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Client Alert

Environmental, Health & Safety Practice Group

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U.S. Supreme Court Restricts EPA Regulation of Greenhouse Gas Emissions

GHG Rules Allowable for Sources Otherwise Subject to Federal Clean Air Act Permitting

On June 23, 2014, the U.S. Supreme Court issued its widely anticipated decision in *Utility Air Regulatory Group v. EPA* concerning the U.S. Environmental Protection Agency's regulation of greenhouse gas emissions (GHGs) from stationary sources. In a divided decision with a majority opinion written by Justice Antonin Scalia, the Court ruled that EPA may require stationary sources to control GHGs *if* those sources would be required to obtain PSD or Title V permits for conventional pollutants. However, the Court rejected EPA's rewriting of the Clean Air Act 100- or 250-ton permitting thresholds to expand its regulatory net to capture sources that would become newly subject to PSD or Title V permitting based only on their potential to emit GHGs in amounts less than 100,000 tons per year.

Background

In the Court's landmark 2007 decision in *Massachusetts v. EPA*—widely known as the "single largest expansion in the scope of the Clean Air Act in its history"—the Court held that Title II of the Act authorized EPA to regulate GHGs from new motor vehicles if the Agency formed a "judgment" that those emissions contributed to climate change. EPA leveraged this opportunity and interpreted the Act and its rules to mean that once GHGs were regulated under any part of the Clean Air Act, Title V and PSD permitting requirements would automatically apply to any stationary source with the potential to emit GHGs in excess of the respective 100- or 250-ton statutory air pollutant thresholds. Recognizing the regulatory burden this interpretation would impose on smaller sources never before subject to PSD or Title V requirements—such as malls, apartments buildings, and schools—EPA attempted to "tailor" its program for those "new" sources by redefining the statutory threshold for GHGs to 100,000 tons per year, as opposed to the statutorily-required 100 or 250 tons.

The Decision

In yesterday's decision, the Court saw EPA's attempt to "tailor" a clear 100- or 250-ton statutory threshold to 100,000 tons as an overstep in the Agency's authority and an impermissible attempt to "tailor legislation to bureaucratic

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policy goals by rewriting unambiguous statutory terms." EPA had argued that the Act required it to interpret the phrase "air pollutant" broadly in the PSD and Title V provisions to include greenhouse gases, ignoring the fact that the Agency routinely used a much more "narrow, context-appropriate" definition of air pollutant when applying the concept to specific operative portions of the Act. Justice Scalia quoted an amicus brief from administrative law professors in the Court's majority opinion, agreeing that "while *Massachusetts v. EPA* 'rejected EPA's categorical contention that greenhouse gases *could not* be 'air pollutants' for purposes of the Act,' it did not 'embrace EPA's current, equally categorical position that greenhouse gases *must* be air pollutants for all purposes,' regardless of statutory context." For the PSD permitting trigger, the Court further pointed out that EPA's own regulations historically interpreted "air pollutant" as limited to *regulated* air pollutants, and that the Agency also informally took the same position with regard to Title V.

For those stationary sources already subject to PSD and Title V for other pollutants (the so-called "anyway" sources, such as power plants, refineries and heavy manufacturing facilities), the Court supported EPA's interpretation that those sources, because of their conventional pollutant emissions, may also be required to limit emissions by employing BACT for GHGs. This determination has wide-reaching implications given that these "anyway" sources account for roughly 83% of U.S. stationary-source greenhouse gas emissions. While the Court did not agree with petitioners' argument that BACT is "fundamentally unsuited to greenhouse-gas regulation" because it shifts emissions controls from "end-of-stack" to a focus on energy efficiency, it did caution EPA that its decision should not be taken as a "free rein for any future regulatory application of BACT in this distinct context."

Stationary sources that are not already subject to PSD or Title V, such as large offices, residential buildings, and hotels, may not be out of the woods yet, though. In a footnote in the majority opinion, the Court suggested that EPA might have an opportunity to bring its interpretation of the PSD trigger in line with its longstanding interpretation of the permitting requirements for areas where NAAQS were not attained ("nonattainment" areas) if it were to limit the definition of "air pollutants" to those with localized effects on air quality, or just those for which the area in question is designated "attainment" or "unclassifiable." Using this reasoning, the Agency could issue revised rules concerning stationary sources not otherwise subject to PSD. Given that such rules would not significantly raise the level of regulated emissions above the 83% already encompassed by "anyway" sources, the question is whether and when EPA will consider it worth the effort.

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