

US EPA ARCHIVE DOCUMENT



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

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OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Next Steps for Addressing EPA-Issued Step 2 Prevention of Significant Deterioration Greenhouse Gas Permits and Associated Requirements

FROM: Janet G. McCabe *JG McCabe*
Acting Assistant Administrator

TO: Air Division Directors, Regions 1-10

The Environmental Protection Agency's Office of Air and Radiation (OAR) understands that Regional Offices have received questions after the United States Supreme Court decision in *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA)*, 134 S. Ct. 2427 (2014) regarding the rescission of Prevention of Significant Deterioration (PSD) permits issued by the EPA¹ under Step 2 of the Tailoring Rule² ("EPA-issued Step 2 PSD permits") and the extent to which a source with such a permit should address any related Title V requirements that the source may have at this time.

In the *UARG v. EPA* decision, the Supreme Court held that the EPA may not treat greenhouse gases (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 thus invalidated regulations implementing that approach. Several sources had obtained PSD permits from the EPA in accordance with these regulations because these sources (or modifications thereof) were classified as "major" solely on the basis of GHG emissions. For some of these sources, the appropriate permitting authorities also issued title V permits that incorporate the terms and conditions of the EPA-issued Step 2 PSD permits. In other instances, OAR 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.

This memorandum addresses how OAR intends to proceed on this issue and should help you address these and other questions as they relate to Step 2 PSD permits issued by the EPA. First, the memorandum explains the process OAR intends to initiate to enable EPA Regional Offices to rescind the EPA-issued Step 2 PSD permits that they have issued and consult with the appropriate permitting authorities on replacing these permits with minor source construction permits where appropriate. Second, the memorandum briefly explains the process the EPA encourages permitting authorities to

¹ For purposes of this memorandum, the term "EPA-issued permit" includes permits issued under 40 CFR 52.21 by a state or local permitting authority exercising federal law authority delegated by an EPA Regional Office under 40 CFR 52.21(u).

² Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FR 31514, 35569-71 (June 3, 2010); 40 CFR § 52.21(b)(49)(v).

follow to address any title V permit terms or conditions or application requirements that may derive from the presence of these EPA-issued Step 2 PSD permits.

Specifically, the EPA intends to complete a rulemaking authorizing the rescission of Step 2 PSD permits. EPA will then rescind EPA-issued Step 2 PSD permits in response to requests from applicants that can demonstrate they are eligible for rescission. Once the EPA-issued Step 2 PSD permits are rescinded, the EPA will encourage state permitting authorities to take appropriate actions to resolve any issues related to the incorporation of the EPA-issued Step 2 PSD permit requirements into title V permits that have already been issued. For Step 2 PSD permits issued by state, local and tribal permitting authorities under the permitting programs approved into the state or tribal implementation plan, permit applicants should consult with these permitting authorities to determine the appropriate next steps for these permits based on the source's specific permitting situation and applicable regulations. In consideration of the timing associated with the above described rulemaking, Cynthia Giles, Assistant Administrator for the Office of Enforcement and Compliance Assurance is concurrently issuing a memorandum entitled "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*." This OECA memorandum provides details for sources seeking compliance relief for EPA-issued Step 2 PSD permits and related title V permitting requirements.

1. Process for Rescinding EPA-Issued Step 2 Permits

Although the Supreme Court has held that the EPA's regulations classifying sources as major sources (or modifications as major) based solely on GHG emissions were not valid, section 52.21 of the EPA's regulations is clear in that "[a]ny [PSD] permit issued under this section or a prior version of this section shall remain in effect, unless and until it expires ... or is rescinded." 40 CFR § 52.21(w)(1). Thus, to implement the Supreme Court's decision, it is necessary to undertake a process to rescind the EPA-issued Step 2 PSD permits that have become final and effective.

Section 52.21(w) provides authority for a source holding a PSD permit to request rescission of a permit and for the EPA to "grant an application for rescission if the applicant shows that this section [40 C.F.R. 52.21] would not apply to the source or modification." 40 CFR 52.21(w)(3). Those portions of the EPA's regulations that would require sources emitting only GHGs in major amounts to obtain a PSD permit are expected to be vacated³ by the United States Court of Appeals for the District of Columbia Circuit, to which the Supreme Court remanded the case for further proceedings. Therefore, once these parts of the regulations are vacated by the court, or the EPA revises its regulations appropriately, a source holding an EPA-issued Step 2 PSD permit that can show it had the potential to emit only GHG above the major source thresholds of 100 or 250 tons per year at the time of permit issuance would be able to qualify for rescission of its EPA-issued Step 2 PSD permit by showing, in accordance with 52.21(w)(3), that section 52.21 would not apply to the source.

However, as currently written, the scope of this rescission authority is limited to permits issued under section 52.21 on or before July 30, 1987. Since the Step 2 PSD permitting requirements for sources emitting major amounts of GHGs did not begin until July 1, 2011, the rescission authority in section 52.21(w) of the EPA's regulations is not currently available to sources with EPA-issued Step 2 PSD permits.

³ There is no dispute among the parties about the need for this relief in proceedings presently pending before the court.

Thus, OAR intends to undertake a rulemaking action to revise section 52.21(w) of the EPA's PSD regulations to enable the EPA to rescind EPA-issued Step 2 PSD permits consistent with the EPA's understanding of the Supreme Court decision. The EPA will conduct this rulemaking as quickly as practicable. Given the nature of the rulemaking process, it is difficult to specify a precise date when the EPA will have the rule completed. However, the EPA expects to be able to complete this rule no later than December 31, 2015, and we will endeavor to complete it in advance of that date. After the appropriate revisions to section 52.21 are completed, the EPA will rescind EPA-issued Step 2 PSD permits in response to requests from applicants that can demonstrate they are eligible for rescission.

To qualify for the rescission of an EPA-issued Step 2 PSD permit under section 52.21(w), the EPA expects that PSD permit-holders will need to provide information to demonstrate that the source did not, at the time the source obtained its EPA-issued Step 2 PSD permit, emit or have the potential to emit any regulated pollutant other than GHGs above the major source threshold applicable to that type of source. Furthermore, the EPA intends to consider whether the EPA or another permitting authority is relying on the EPA-issued Step 2 PSD permit for any other regulatory purpose. In the memorandum issued on July 24, 2014, communicating the agency's preliminary views on the application of the PSD and title V Clean Air Act permitting programs to GHGs following the *UARG v. EPA* decision, the EPA noted, among other things,⁴ that it may be appropriate to ultimately remove the GHG BACT limitations from Step 2 PSD permits and to convert such permits into minor source permits where this is feasible and appropriate. This is because such sources may still be required to comply with minor source construction permitting requirements that would have applied if the source had not obtained a PSD permit based solely on its GHG emissions. Minor source construction permitting requirements generally apply only to pollutants and precursors of pollutants for which there are National Ambient Air Quality Standards (NAAQS). Since PSD also applies to these pollutants, some Step 2 PSD permits obtained by a source may also contain permitting requirements (i.e., emissions limitations) for NAAQS pollutants and their precursors that would be similar to what may have otherwise been included in a minor source construction permit to prevent a violation of the NAAQS. As a result, the rescission of any EPA-issued Step 2 PSD permits should not proceed without an understanding of how minor source construction permitting requirements will be met going forward. Since the EPA generally does not issue construction permits for minor sources except in Indian country, EPA Regional Offices and sources holding EPA-issued Step 2 PSD permits should consult with the appropriate state and local permitting authorities and develop a plan to ensure that sources remain in compliance with applicable minor source requirements as the EPA moves forward with its intended actions to enable rescission of EPA-issued Step 2 PSD permits.

Until the EPA's process of revising the regulations and the permit rescission process is completed in each instance, the EPA intends to provide narrowly-crafted interim relief from the GHG conditions in EPA-issued Step 2 PSD permits and any title V requirements that a source may have that may derive from the existence of EPA-issued Step 2 PSD permits. In the memorandum being issued concurrently with this memorandum, the Office of Enforcement and Compliance Assurance (OECA) provides this interim relief. A copy of this memorandum can be found at: <http://epa.gov/nsr/ghgpermitting.html>.

⁴ In the July 24, 2014 memorandum, the EPA said it would no longer require stationary sources to obtain PSD and title V permits solely because the source or modification qualified as "major" based on GHG emissions and that the EPA would no longer apply or enforce federal regulations imposing such requirement. The Agency also recognized that some Step 2 PSD and title V permits had already been issued to sources or modifications classified as "major" based solely on GHG emissions, and the EPA recognized the need to address the status of these permits in light of the Court's conclusion. In addition, the memorandum explained that the EPA would provide additional views in the future with respect to sources that have already obtained a Step 2 PSD permit.

2. Process for Addressing Title V Obligations Arising from EPA-Issued Step 2 PSD Permits

Once the EPA-issued Step 2 PSD permits are rescinded, the EPA will encourage permitting authorities to take appropriate actions to resolve any issues related to the incorporation of the EPA-issued Step 2 PSD permit requirements into title V permits that have already been issued. To determine how to proceed for a particular title V permitting issue, the title V permitting authority should review the governing statutory provisions and provisions in the applicable approved title V permitting program and consult with the EPA as necessary. Appropriate actions may include revising title V permits to remove GHG conditions based on the EPA-issued Step 2 PSD permit or potentially reopening a title V permit after the EPA-issued Step 2 PSD permit is rescinded to terminate, modify, or revoke and reissue the title V permit. However, with respect to PSD-based conditions applicable to emission of NAAQS pollutants and their precursors, consistent with considerations about whether to convert the EPA-issued Step 2 PSD permits into minor source permits, it may be appropriate for title V permitting authorities to also consider the extent to which such conditions should be retained or revised to ensure the title V permit addresses applicable minor source construction permitting requirements as necessary. OAR believes that EPA's existing title V regulations contain sufficient procedures for the actions discussed in this paragraph and that no revisions to EPA's title V regulations are necessary to enable these steps of the process to proceed.

Sources with questions on title V permitting obligations arising from Step 2 PSD permits issued by state, local or tribal permitting authorities under permitting programs approved into the state or tribal implementation plan should also review the governing statutory provisions and provisions in the applicable approved title V permitting program to determine how to address a particular title V permitting issue and consult with the EPA as necessary.

Conclusion

I trust this information will be helpful as we pursue next steps. Should you have questions concerning the information set forth in this memorandum, please contact Juan Santiago, Associate Division Director of the Air Quality Policy Division, Office of Air Quality Planning and Standards at santiago.juan@epa.gov or (919) 541-1084.