

# Supreme Court Upholds EPA's Power to Regulate Greenhouse Gas Emissions From Large Stationary Sources – But Hammers EPA For Overreaching in Its Regulatory Approach

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On Monday, June 23, in a long-awaited decision, the U.S. Supreme Court in [Utility Air Regulatory Group v. Environmental Protection Agency](#) partially invalidated and partially upheld U.S. Environmental Protection Agency ("EPA") regulations of greenhouse gas emissions from stationary sources. By a narrow 5-4 majority, the Court, in an opinion authored by Justice Antonin Scalia, struck down EPA's effort to require a source to obtain a Clean Air Act permit solely because of its potential to emit greenhouse gases. In the same case, however, a larger 7-2 majority of the Justices upheld EPA's regulations to the extent they require a category of sources -- those that must obtain a Clean Air Act permit anyway on account of their emissions of other regulated air pollutants -- to take steps to control their greenhouse gas emissions as well.

The decision gives EPA a legal green light to regulate greenhouse gas emissions from most large stationary sources – power generation plants, refineries, factories, and the like – but also gives notice that a skeptical Court will scrutinize carefully the way EPA justifies and implements such regulations in the future.

## Background

Monday's decision is the latest major Supreme Court opinion to follow in the wake of its landmark 2007 decision in *Massachusetts v. EPA*, in which the Court held that mobile sources of greenhouse gases could be "air pollutants" subject to regulation under the Clean Air Act if EPA found that greenhouse gases "endanger public health or welfare." EPA made this finding and adopted regulations to address mobile sources of greenhouse gas emissions. It then turned its attention to stationary sources. Its first major step was to determine that its decision to regulate of greenhouse gas emissions from mobile sources also compelled it to regulate such emissions from stationary sources. This determination was referred to as the "Triggering Rule."

EPA next determined that it would attempt to regulate stationary source greenhouse gas emissions

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through a Clean Air Act permitting program known as "Prevention of Significant Deterioration" ("PSD"). The PSD program requires sources of air pollutants to obtain permits based on technical and complex analyses or models of emissions and emissions impacts, and to reduce their emissions by the application of "best available control technology" ("BACT"). The problem, however, is that PSD applies only to sources whose potential to emit exceeds statutory thresholds (either 100 tons per year or 250 tons per year, depending on the specific pollutant). The Clean Air Act's Title V permitting program applies similar applicability thresholds. In establishing these thresholds, Congress had other kinds of air pollutants – including ozone, carbon monoxide, sulfur dioxide, and particulate matter – in mind. Greenhouse gases, by contrast, are typically emitted in volumes that are orders of magnitude higher than the low statutory thresholds established for other pollutants. Applying these statutory thresholds to greenhouse gas emissions would therefore have swept millions of small and insignificant sources (such as large commercial office and residential complexes, retail establishments, and small industrial facilities) into the PSD program, and subjected them to the time-consuming, expensive and complicated process of obtaining a PSD permit and having to implement BACT to limit emissions. Even EPA recognized that requiring permits from such an enormous pool of sources would make the permitting process completely unworkable and undermine Congress' intent to confine the process to large sources.

EPA's solution to this problem was the "Tailoring Rule," by which it limited the applicability of the PSD permitting program (and of the BACT requirement) on a phased basis to stationary sources with a potential to emit greenhouse gases of 100,000 tons per year, or 75,000 tons per year (or, in time, some potentially lower amount), depending on a number of factors, including whether the source was an "anyway" source – i.e., a facility that needed a PSD permit anyway on account of its potential to emit other regulated pollutants.

Both the Triggering Rule and the Tailoring Rule were subjected to multiple challenges in federal court, including a challenge by the named petitioner, Utility Air Regulatory Group, a consortium of industry members potentially subject to regulation. The various cases were consolidated, and were either dismissed or decided in favor of EPA, by the District of Columbia Circuit Court of Appeals.

## **The Supreme Court's Opinion**

In an opinion notable for its skeptical and sarcastic tone, the Supreme Court rejected both the Triggering Rule and the Tailoring Rule. With respect to the Triggering Rule, the Court held that broad regulatory mandates in the Clean Air Act did not compel EPA to regulate greenhouse gas emissions from stationary sources once it had decided to regulate them from mobile sources. In other contexts, the Court observed, EPA had applied similarly broad language regarding "air pollutants" in the Clean Air Act to narrow, specified categories of emissions or sources and refrained from applying it to others. This case was no different, the Court held, and it criticized EPA for its "cheek" in insisting otherwise.

Having held that EPA was not compelled to regulate stationary source greenhouse gas emissions, the Court then invalidated the Tailoring Rule. It held that EPA could not validly exercise its discretion to regulate greenhouse gases from stationary sources if that meant ignoring the unambiguous statutory thresholds established by Congress for the applicability of the permitting programs (100 or 250 tons per year of relevant pollutants), and substituting in their place a special set of its own elevated thresholds to make the program workable in the context of the scale of greenhouse gas emissions. The Court grounded its rejection of the Tailoring Rule on (a) the Constitutional principle of Separation of Powers, which holds that Congress, not the Executive Branch, has primary responsibility for legislating and in this case Congress had specifically legislated thresholds that EPA was not free to alter, and (b) the limits of agency discretion under *Chevron U.S.A. Inc. v. Natural*

*Resources Defense Council, Inc.* to interpret statutes they are charged with implementing. Though the Tailoring Rule would have greatly reduced the number of sources of greenhouse gas emissions subject to permitting under the PSD program (compared to the number subject to the permitting if the low statutory thresholds were applied), the Court found EPA's exercise of its discretion to require sources to obtain PSD (and, possibly, Title V) permits on account of their potential to emit greenhouse gases to be "patently unreasonable - not to say outrageous," and accused EPA of "insist[ing] on seizing expansive power that it admits the statute is not designed to grant." Noting that the Tailoring Rule would give EPA discretion, over time and based on its experience, to lower the thresholds and sweep in more sources, Justice Scalia also commented: "We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery."

Having excoriated EPA for its "cheek" and attempts at "seizing expansive power," the Court then proceeded, quite remarkably, to uphold EPA's power to compel emission reductions from what is likely to be the vast majority of large sources of greenhouse gas emissions. Based on the use of the term "BACT" in the Clean Air Act, the Court held that EPA could legitimately require "anyway" sources of more than a *de minimis* volume of greenhouse gas emissions - i.e., those sources of greenhouse gas emissions that, due to their size, are already subject to PSD permitting for other kinds of pollutants -- to meet emerging BACT standards for controlling their greenhouse gas emissions. Noting that the thresholds in the Tailoring Rule were not intended to be "*de minimis*" levels, the Court effectively invited EPA to promulgate rules establishing *de minimis* levels as a predicate to its application of the BACT requirement to greenhouse gas emissions by these "anyway" sources.

## The Upshot

Both sides in the litigation can claim victory in the Court's divided decision. The petitioners who challenged the rules may be freed from complex permitting processes relating to greenhouse gases. Their challenge also exposed significant levels of skepticism within the high court regarding EPA's effort to combat climate change through legislation – the Clean Air Act – that was not written with greenhouse gases in mind.

EPA, on the other hand, may rely on the opinion for authority to impose BACT requirements on new and modified "anyway" sources that, according to the government, account for roughly 83% of American stationary-source greenhouse gas emissions. (By contrast, only about 3% of domestic stationary source greenhouse gases are emitted by sources that would have been subject to permitting under the rejected Tailoring Rule solely because of their emission of these pollutants.) In the coming months and years, EPA can expect vigorous debate and careful judicial scrutiny of its determination of *de minimis* levels of greenhouse gas emissions, and likely of its determinations of BACT for these sources as well. But the Court's decision in *Utility Air Regulatory Group* - scornful as it is of EPA's justification for regulating the largest sources of greenhouse gas emissions - paves the way for EPA to advance the regulatory process to these next stages.

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