This will ensure that the state maintains full authority over its permitting programs, and will avoid the need for EPA to exercise its oversight authority to require states to meet minimum federal standards.

EPA’s tailoring rule, which becomes effective under federal law on August 2, 2010, codifies certain interpretations and definitions of terms such as “subject to regulation,” “major source,” and “regulated NSR pollutant” in a manner that results in a phased approach to regulating greenhouse gases (GHG) for certain sources under the federal Clean Air Act, instead of applying the 100 or 250 tons per year thresholds applicable to other types of pollutants. During the first phase of the rule, which begins on January 2, 2011, PSD or Title V requirements will apply to sources’ GHG emissions only if such sources are already subject to PSD or Title V anyway due to their non-GHG pollutants. Specifically: (1) under the PSD program, best available control technology (BACT) requirements will apply to projects that increase net GHG emissions by at least 75,000 tons per year of CO2 equivalent, if the project also significantly increases emissions of at least one non-GHG pollutant; and (2) under the Title V program, only existing sources with Title V operating permits, or new sources obtaining such permits, for non-GHG pollutants will need to address GHGs in their operating permit. During the second phase of the rule, which begins on July 1, 2011, additional large sources of GHG emissions with the potential to emit at
least 100,000 ton per year of CO2 equivalent will become subject to PSD and Title V requirements. EPA also committed to taking a third step of including more sources of GHGs via a later rulemaking to be completed by July 1, 2012 and to become effective beginning July 1, 2013. However, sources with emissions below 50,000 tons per year of CO2 equivalent will not be subject to PSD or Title V permitting before April 30, 2016 after further study is completed.

EPA’s final rule asks states to respond to two specific information requests. The first request is for states to indicate whether they will apply the meaning of the term “subject to regulation” established by EPA in the tailoring rule in implementing both their PSD and Part 70 Title V permitting programs, and if the state intends to do so without undertaking a regulatory or legislative process. The second request asks for an estimated timeframe from states which need to revise statutes or regulations.

The Department intends to follow the state rulemaking process in order to apply the meaning of the term “subject to regulation” in implementing its permitting programs. EPA suggests that its approach to regulating greenhouse gases through further defining key permitting terms may allow some states to more quickly adopt and implement the tailoring rule. EPA further suggests that absent any unique requirements, state programs intended to mirror federal PSD program regulations may be able to immediately incorporate greenhouse gases as a New Source Review pollutant based on EPA’s interpretation as embodied in the tailoring rule.

EPA’s interpretive approach is not feasible for the Department. While EPA is changing federal applicability thresholds for sources of GHGs to incorporate the tailoring approach, and limiting the scope of EPA approval of SIPs consistent with these thresholds, the state rules containing the originally approved SIP thresholds must also be revised before the Department can reasonably enforce any new permitting thresholds. For example, state regulations at 10 CSR 10-6.060(8) largely incorporate by reference the 2008 version of 40 CFR 52.21, including its definition of “regulated NSR pollutant.” However, in accordance with Section 536.031.4 RSMo, this state rule expressly “does not incorporate any subsequent amendments or additions.” Further, Section 643.075.1 RSMo makes it “unlawful for any person to commence construction of any air contaminant source in this state, without a permit therefor, if such source is of a class fixed by regulation of the commission which requires a permit therefor.” Over the years, Missouri has developed state regulations to be consistent with EPA PSD requirements for sources that emit air pollutants subject to regulation at the 100/250 ton per year threshold. EPA’s approach is also problematic for the Department because our state Administrative Procedure and Review statutes prohibit state agencies from enforcing rules without following the procedures in Chapter 536, which include filing with the secretary of state a notice of proposed rulemaking and a subsequent final order of rulemaking. Section 536.010 RSMo specifically defines the term “rule” to mean “each agency statement of general applicability that implements, interprets, or prescribes law or policy” subject to certain exceptions that appear to be inapplicable.

The result is that Missouri will need to amend its regulations in order to implement EPA’s interpretation of “subject to regulation” and its revised definitions and changes to threshold levels. Such state rulemakings which implement federal requirements are authorized by
Sections 643.050 and 643.055 RSMo, and Department staff are not aware of any statutory language that would need to be changed in order to implement EPA’s tailoring rule.

The Department of Natural Resources’ Air Pollution Control Program is currently reviewing EPA’s final rule and its state regulations to determine what changes are necessary. Afterward, the rulemaking process will begin. Department rulemakings follow a sometimes lengthy process that includes publication in the Missouri Register and presentation at a public hearing. The timeframe to accomplish this depends upon a number of factors, but it typically takes 12-18 months for a rule to become permanently effective. It may be possible to propose an emergency rulemaking on the basis of a compelling governmental interest pursuant to Section 536.025, RSMo. An emergency rulemaking would allow the department the ability to issue permits that address GHGs beginning in January 2011, but because an emergency rulemaking is only effective for 180 days, a successive permanent rulemaking would also be necessary. Even in the absence of an emergency rule, many sources covered by Phase 1 or 2 of the tailoring rule may prefer to address federal GHG requirements as part of any permits issued by the Department.

EPA’s timeline requiring Missouri to issue permits addressing GHGs beginning in January 2011 is aggressive. The controversial nature of regulating GHGs coupled with probable changes to permitting requirements make the task of informing and educating our stakeholders, legislators, and Department staff about the new requirements difficult in such a short period of time.

In addition, despite these new requirements, there is little guidance from EPA regarding BACT determinations, which require thorough technical analysis. Without guidance from EPA regarding acceptable BACT analysis for GHGs, states will have to develop their own BACT procedures. Unless EPA provides this guidance before January 2011, the PSD permitting process could become even more cumbersome and time consuming. The Department urges EPA to provide BACT guidance on GHGs as soon as possible and before states are required to implement this rule.

Thank you for your attention to this matter. If you have any questions feel free to contact Paul Myers with the Department’s Air Pollution Control Program at P.O. Box 176, Jefferson City, MO 65102 or by phone at (573) 751-4817.

Sincerely,

DIVISION OF ENVIRONMENTAL QUALITY

[Signature]
Leanne Tippett Mosby
Acting Division Director

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