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

JUL 24 2014

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: 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*

FROM: Janet G. McCabe, Acting Assistant Administrator
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TO: Regional Administrators, Regions 1-10

On June 23, 2014, the United States Supreme Court issued a decision addressing the application of stationary source permitting requirements to greenhouse gases (GHG). *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency* (EPA) (No. 12-1146). The EPA actions at issue in the case included those generally known as the "Tailoring Rule" and the "Timing Decision." In very brief summary, the Supreme Court said that the EPA may not treat greenhouse gases as an air pollutant for purposes of determining whether a source is a major source required to obtain a Prevention of Significant Deterioration (PSD) or title V permit. The Supreme Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of conventional pollutants, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). The EPA is continuing to examine the implications of the Supreme Court's decision, including how the EPA will need to revise its permitting regulations and related impacts to state programs.

There will be further federal court action to apply the decision, but we know that you, as well as our partner agencies in state, local and tribal governments, have questions regarding how the decision affects PSD and title V permitting requirements in the meantime. Some of these questions have near term implications, in particular those related to pending PSD and title V permitting actions. The EPA intends to actively engage with stakeholders on time-sensitive actions, such as permit applications, state program submissions, and stationary source construction that may no longer need to meet certain permitting requirements. The EPA is likely to take other steps in the longer term and to respond to further court action in this case as needed.

Pending further EPA engagement in the ongoing judicial process before the District of Columbia Circuit Court of Appeals (D.C. Circuit), the EPA plans to act consistent with its understanding of the Supreme Court's decision. This memorandum has two parts. First, it explains how the EPA intends to proceed at this point with respect to permit applications for Tailoring Rule "Step 2" sources and PSD modifications that were previously classified as major based solely on GHG emissions (thus requiring that the sources get permits). Second, this memorandum provides preliminary guidance in response to several questions regarding ongoing permitting requirements for "anyway sources" and some additional issues pertaining to permitting requirements for "Step 2" sources. We believe that the status of pending permit applications and whether certain projects need to apply for PSD and title V permits in light of the Supreme Court decision may be the most immediate questions.

1. Permit Applications for Sources and Modifications Previously Classified as "Major" Based Solely on Greenhouse Gas Emissions ("Step 2" Sources)

In order to act consistent with its understanding of the Supreme Court's decision pending judicial action to effectuate the final decision, the EPA will no longer require PSD or title V permits for Step 2 sources. More specifically, the EPA will no longer apply or enforce federal regulatory provisions or the EPA-approved PSD State Implementation Plan (SIP) provisions that require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR 52.21(b)(49)(v)). Nor does the EPA intend to continue applying regulations that would require that states include in their SIP a requirement that such sources obtain PSD permits.

Similarly, the EPA will no longer apply or enforce federal regulatory provisions or provisions of the EPA-approved title V programs that require a stationary source to obtain a title V permit solely because the source emits or has the potential to emit greenhouse gases above the major source thresholds (e.g., the regulatory provision relating to GHG under the definition of "subject to regulation" in 40 CFR 71.2). The EPA also does not intend to continue applying regulations that would require title V programs submitted for approval by the EPA to require that such sources obtain title V permits.

Thus, the EPA does not intend to continue processing PSD or Title V permit applications for Step 2 sources or require new applications for such permits in cases where the EPA is the permitting authority.

In summary, in order to act consistently with its understanding of the Supreme Court's decision pending judicial action to effectuate the final decision, the EPA will not apply or enforce the following regulatory requirements:

- Federal regulations or the EPA-approved PSD SIP provisions that require a stationary source to obtain a PSD permit if GHG are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR 52.21(b)(49)(v)).
- Federal regulations or provisions in the EPA-approved title V programs that require a stationary source to obtain a title V permit solely because the source emits or has the potential to emit GHG above the major source thresholds.

As discussed further below, we recommend that Regional Offices confer with state, local and tribal permitting authorities and permit applicants to discuss how to handle permit applications pending with those agencies.

2. Preliminary EPA Views Regarding Other Questions Raised by Supreme Court Decision

The remainder of this memorandum is intended simply to provide a clear statement of the EPA's present understanding of the implications of the Supreme Court's decision on additional subjects regarding permitting requirements. The following is not intended to represent a definitive or final statement by the agency on these issues. In fact, the EPA expects that some changes or refinements to the following guidance may result as the EPA examines these matters further in the course of judicial proceedings, discussions with stakeholders, and forthcoming action with respect to permit applications, issued permits, and approval of state programs.[1]

Next Steps in the Legal Process Following the Supreme Court's Decision

Additional steps have yet to occur in the U.S. Courts to implement the Supreme Court decision. Since no party requested reconsideration of the Supreme Court decision by the applicable deadline under Supreme Court rules, the EPA expects that the Supreme Court's decision will become final shortly. This will be the case as soon as the Supreme Court sends its decision down to the D.C. Circuit for further proceedings. After this occurs, we expect that the D.C. Circuit will issue an order that leads to a process that identifies particular parts of the regulations adopted in the Tailoring Rule and earlier EPA regulations that the EPA must revise (remanding the regulations) or that are struck down (vacating the regulations). The EPA and the Department of Justice expect to soon begin a process of consulting with the parties to the litigation regarding this step of the court process.

PSD Construction Permit Requirements

Sources Triggering PSD Based on Pollutants Other Than GHG

The Supreme Court upheld application of the BACT requirement to greenhouse gas emissions from new and modified sources that trigger PSD permitting obligations on the basis of their emissions of air pollutants other than GHG (also known as "Step 1" or "anyway sources"). In the EPA's current view, Step 1 sources remain subject to the PSD BACT requirement for GHG, as well as other pollutants, if they emit those pollutants at or above certain thresholds. With respect to new "anyway sources," the EPA intends to continue applying the PSD BACT requirement to GHG emissions if the source emits or has the potential to emit 75,000 tons per year (tpy) or more of GHG on a carbon dioxide equivalent (CO_2e) basis. With respect to modified "anyway sources," the EPA intends to continue applying the PSD BACT requirements to GHG if both of the following circumstances are present: (1) the modification is otherwise subject to PSD for a pollutant other than GHG; (2) the modification results in a GHG emissions increase and a net GHG emissions increase equal to or greater than 75,000 tpy CO_2e and greater than zero on a mass basis.

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[1] Since it provides general guidance on these issues, the remainder of this memorandum does not itself create any rights or impose any new obligations or prohibitions, and is not intended to be a basis for enforcement actions. The guidance that follows from this point may not be appropriate for all situations, and EPA retains the discretion to approach issues differently than recommended here in specific situations that may arise.

The part of the Supreme Court opinion that affirmed application of BACT to greenhouse gases at "anyway sources" also noted that the EPA may limit application of BACT to greenhouse gases to those situations where a permit applicant's source has the potential to emit GHG above a specified threshold (or *de minimis*) level. The Supreme Court explained that the EPA would need to justify its *de minimis* threshold on proper grounds. In the meantime, to ensure compliance with the Clean Air Act at present, the EPA intends to continue applying BACT to GHG at "anyway sources" and processing PSD permit applications for "anyway sources" using a 75,000 tpy CO_2e threshold to determine whether a permit must include a BACT limitation for greenhouse gases, pending further developments. Such further developments may include action by the D.C. Circuit, input received by the EPA from stakeholders in connection with the court process, experience applying this approach in individual permitting actions, and further EPA action to consider whether to promulgate a *de minimis* level and what level would be appropriate. Thus, for now, the EPA believes the best course of action with respect to "anyway sources" is to continue applying existing regulations.

Sources Triggering PSD Solely Based on GHG Emissions

Subject to the considerations discussed below, headquarters recommends that Regional Offices confer with state, local, and tribal permitting authorities and permit applicants to explore their plans to respond to the Supreme Court's decision. These conversations should examine whether, in light of the Supreme Court decision, there is flexibility under state, local and tribal laws to determine that Step 2 sources no longer are required to obtain PSD permits prior to the completion of any actions to repeal or revise such regulations to in light of the Supreme Court decision. The EPA understands that some states have provisions in their laws that may automatically modify state-law permitting requirements based on the Supreme Court's decision. To the extent such provisions were approved by the EPA as part of a SIP, Regional Offices should encourage such states to contact the EPA to discuss implementation of those provisions. We do not read the Supreme Court decision to preclude states from retaining permitting requirements for sources of GHG emissions that apply independently under state law even where those requirements are no longer required under federal law.

Regional Offices should be mindful that even if the EPA is not requiring Step 2 sources to obtain a PSD permit under federal law, such sources likely have a continuing obligation to obtain minor source construction permits under the applicable SIP as a result of their emissions of non-GHG pollutants. Thus, we recommend discussing with state, local, and tribal permitting authorities and permit applicants, the feasibility of converting pending permit applications into minor source permit applications and proceeding on that basis where appropriate.

We plan to provide additional views in the future with respect to Step 2 sources that have already obtained a PSD permit, but our general thinking at this time is that it may be appropriate to ultimately remove GHG BACT limitations from such permits and to convert such permits into minor source permits where this is feasible and minor source requirements remain applicable. We encourage Regional Offices to contact states to discuss their ability to proceed consistent with the outcome of the Supreme Court decision on individual permitting matters.

Title V Operating Permits

While the EPA will no longer apply or enforce the requirement that a source obtain a title V permit solely because it emits or has the potential to emit greenhouse gases above major source thresholds, the agency does not read the Supreme Court decision to affect other grounds on which a title V permit may be required or the applicable requirements that must be addressed in title V permits. For example, the EPA currently believes it is still appropriate for a title V permit to incorporate and assure compliance with greenhouse gas BACT limits that remain applicable requirements under a PSD permit issued to a Step 1 "anyway source."

We recommend that Regional Offices confer with state, local, and tribal permitting authorities and permit applicants regarding their plans to respond to the Supreme Court's decision. These conversations should examine whether, in light of the Supreme Court decision, there is flexibility under state, local, and tribal laws to determine that Step 2 sources are no longer required to obtain title V permits prior to the completion of any actions to repeal or revise such regulations in light of the Supreme Court decision. To the extent that any approved state, local or tribal title V programs have provisions in their laws that may automatically modify state, local or tribal-law permitting requirements based on the Supreme Court's decision, Regional Offices should encourage such permitting authorities to contact the EPA to discuss implementation of those provisions. Similar to state-law construction permitting requirements, the Supreme Court decision does not preclude states from continuing to require that certain types of sources obtain operating permits meeting requirements that apply independently under state law. Thus, we recommend that Regional Offices advise sources to consult with their individual permitting authorities regarding operating permit requirements after the Supreme Court's decision.

With respect to title V permits that have already been issued to Step 2 sources, we recommend that such sources consult with their title V permitting authority to determine the appropriate next steps based on the source's specific permitting situation.

Federal PSD and Title V Rules, SIP and State Title V Programs

The Office of Air and Radiation (OAR) anticipates a need for the EPA to revise federal PSD and title V rules[2] in light of the Supreme Court opinion. In addition, OAR anticipates that many SIPs and approved title V programs will be revised to effectuate the Supreme Court's decision. The timing and content of the EPA's actions with respect to the EPA regulations and state program approvals are expected to be informed by the forthcoming legal process before the D.C. Circuit. The EPA plans to consult with permitting authorities to determine the most efficient and least burdensome ways to accomplish any such revisions to state or tribal programs.

GHG 5-Year Study

In the Tailoring Rule, the EPA described next steps to include a study by April 2015, referred to as the "5-year study," and a possible further regulatory action, referred to as "Step 4." OAR believes the results of the Supreme Court decision eliminate the need for the 5-year study. Thus, at this time, OAR is no longer working on the study, and we intend to inform states collecting data requested by the EPA for

[2] The EPA is still evaluating the implications of the Supreme Court's decision, if any, on GHG Plantwide Applicability Limitations which were finalized under Step 3 of the Tailoring Rule.

that study that this data collection is no longer necessary. In addition, the EPA does not intend to take further action on Step 4. The EPA is, however, continuing to evaluate GHG permitting data as appropriate with regard to the possible development and justification of an appropriate GHG significance (or "*de minimis*") level for determining the application of PSD BACT requirements to GHG in permitting of "anyway sources." We expect that the information that states have submitted for the 5-year study will be useful in that effort.

Assessment of Biogenic Carbon Dioxide (CO_2) Emissions

The Supreme Court's decision did not directly address the application of PSD and title V permitting requirements to biogenic CO_2 emissions. On July 12, 2013, the D.C. Circuit issued a decision (the Deferral decision) overturning the EPA regulation that deferred application of these permitting programs to biogenic CO_2 emissions (the Deferral Rule). *Center for Biological Diversity v. EPA*, 722 F.3d 421 (D.C. Cir. 2013). However, the Deferral decision has not yet taken effect because some parties have been waiting for the Supreme Court decision to determine whether to ask the D.C. Circuit to reconsider its ruling on the Deferral Rule. Furthermore, court actions against the Tailoring Rule remain pending by parties that contend that the Tailoring Rule caused PSD and title V programs to apply to biogenic greenhouse gas emissions. Notwithstanding these matters still pending in the courts, the Deferral Rule itself expired on its own terms on July 21, 2014. The EPA's work regarding the biogenic CO_2 assessment framework remains ongoing and is not directly impacted by the Supreme Court's decision. Nonetheless, the EPA's current view is that the Supreme Court's decision effectively narrows the scope of the biogenic CO_2 permitting issues that remain for the EPA to address. This is because, as described above, the EPA will no longer apply or enforce regulatory provisions requiring PSD or title V permits for sources solely on the basis of their GHG emissions. Continuing our current approach, OAR recommends that Regional Offices consult with sources and permitting authorities on biomass related permitting questions as they arise.

Conclusion

We trust this information will be helpful as the EPA pursues next steps and await further developments before the U.S. Courts. Should you have questions generally concerning 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. Should you have questions generally concerning the enforcement specific aspects of this memorandum, please contact Apple Chapman, Associate Division Director, Air Enforcement Division, Office of Civil Enforcement at *chapman.apple@epa.gov* or 202-564-5666.