



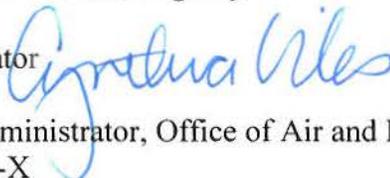
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 19 2014

ASSISTANT ADMINISTRATOR  
FOR ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: No Action Assurance Regarding EPA-Issued Step 2 Prevention of Significant Deterioration Permits and Related Title V Requirements Following *Utility Air Regulatory Group v. Environmental Protection Agency*

FROM: Cynthia Giles, Assistant Administrator 

TO: Janet McCabe, Acting Assistant Administrator, Office of Air and Radiation  
Regional Administrators, Regions I-X

On July 24, 2014, the Office of Air and Radiation (OAR) and the Office of Enforcement and Compliance Assurance (OECA) jointly issued a memorandum in response to the Supreme Court's decision in *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA)*, 124 S.Ct. 2427 (2014). See "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*" (July 24, 2014) (available at <http://www.epa.gov/nsr/documents/20140724memo.pdf>). In that memorandum, the agency provided its preliminary thinking on the implications of the decision for PSD permits issued to "Step 2" sources. Generally speaking, Step 2 sources<sup>1</sup> are sources that were classified as major, and required to obtain a Prevention of Significant Deterioration (PSD) or title V permit, based solely on greenhouse gas (GHG) emissions. The Supreme Court decision in *UARG* held that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD or title V permit and that EPA's regulations implementing that approach are invalid. The July 24, 2014 memorandum indicated that the agency planned "to provide additional views in the future with respect to Step 2 sources that have already obtained a PSD permit" and noted that it might be appropriate to "remove GHG BACT limitations from such permits and convert such permits into minor source permits where this is feasible and minor source requirements remain applicable."

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<sup>1</sup> Such sources are generally known as "Step 2" sources because the EPA deferred the requirement for such sources to obtain PSD and title V permits until Step 2 of its phase-in of permitting requirements for greenhouse gases under the Prevention of Significant Deterioration and title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 35569-71 (June 3, 2010); 40 C.F.R. § 52.21(b)(49)(v).

Today, OAR provided further information on how it intends to proceed regarding EPA-issued Step 2 PSD permits.<sup>2</sup> More specifically, the EPA described its intention to undertake a rulemaking action to revise 40 C.F.R. § 52.21(w) of EPA's PSD regulations to enable EPA to apply section 52.21(w) to rescind EPA-issued Step 2 PSD permits consistent with EPA's understanding of the Supreme Court's decision. The EPA expects to be able to complete this rule no later than December 31, 2015. After the appropriate revisions to 40 C.F.R. § 52.21 are completed, EPA will then proceed to rescind EPA-issued Step 2 PSD permits in response to requests from applicants that can demonstrate they are eligible for rescission.

As noted in OAR's memorandum, it may be December 31, 2015 before the EPA completes the rulemaking process that will allow the agency to rescind any Step 2 PSD permits that it issued under the regulations the Supreme Court held to be invalid. We are aware that the agency has already received requests to rescind some EPA-issued Step 2 PSD permits, and to issue a No Action Assurance regarding some EPA-issued Step 2 PSD permit provisions in the interim.<sup>3</sup>

The EPA is sensitive to the difficulties faced by sources that have EPA-issued Step 2 PSD permit requirements that may remain in place until EPA can fully implement the Supreme Court's decision. Thus, OECA is issuing the narrowly-tailored No Action Assurance set forth below to sources with EPA-issued Step 2 PSD permits. The Supreme Court's decision finding portions of EPA's regulations to be invalid is an "extremely unusual circumstance[] where an assurance is clearly necessary to serve the public interest" and, until EPA's rulemaking process is complete, no other mechanism is adequate to address the situation. See "Processing Requests for Use of Enforcement Discretion," at 2 (Mar. 3, 1995); "Policy Against 'No Action' Assurances (Nov. 16, 1984). The public interest that is served in this instance is the granting of interim relief from GHG terms and conditions in EPA-issued Step 2 PSD permits that may be rescinded after the Supreme Court decision, any related terms and conditions in title V permits, and specific title V regulatory requirements that may be triggered by the existence of EPA-issued Step 2 PSD permits.

#### **No Action Assurance for EPA-Issued Step 2 PSD Permit Terms and EPA-Issued Step 2 PSD Permit Terms in Title V Permits**

This No Action Assurance establishes that the EPA will exercise its enforcement discretion not to pursue enforcement of the terms and conditions relating to GHGs in a source's EPA-issued Step 2 PSD permit, and for related GHG terms and conditions that are contained in the source's title V permit, if any.

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<sup>2</sup> In this memorandum, the term "EPA-issued Step 2 PSD permit" includes Step 2 PSD permits issued by the EPA Regions, as well as Step 2 PSD permits issued by states delegated to issue permits on EPA's behalf under 40 C.F.R. § 52.21. See 40 C.F.R. §52.21(u). The term "state-issued Step 2 PSD permits" refers to Step 2 PSD permits issued by states pursuant to the applicable EPA-approved State Implementation Plan provisions.

<sup>3</sup> Sources seeking a No Action Assurance may fall into one of three categories; they could have (1) built their facility consistent with the Step 2 PSD permit and have started operations, but seek relief from operational requirements in the permit, (2) built the facility consistent with the Step 2 PSD permit, but have not started operations and seek relief from testing and operational requirements in the permit, or (3) not finished construction and seek relief from all aspects of the permit.

This No Action Assurance applies only to potential violations of the GHG requirements in an EPA-issued Step 2 PSD permit itself (and related title V permit terms, if any). In other words, the EPA will exercise its discretion to not include a count for violating the GHG requirements in an EPA-issued Step 2 PSD permit (or any related terms in a title V permit) in any enforcement action, as provided in this memorandum.

However, there are three important limitations on the scope of this No Action Assurance. First, as outlined above, the No Action Assurance applies only to the GHG-related terms and conditions in an EPA-issued Step 2 PSD permit (and any related terms in a title V permit). The No Action Assurance does not apply to any terms or conditions of an EPA-issued Step 2 PSD permit which apply to non-GHG pollutants. For example, as noted in the July 24 memorandum and OAR's memorandum of today, a source with an EPA-issued Step 2 PSD permit may now have other regulatory or permitting obligations (*e.g.*, minor New Source Review (NSR) requirements, which generally concern sources emitting pollutants subject to National Ambient Air Quality Standards (NAAQS)). The source may have previously not needed to obtain a minor NSR permit because it was previously considered a major source and obtained an EPA-issued Step 2 PSD permit to satisfy its preconstruction permitting obligations. Until such time as the source and the state permitting authority can determine whether and how to replace Step 2 PSD permit conditions for such pollutants with a permit satisfying minor NSR requirements, continued compliance with PSD permit terms and conditions for such pollutants is important to protect the NAAQS.

Second, if a source's action that is in violation of a GHG condition in an EPA-issued Step 2 PSD permit triggers another requirement, or violates another state or federal requirement, then the EPA may enforce that separate (non-Step 2 PSD permit) requirement. For example, the source may wish to confirm that the existence of, and compliance with, the EPA-issued Step 2 PSD permit is not considered a necessary method for complying with other federal, state or local requirements (*e.g.*, the state is presuming the source builds consistent with the efficiency requirement in the EPA-issued Step 2 permit in order to satisfy other state air pollution requirements). Therefore, sources are encouraged to consult with their state or local air pollution control agency before deciding how to proceed regarding their EPA-issued Step 2 PSD permit.

Third, this No Action Assurance does not grant relief from requirements that, while similar or identical to the EPA-issued Step 2 PSD permit terms, are mandated by separate statutory or regulatory provisions. For example, a source may be required to install and operate a carbon dioxide (CO<sub>2</sub>) monitor under the EPA-issued Step 2 PSD permit, but it may also be required to install and operate a CO<sub>2</sub> monitor pursuant to the Acid Rain regulations at 40 C.F.R. Part 75. Accordingly, this No Action Assurance would cover only the CO<sub>2</sub> monitoring requirement in the EPA-issued Step 2 PSD permit (and any related title V permit terms), and would not cover any other requirements related to CO<sub>2</sub> monitors.

### **No Action Assurance for Title V Regulatory Requirements**

As noted in OAR's memorandum, the EPA understands that title V permitting authorities and sources with EPA-issued Step 2 PSD permits have asked about the extent to which such sources

need to address the EPA-issued Step 2 PSD permit requirements in an application for a title V permit. A permitting authority and a few sources have also asked whether they should submit such a title V permit application at all. Consistent with the July 24, 2014 memorandum, and in order to act consistently with our understanding of the Supreme Court's decision pending regulatory action to effectuate that decision, the EPA will exercise its enforcement discretion not to pursue enforcement of provisions of Federal regulations or provisions in EPA-approved title V programs to the extent that the provisions:

- (1) Require a source to obtain a title V permit solely because it has an EPA-issued Step 2 PSD permit;
- (2) Require a source to incorporate and assure compliance with EPA-issued Step 2 PSD permit conditions in a new title V permit the source is obtaining based on non-GHG emissions or requirements; or
- (3) Require a source with an existing title V permit to amend its title V permit to incorporate and assure compliance with the terms and conditions of an EPA-issued Step 2 PSD permit.

#### **Effective Date of the No Action Assurance**

As noted in today's OAR memorandum on this matter, the revisions to 40 C.F.R. § 52.21(w) may not be final until December 31, 2015; EPA will then need to receive and process any requests to rescind EPA-issued Step 2 PSD permits, and state permitting agencies may need to subsequently revise title V permits. Therefore, this No Action Assurance is effective immediately to sources with EPA-issued Step 2 permits, and it will remain in effect for all covered sources until 11:59 PM EDT, September 30, 2016. This No Action Assurance ceases to apply to a source once its EPA-issued Step 2 PSD permit is rescinded, and if applicable, its title V permit is accordingly revised, whichever is later.

The EPA reserves the right to revoke or modify this No Action Assurance at any time.

#### **State-Issued Step 2 PSD Permits and Any Related Title V Requirements Are Not Covered**

As discussed above, this No Action Assurance applies only to the GHG-related terms and conditions of certain EPA-issued Step 2 PSD permits and any related title V permit provisions, and those title V regulatory requirements that may be triggered by the existence of the EPA-issued Step 2 PSD permit. It does not apply to state-issued Step 2 PSD permits (permits issued by states with an approved PSD program in its State Implementation Plan), any related title V permit provisions, or any title V permit or regulatory requirements that may be triggered by the existence of the state-issued Step 2 PSD permit.

This No Action Assurance does not extend to state-issued Step 2 PSD permits because the EPA is not able to determine at this time whether other state authority-based mechanisms (*e.g.*, state authority to rescind the permit) are available to provide relief from the state-issued Step 2 PSD

permit requirements under state law.<sup>4</sup> In addition, as stated in the July 24 memorandum, we do not read the Supreme Court's decision as precluding states from retaining permitting requirements for major sources of GHG emissions to the extent state law provides independent authority to do so. The EPA also does not want to pre-judge an approved state's decisions regarding its response to the Supreme Court's decision; therefore, sources with state-issued Step 2 PSD permits should consult their state permitting agency regarding the actions that the state intends to take with regard to its Step 2 PSD permit.

### **Contact Information**

If you have any questions about this No Action Assurance memorandum, please contact Apple Chapman at (202) 564-5666, or [chapman.apple@epa.gov](mailto:chapman.apple@epa.gov).

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<sup>4</sup> As noted above, a No Action Assurance is appropriate only when there is "no other mechanism" available to address the situation. As explained in the OAR memorandum, there will be an unavoidable delay in rescinding EPA-issued Step 2 PSD permits, and until that time there is no other mechanism available to the EPA (or delegated states) with respect to those permits.