



October 15, 2014

**Re: Enforcement Discretion for State GHG Tailoring Rule Provisions**

To Whom It May Concern:

This is to advise you that, subject to the terms set forth in this letter, the New York State Department of Environmental Conservation (“DEC”) will exercise its authority to utilize enforcement discretion with respect to certain provisions of 6 NYCRR Parts 201 and 231 relating to the regulation of greenhouse gas (“GHG”) emissions.

On June 23, 2014, the U.S. Supreme Court issued its decision in *Utility Air Regulatory Group v. EPA* (“*UARG*”) concerning the regulation of GHG emissions under the Clean Air Act (“*CAA*”) by the U.S. Environmental Protection Agency (“*EPA*”). Essentially, the Court held that EPA may not treat GHGs as an air pollutant for purposes of determining whether a stationary source is a major source required to obtain a Prevention of Significant Deterioration (“*PSD*”) or Title V permit. The Court also stated that EPA could continue to require that PSD permits, otherwise required based on emission of conventional pollutants (i.e., criteria pollutants), contain limitations on GHG emissions based on the application of Best Available Control Technology (“*BACT*”).

While the DEC anticipates additional legal action in the District of Columbia Circuit Court of Appeals (“*D.C. Circuit*”) and by the EPA to clarify outstanding issues, DEC’s PSD and Title V permitting requirements remain in effect in New York State. DEC estimates that any regulatory action necessary to conform federal and state laws to the Supreme Court’s decision could take approximately 18-24 months to complete. In order to timely process state PSD and Title V permits in accordance with the Supreme Court’s decision and EPA’s July 24, 2014 Guidance Memorandum<sup>1</sup>, DEC is herein providing limited enforcement discretion for certain provisions of the State’s PSD and Title V permitting regulations as set forth below.

Therefore, in conformance with the Supreme Court’s *UARG* decision, the DEC will no longer apply or enforce provisions of the State’s PSD and Title V permitting regulations which, prior to the Court’s *UARG* decision, required a source to obtain PSD or Title V permit based solely on its GHG emissions (also known as “*Step 2*” or “*GHG-only sources*”). In other words, a source will not be considered a “major stationary source or major source or major facility” under 6 NYCRR § 201-2.1(b)(21)(i) and (v) or trigger the major facility threshold or significant project

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<sup>1</sup> 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. EPA*, EPA Memorandum from Janet G. McCabe, Acting Assistant Administrator, Office of Air and Radiation, and Cynthia Giles, Assistant Administrator, Office of Enforcement and Compliance, to EPA Regional Administrators (July 24, 2014) (“*July 24, 2014 Guidance Memorandum*”).

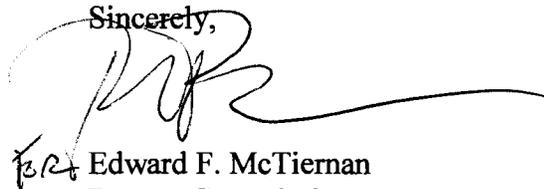
thresholds and significant increase thresholds enumerated under 6 NYCRR § 231-13, Tables 5 and 6 for purposes of PSD and Title V permitting if the sole basis for becoming a major source or major modification would be a source's GHGs emissions.

Also, consistent with the Supreme Court's holding and EPA's July 24, 2014 Guidance Memorandum, the DEC will continue to require sources to comply with the PSD BACT requirement for GHGs, and other pollutants, if they emit those pollutants at or above the certain thresholds. For new sources that are otherwise required to obtain a PSD permit based on their emissions of conventional pollutants (also known as "Step 1" or "anyway sources"), the PSD BACT requirement will continue to apply 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<sub>2e</sub>") basis pursuant to 6 NYCRR § 231-7.6(a). For modified "anyway sources", the PSD BACT requirement will continue to apply to GHG emissions if the modification is otherwise subject to PSD for a pollutant other than GHGs, and the modification results in a net GHG emissions increase that exceeds the thresholds, on both a mass and CO<sub>2e</sub> basis, set forth in 6 NYCRR § 231-13, Table 6.

The DEC will utilize this interim approach until either April 1, 2016 or a rule is promulgated or a statute enacted that is consistent with the Supreme Court's decision and sets forth applicable requirements related to the regulation of GHG emissions under Parts 201 and 231, whichever is earlier. All other provisions of 6 NYCRR Parts 201 and 231 remain in effect and will be enforced.

Thank you for your cooperation in this matter. If you have any questions, please call Khai H. Gibbs, Esq. of my staff at (518) 402-9512.

Sincerely,



Edward F. McTiernan  
Deputy Commissioner  
and General Counsel

cc: Regional Directors  
Regional Air Pollution Control Engineers  
Department of Environmental Permits  
R. Stanton