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Summary of the U.S. Supreme Court's Greenhouse Gas Decision, *UARG v. EPA*

On June 23, 2014, the U.S. Supreme Court released its opinion in *Utility Air Regulatory Group v. EPA*. Justice Scalia wrote the majority in which Chief Justice Roberts and Kennedy joined in full. Justices Thomas and Alito joined the part of the opinion (5-4) rejecting EPA's conclusion that sources are required to obtain Prevention of Significant Deterioration (PSD) or Title V permits on the sole basis of their potential greenhouse gas (GHG) emissions and finding that EPA lacked the authority to issue the Tailoring Rule. Justices Ginsberg, Breyer, Sotomayor and Kagan joined the part of the opinion (7-2) that finds it reasonable for EPA to determine that sources that are otherwise subject to PSD review (i.e. "anyway source") must also consider their GHG emissions. In the opinion, the Court notes that the Solicitor General stated in oral argument that "anyway" sources "account for roughly 83% of American stationary-source greenhouse gas emissions, compared to just 3% for the additional, non-'anyway' sources EPA sought to regulate at Steps 2 and 3 of the Tailoring Rule."

Background

Following the Supreme Court's decision in *Massachusetts v. EPA* in 2007, EPA issued its Endangerment Finding for motor-vehicle GHG emissions in 2009. EPA then issued its decision that GHGs were subject to regulation for the purposes of triggering PSD and Title V on January 2, 2011 (the first day on which 2012 model year cars, with regulatory limits on greenhouse gas, could be sold). EPA issued the Tailoring Rule in 2010, which increased the threshold for GHGs for PSD and Title V in the initial years of the program, beginning at 75,000 to 100,000 tons per year (tpy), measured on a carbon dioxide-equivalent (CO_2e) basis. Without the Tailoring Rule, PSD and Title V would have automatically included greenhouse gases at the current 100 to 250 tpy threshold (with a significance threshold for modifications of zero).

Several petitioners challenged these regulations in the D.C. Circuit, and in 2012, that court dismissed some of the petitions due to lack of jurisdiction and denied the others. Specifically, the D.C. Circuit upheld EPA's Endangerment Finding and motor vehicle standards, concluded that state and industry petitioners lacked Article III standing to challenge EPA's GHG permitting rules, and held that the PSD permitting requirements under §165(a) of the Clean Air Act (CAA) apply automatically to newly-regulated pollutants.

The Supreme Court granted the petitions for a writ of certiorari but limited to the question of "[w]hether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."

Decision

Part A (5-4)

The Court first examined the question of whether EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source's potential to emit GHGs. In answering this question, the Court explains that:

> It is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances. It takes some cheek for EPA to insist that it cannot possibly give "air pollutant" a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades.

The Court further notes that *Massachusetts v. EPA* held that the Act does not give EPA a command to regulate but rather provided a "description of the universe of substances EPA may *consider* regulating under the Act's operative provisions." The opinion includes examples of where EPA has given "air pollutant" a narrower meaning. Thus, the Court holds that EPA was not compelled to read the Act as requiring the Agency to include GHGs as triggers for the PSD and Title V permitting process.

The Court then examines the implications of applying PSD and Title V to GHGs and notes that EPA acknowledged that applying the thresholds in the Act would be inconsistent with the Act's structure and design. Because the Act contains the 100 and 250 tpy thresholds, the Court concludes that "it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits that statute is not designed to grant."

Given this reasoning, the Court then examines EPA's argument that the Tailoring Rule was justified as an exercise of discretion to adopt a reasonable construction of the Clean Air Act. For this question, the Court notes that EPA's increase of the statutory numbers would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." Accordingly, the Court holds that EPA lacked the authority to tailor the Act's unambiguous numerical thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting thresholds."

Of note, in his dissent, Justice Breyer, with whom Justices Ginsberg, Sotomayor and Kagan join, disagrees with the majority that the only way to avoid an absurd result is to create "an atextual greenhouse gas exception to the phrase 'any air pollutant'". Rather, Justice Breyer would read the Act as applying to any air pollutant meeting the statutory thresholds for major sources except those that emit an "unmanageably small amounts of greenhouse gases, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources than Congress did not mean to cover." Thus, the dissent would support EPA's interpretation and allow EPA to exempt sources from regulation if EPA reasonably determined that applying the permitting program to them would contravene Congress's intent. Breyer also cautions that the "Court's decision to read greenhouse gases out of the PSD program drains the Act of its flexibility and chips away at our decision in *Massachusetts*."

Part B (7-2)

The second part of the opinion examines whether EPA reasonably interpreted the Act to require sources to comply with "best available control technology" (BACT) emission standards for GHGs. While some petitioners argued that EPA could never require BACT for GHGs because the permitting program is unsuited to GHGs, the Court explains that the statutory provisions for BACT are more specific as they state that BACT is required for "each pollutant subject to regulation under this chapter." The opinion also notes that unlike the PSD and Title V discussion,

> we are not talking about extending EPA jurisdiction over millions of previously unregulated entities, but about moderately increasing the demands EPA (or a state permitting authority) can make of entities already subject to its regulation…In short, the record before us does not establish that the BACT provision as written is incapable of being sensibly applied to greenhouse gases.

Thus, the Court holds that "EPA may require an 'anyway' source to comply with greenhouse-gas BACT only if the source emits more than a *de minimis* amount of greenhouse gases." The Court notes that the Tailoring Rule applied BACT only if a source emitted over 75,000 tons per year of CO_2e, but EPA did not identify that threshold by identifying a *de minimis* level. Thus, EPA must justify a *de minimis* level on "proper grounds" in any future rulemakings.

Next Steps

At this point, it is unclear what regulatory steps EPA will take in response to the Supreme Court decision. As the Court and EPA have acknowledged, the practical implications of the opinion are likely limited given that the majority of sources that triggered PSD and Title V for GHGs will still be required to consider their GHG emissions for BACT given that other emissions trigger the applicable permitting thresholds.

This decision does not affect EPA's authority to regulate new or existing power plant under section 111 of the Clean Air Act.

Contacts

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