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Supreme Court Holds That Industrial Sources Cannot Be Required to Obtain PSD (Prevention of Significant Deterioration) or Title V Permits Based Solely on Their Greenhouse Gas Emissions

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Summary and Implications

On June 23, the Supreme Court, in *Utility Air Regulatory Group v. EPA*, held that an industrial facility's **greenhouse gas** (GHG) emissions alone cannot be the basis for subjecting the source to the permitting requirements of the PSD and Title V provisions of the **Clean Air Act** (CAA or the Act), but if the source does a capital project that would be subject to regulation under these provisions for more conventional pollutants (e.g., particulate matter, NOx, SO2), permitting authorities may impose emissions limits (defined in the Act as Best Available Control Technology or BACT) on emissions of GHGs from those sources.

Below we provide the background to the case, summarize the D.C. Circuit opinion which the Court affirmed in part and reversed in part, and then analyze the Court's holding. First, however, a few practical takeaways from the opinion:

1. Who won and who lost?

EPA has been quoted as claiming the opinion as a major victory. We don't think that is at all clear. First, there are numerous industrial facilities that would not trigger PSD permitting but for their GHG emissions. Such facilities will not now be subject to the PSD program. Second, companies planning expansions that require capital projects can sometimes structure the projects so that they "net out" of PSD review for the conventional pollutants. If that is the case, the project would, again, not trigger PSD review for GHGs after the opinion. Finally, companies should evaluate recently issued PSD permits that contain GHG emission limits to determine whether those limits are still valid after the Court's opinion.

2. What will BACT be for GHGs going forward?

While the Court held that permitting authorities may require BACT for GHGs for sources that otherwise trigger PSD permitting, the Court noted several "important limitations" on BACT that

constrain a permitting authority's "'unbounded' regulatory authority" (Slip Op at 24-27):

- BACT cannot be used to order a fundamental redesign of a facility;
- BACT can only be required for pollutants that the source itself emits;
- BACT should not require every conceivable change that could result in minor improvements in energy efficiency;
- Permitting authorities should consider whether "a proposed regulatory burden outweighs any reduction in emissions to be achieved, and should concentrate on the facility's equipment that uses the largest amounts of energy";
- BACT can only be required if the source emits more than a *de minimis* amount of GHGs. EPA must now select this new threshold limit and "justify its selection on proper grounds."

Background

In 2007, the Supreme Court held in *Massachusetts v. EPA* that "greenhouse gases fit well within the Act's definition of 'air pollutant'" and that EPA therefore had statutory authority to regulate GHG emissions from new motor vehicles if EPA found that such emissions endangered public health or welfare. 549 U.S. 497. The Court further ruled that "policy judgments have nothing to do with whether greenhouse gas emissions contribute to climate change and do not amount to a reasoned justification for declining to form a scientific judgment." In EPA's view, this required the Agency to make a positive or negative endangerment finding under Section 202(a) of the CAA.

Fast-forward to 2009, and EPA proposed a finding that GHG emissions endangered public health and welfare and that GHG emissions from new motor vehicle engines were contributing to air pollution that endangered public health and welfare (Endangerment Finding). The Agency issued the final Endangerment Finding later that year, stating that GHG emissions from new motor vehicle engines "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 74 Fed. Reg. 66496 (Dec. 15, 2009). Having made this finding with respect to mobile source emissions of GHGs, EPA, together with the Department of Transportation, subsequently proposed and finalized GHG emissions standards and CAFE standards for new light-duty vehicles and engines for model years 2012-2016 (the Tailpipe Rule), which became effective on July 6, 2010. 75 Fed. Reg. 25323 (May 7, 2010).

Although the Tailpipe Rule regulated only automobile GHGs, EPA subsequently took the position that GHGs would have to be regulated under the PSD and Title V permitting provisions once GHGs became a regulated pollutant under the Act. This interpretation was embodied in the Johnson Memo, issued in 2008, which stated that the "subject to regulation" provision of the "regulated NSR pollutant" definition would "include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires *actual control* of emissions of that pollutant," which would have meant that GHGs would be subject to PSD and Title V permitting programs on July 6, 2010, the date the Tailpipe Rule became effective. *See* "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (Dec. 18, 2008).

The Agency took two actions, one with respect to timing and the other with respect to "tailoring" the

threshold limits for triggering PSD, to account for GHGs. In the Timing Rule, EPA revised the 2008 Johnson Memo guidance with respect to the timing of PSD/Title V applicability to GHGs, adopting an interpretation that a pollutant becomes "subject to regulation" when the control regulation "takes effect." 75 Fed. Reg. 17004 (Apr. 2, 2010). According to this interpretation, then, GHGs would become a regulated pollutant at the earliest on January 2, 2011, the date the motor vehicle GHG emissions standards would take effect.

Once the Agency concluded in the Timing Rule that PSD and Title V requirements would apply to GHG emissions, EPA concluded that it was necessary to address how those programs could be tailored to fit GHG emissions. Under the Act and its implementing regulations, the PSD program applies to any source on a specified list of 28 source categories that emits, or has the potential to emit, 100 tons per year (tpy) or more of any pollutant subject to regulation under the Act, or to any other source type that emits, or has the potential to emit, such pollutants in amounts equal to or greater than 250 tpy (the 100/250-tpy thresholds). EPA estimated that the increase in the number of facilities requiring a PSD permit as a result of its GHG emissions under the 100/250-tpy threshold would rise from 280 per year to 81,598 and those needing a Title V permit would increase from 14,700 to 6 million. EPA purported to address this massive increase in permitting burdens by promulgating the Tailoring Rule, raising the applicability threshold to 100,000 tpy for GHGs for a major source with a 75,000 tpy significance level (to determine if a capital project at an existing plant was a "modification" that triggered review). 75 Fed. Reg. 31514 (June 3, 2010).

Now, more than three years since the Tailoring Rule became effective, more than 300 applications for PSD permits applicable to GHG emissions have been submitted to state and federal permitting authorities, with more than 200 final permits issued. Facilities submitting applications are from most major industrial sectors, including electric utilities and alternative energy plants, petroleum refining, chemical, pharmaceutical, steel, paper, etc. At the same time, litigation challenging EPA's GHG rules was working its way through the court system.

D.C. Circuit Review

Several parties filed petitions for review in the D.C. Circuit related to each one of EPA's GHG-related rulemakings. The court held that EPA did not act arbitrarily and capriciously when it based the Endangerment Finding on scientific judgment over the policy considerations advanced by the petitioners. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). The court also rejected challenges to the Tailpipe Rule, holding that the Agency, after making the Endangerment Finding with respect to GHGs emitted from mobile sources, was compelled by the Act to set tailpipe emission limits.

The court then turned to the Timing and Tailoring Rules, and found that the petitioners did not have standing to challenge these rules. Because the Timing and Tailoring Rules only exempted certain sources (i.e., sources of GHGs that emitted less than the revised significance thresholds) from regulation, the petitioners had not themselves been injured and lacked standing.

Supreme Court Review

The Supreme Court granted six separate petitions for writ of certiorari filed by industry and state petitioners but limited the scope of its review to the sole issue of whether the agency "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 greenhouses gases."

The Court divided the issue into two parts:

A. 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 greenhouse gases.

B. Whether EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants may be required to employ BACT for GHGs.

A. GHG Emissions as the Sole Basis for Regulation Under PSD and Title V

By a vote of 5 (Justice Scalia (author of the opinion), Chief Justice Roberts, Justices Kennedy, Thomas, and Alito) to 4 (Justices Breyer, Ginsburg, Sotomayor, and Kagan), the Court struck the Agency's Triggering and Tailoring Rules., holding that the inclusion of GHGs within the "general, Act-wide definition of 'air pollutant'" neither compels nor permits regulation of GHGs under the PSD and Title V programs. The Court rejected EPA's "categorical position that greenhouse gases must be air pollutants for all purposes regardless of the statutory context," by highlighting, in part, that when the Agency has used the term "air pollutant" in other operative contexts (e.g., new source performance standards and select new source review provisions), the term has been given a narrower, more "reasonable, context-appropriate meaning." The Court also found that EPA does not have the discretion to construe the meaning of "air pollutant" to include GHGs in the PSD and Title V contexts because, as the Agency admitted when it promulgate the Tailoring Rule, doing so would lead to absurd results.

Further, the Court held that the Agency's decision to tailor the threshold of regulation for GHGs under the PSD and Title V program was impermissible, as it contradicted the unambiguous 100/250-tpy thresholds established in the Clean Air Act. EPA's contention had been that without the greatly increased thresholds for GHG emissions, the PSD and Title V programs would become much larger than anything contemplated by Congress when it passed the Act. The Court agreed that the expansion would have been unprecedented and unanticipated, but concluded that that should have been a signal to EPA to revisit its interpretation of whether to regulate GHGs in the first place – EPA could not simply revise the Act, that is a job for Congress.

B. BACT for GHG for Sources Already Subject to PSD

By vote of 7 (Justice Scalia (author of the opinion), Chief Justice Roberts, Justices Kennedy, Breyer, Ginsburg, Sotomayor, and Kagan) to 2 (Justices Alito and Thomas), the Court held that sources already subject to regulation under PSD could be required to employ BACT for GHG emissions, as long as the GHG emissions exceeded an undefined, *de minimis* amount. For sources subject to PSD, BACT is required "for each pollutant subject to regulation under" the Act. The Court interpreted this to include GHGs, as they are included in the Act-wide definition of "air pollutant." In addition, the Court stated that requiring BACT for GHG emissions from sources already subject to PSD would not present any issue with respect to increasing EPA's authority over previously unregulated sources. The Court did not establish a level of GHG emissions that would trigger BACT for regulated sources, and stated that whatever level EPA chooses, it "must justify its selection on proper grounds."