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U.S. Supreme Court Limits EPA's Greenhouse Gas Permitting Authority

by

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In a split decision, the U. S. Supreme Court recently ruled that the U.S. Environmental Protection Agency ("EPA") does not have authority under the federal Clean Air Act ("CAA") to require stationary sources of air emissions to obtain major source permits based solely on emissions of greenhouse gases ("GHG"). The opinion was issued in *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (U.S. June 23, 2014) ("UARG"), one of several similar cases consolidated for review. Justice Antonin Scalia wrote the opinion for the Court, and there were several dissents as well as concurrences.

Specifically, the Court said the EPA may not treat greenhouse gases as a pollutant in deciding whether facilities must obtain prevention of significant deterioration ("PSD") permits for major sources of emissions. Similarly, GHG emissions alone cannot be used for purposes of defining a "major source" under the operating permit (Title V) provisions of the CAA. The Court ruled, however, that EPA may continue to treat greenhouse gases as a "pollutant" under the CAA for purposes of requiring Best Available Control Technology ("BACT") at so-called "anyway" sources (i.e., sources subject to PSD permitting due to their emissions of other pollutants).

Substance of Decision

The decision further explains whether and how EPA can regulate GHGs under the CAA. It builds on a prior decision issued by the Court in 2007: *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that opinion, the Court held GHGs were "pollutants" as defined in section 302(g) of the CAA,

which provides a general definition of pollutants for purposes of the act, and defines the term broadly to include "any air pollution agent...which is emitted into or otherwise enters the ambient air."

Relying on the Court's *Massachusetts* decision, EPA issued a determination (the "Endangerment Finding") under the CAA that releases of elevated concentrations of GHGs into the atmosphere by motor vehicles may reasonably be expected to endanger the public health and welfare due to sea level changes and other climate change impacts. After issuing this Endangerment Finding, EPA determined it had a series of implied obligations to regulate GHGs under the CAA, including implementation of GHG tailpipe emissions standards and the requirement to treat GHGs as pollutants subject to the PSD stationary source permitting provisions of CAA section 165.

Section 165, however, expressly applies only to stationary sources of pollutants that emit at least 100 tons per year of a regulated pollutant. If EPA were to regulate sources emitting this level of GHGs, it would require permits for many sources—such as apartment buildings, hospitals, and other commercial and institutional facilities—that had never been considered major sources of emission for PSD permitting purposes.

Applying the CAA's statutory PSD permitting thresholds to GHGs could cause major economic disruptions and would overwhelm permitting authorities, causing them to process an estimated 75,000 additional PSD permit applications per year and more than 5 million additional Title V permit applications. Instead of pursuing such an approach, EPA determined it had authority to revise the statutory thresholds for GHGs. In its Tailoring Rule issued in 2010, EPA decided it could raise the PSD

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permitting thresholds for GHGs to 75,000/100,000 tpy.

The Supreme Court in *UARG* implicitly vacated the EPA's Tailoring Rule, finding EPA had impermissibly rewritten the CAA. The Court determined the broad definition of "pollutant" in section 302 of the CAA could encompass nearly any substance emitted into the air and clarified that, consistent with its holding in *Massachusetts v. EPA*, EPA may treat GHGs as pollutants under the CAA, but is not compelled to do so for every provision of the CAA. Whether a substance is a pollutant for purposes of a given provision of the CAA depends on the context of the language in the provision. *UARG*, at 2441 (definition of "air pollutant" does not include every conceivable airborne substance, but only those sensibly encompassed within a particular regulatory program).

The EPA had previously limited the definition of pollutants in the case of the PSD permitting provisions to mean substances with localized or regional effects, such as criteria pollutants that could impact the region's ability to maintain compliance with the national ambient air quality standards. GHGs do not fit within that category of substances and, therefore, they are not necessarily pollutants for purposes of the PSD and Title V programs outlined in the CAA. See, *UARG*, at 2442 (CAA can be interpreted to include only those pollutants that can be "sensibly regulated at statutory thresholds").

Implications

Several issues remain that must be clarified based on this decision, particularly with respect to modifications of major sources of emissions subject to PSD permitting due to increases in emissions of criteria pollutants (so called "anyway sources"). For example, several states adopted EPA's Tailoring Rule approach into their state implementation plans. Those state level requirements remain in effect until further actions are taken. This makes it very important for a facility undergoing any permitting actions now, or in the near future, to coordinate closely with state and local agencies.

In addition, EPA has always recognized that the PSD permitting program should not be triggered by *de minimis* increases in emissions of PSD pollutants, and it has developed significance levels for purposes of determining when a net emissions

increase is more than *de minimis*. For example, an increase of less than 40 tons per year (tpy) of nitrogen oxides at a modified major source does not trigger PSD review for that source per 40 C.F.R. 52.21(b)(23). In acknowledging this aspect of PSD review, the Court in *UARG* expressly stated EPA may require "anyway sources" to comply with GHG BACT "only if the source emits more than a *de minimis* amount" of GHGs. The Court noted that the 75,000 tpy threshold of the Tailoring Rule might be considered a *de minimis* threshold if EPA justifies that level.

Based on the majority's opinion regarding *de minimis* sources, it can be argued that net emissions increases of GHGs less than 75,000 tpy at modified major sources that are subject to PSD permitting due to criteria pollutants are not subject to GHG BACT. But this conclusion is uncertain. Until EPA addresses this issue through further rulemaking or guidance, "anyway" sources pursuing permits face risk in how to conform to PSD permitting requirements for GHG purposes. Thorough coordination with permitting authority representatives in an effort to minimize the risks is warranted.

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