

Client Alert

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Supreme Court Rules Out Clean Air Act Permits for Stationary Sources Based on Greenhouse Gas Emissions...Unless You Are Getting a Permit “Anyway”

By William Sloan, Michael Steel, Peter Hsiao and Dan Gershwin

Today, a divided Supreme Court issued a highly anticipated Clean Air Act (the “Act”) decision in *Utility Air Regulatory Group v. EPA*. In an opinion authored by Justice Scalia, the Court rejected EPA’s application of the Act to require stationary sources to obtain a Prevention of Significant Deterioration (PSD) permit or Title V “major source” permit based solely on their potential greenhouse gas (GHG) emissions. At the same time, the Court upheld EPA’s determination that for sources that would otherwise require PSD permits—known as “anyway” sources—EPA can require compliance with “best available control technology” (BACT) emission standards for greenhouse gases.

The decision is both a win and a loss for EPA. The win was the Court’s confirmation of EPA’s ability to regulate GHGs under the Clean Air Act and preservation of the majority of EPA’s rule, which is a critical element of President Obama’s efforts to implement climate change regulations without the need for Congressional action. After the Supreme Court’s 2007 decision in *Massachusetts v. EPA*, which concluded that GHG emissions from motor vehicles constituted “air pollutants” under the Act and therefore were subject to EPA regulation, EPA embarked upon a rule-making process that ultimately regulated GHG emissions from stationary sources. Recognizing that existing statutory emissions thresholds under the Act of 100 or 250 tons of GHGs would sweep in too many small stationary sources, EPA issued regulations raising these thresholds to 75,000 to 100,000 tons per year—known as the “tailoring” rule—to ensure that GHG-based PSD and Title V permitting requirements would apply only to the largest industrial sources of GHG emissions.

The majority’s opinion concluded that EPA could impose GHG BACT on sources that would otherwise be subject to PSD review. Because the Act states that BACT is required “for each pollutant subject to regulation” under the Act, EPA’s decision to require BACT for “anyway” sources was a permissible statutory interpretation. Justice Scalia’s statement from the bench announcing the decision noted that this holding would allow EPA to regulate sources responsible for 83 percent of GHG emissions from stationary sources, just short of the 86 percent of emissions that would have been regulated if the Court had upheld EPA’s “triggering” rule. Accordingly, both commentators and the EPA itself have already characterized the Court’s decision as a victory for those who want to regulate GHG emissions from stationary sources.

The loss for EPA was the Court’s rejection of its creative effort to construe the Clean Air Act to allow EPA to use its administrative power to interpret the Act to include larger GHG sources and exclude smaller sources from regulation. Overturning the decision of the United States Court of Appeals for the D.C. Circuit, the Court concluded that the Act neither compelled nor permitted EPA to determine that GHG emissions alone could trigger PSD or Title V permitting requirements. The Court noted that although *Massachusetts v. EPA* held that the Act’s definition of “air pollutant” included GHGs, EPA has routinely ascribed a narrower meaning to that term based on

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context, and could have done so here. EPA had argued in the alternative that, even if the Act did not compel its determination, EPA nonetheless justifiably and reasonably interpreted the Act. The Court rejected this argument as well, concluding that EPA's interpretation would both strain limited governmental resources and create an unwarranted expansion of regulatory authority without authorization from Congress. Finally, the Court concluded that EPA lacked authority to "tailor" existing, unambiguous statutory emissions thresholds to exclude smaller stationary sources. Four justices dissented from this portion of the opinion, and would have permitted EPA to interpret the statute to allow GHG emissions to trigger permitting requirements for large stationary sources. The practical effect of the Court's decision was to exclude some smaller sources of GHGs that were proposed for regulation under EPA's rule.

Thus, the industry challengers were able to obtain two of their objectives in the case. First, the Court excluded the smaller of the subject GHG sources from regulation. Second, the Court further clarified EPA's regulatory discretion under the Clean Air Act and rejected the agency's attempt to reinterpret the threshold that triggers those requirements. There is, however, a significant element of irony in the case, where industry in part opposed EPA's efforts to regulate fewer sources than the law would otherwise permit under the PSD and Title V programs.

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Contact:

William Sloan

(415) 268-7209

wsloan@mofo.com

Michael Steel

(415) 268-7350

msteel@mofo.com

Peter Hsiao

(213) 892-5731

phsiao@mofo.com

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