



## *Supreme Court Throws Out the Bathwater, Keeps the Baby, on EPA's GHG Regulations*

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In a long-anticipated end-of-term decision, on June 23, 2014, a majority of the U.S. Supreme Court issued a ruling throwing out EPA's greenhouse gas (GHG) "Tailoring Rule," which revised the statutory thresholds for requiring federal air permits under the Clean Air Act (CAA), finding that the EPA's interpretation that such permits could be required due solely to a source's GHG emissions was not mandated by the CAA and that the EPA's decision to "tailor" the thresholds specifically for GHGs was contrary to the language of the statute. A separate majority also found that EPA could permissibly find that sources already required to obtain a permit for pollutants of conventional pollutants—so called "anyway sources"—must install the "best available control technology" (BACT) for GHGs.

Although the decision makes clear that a majority of the Supreme Court is unwilling to step back from its decision in *Massachusetts v. EPA*, upholding the EPA's authority to regulate GHG emissions under the CAA, the ruling comes as a strong rebuke to the EPA and its efforts to fit GHGs into a statutory construct developed for undeniably different purposes than avoiding global warming. The ruling also comes on the heels of EPA's announcement of its proposed Clean Power Plan (described [here](#)), which proposes a far-reaching set of emissions guidelines for states to reduce GHG emissions from fossil fueled electric generating units.

While the Court's decision speaks generally of the limits on the deference that will be afforded to EPA as it seeks to deliver on President Obama's plan to achieve demonstrable reductions in power sector emissions in the absence of Congressional action (described [here](#)), seldom does an agency's interpretive feat rise to the level of the current case, where EPA essentially took a number clearly written in the statute and multiplied that number by a thousand to avoid consequences it believed were unintended by Congress. Additionally, in a footnote elsewhere in the decision, the Court reaffirms the holding of its other major decision concerning GHG regulation—*American Electric Power Company v. EPA*—which was premised upon EPA's authority to regulate GHG emissions from the Power sector. Thus, there are reasons to believe the Court's decision means little with respect to the lawfulness of EPA's proposed power plant standards.

More immediately, the decision alters the permitting landscape for many proposed sources that would not otherwise require PSD permits, such as gas-fired power plants that are increasingly being relied upon to provide fast-ramping power when intermittent renewable sources (i.e., wind and solar) are not generating. Although such highly efficient sources would be expected to meet the BACT standard for GHGs, elimination of the requirement to obtain PSD permits avoids a favored avenue for project

opponents to delay construction of such projects. *See, e.g., In re: La Paloma Energy Center, LLC*, PSD Appeal No. 13-10, (Mar. 14, 2014) (described [here](#)).

## Background

In response to the Supreme Court's landmark 2007 decision in *Massachusetts v. EPA*, in which it held that GHGs may be regulated as an air pollutant under the CAA, EPA issued an Endangerment Finding for GHGs. 74 Fed. Reg. 66,496 (Dec. 15, 2009). Pursuant to the CAA's requirement that EPA establish motor-vehicle emission standards for "any air pollutant . . . which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7521(a)(1), the EPA then promulgated the "Tailpipe Rule" for GHGs, which set GHG emission standards for cars and light trucks as part of a joint rulemaking for fuel economy standards issued by the National Highway Traffic Safety Administration. 75 Fed. Reg. 25,324 (May 7, 2010).

EPA found that the Tailpipe Rule automatically and necessarily triggered regulation of *stationary* sources of GHG (e.g., power plants and petroleum refineries) under the Prevention of Significant Deterioration (PSD) program, which requires construction permits for stationary sources that have the potential to emit over 100 or 250 tons per year (tpy) of "any air pollutant," 42 U.S.C. §§ 7475, 7479(1), and Title V, which requires operating permits for stationary sources that have the potential to emit at least 100 tpy of "any air pollutant," *Id.* § 7602(j).

EPA then issued two rules phasing in permitting of stationary sources of GHG:

- In the Timing Rule, EPA delayed when major stationary sources of GHGs would otherwise be subject to PSD and Title V permitting, concluding that these requirements would commence on January 2, 2011—the date on which the Tailpipe Rule became effective. 75 Fed. Reg. 17,004 (Apr. 2, 2010).
- In the Tailoring Rule, EPA departed from the CAA's 100/250 tpy emissions threshold and provided that only the largest sources—those exceeding 100,000 tpy carbon dioxide equivalent (CO<sub>2</sub>e)—would initially be subject to GHG permitting. 75 Fed. Reg. 31,514 (June 3, 2010).

In 2012, the U.S. Court of Appeals for the D.C. Circuit upheld all four rules—the Endangerment Finding, Tailpipe Rule, Timing Rule and Tailoring Rule—in *Coalition for Responsible Regulation v. EPA*, 684 F. 3d 102 (2012) (*per curiam*). Last year, the Supreme Court granted six petitions for certiorari, but limited its review to only one question: "Whether EPA 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 greenhouse gases." 571 U. S. \_\_\_\_ (2013).

## Court Rejects EPA'S Requirement for PSD and Title V Permits Based Solely on GHGS

The crux of the problem EPA sought to address through the Tailoring Rule was that, unlike conventional air pollutants typically regulated under the CAA, GHGs—and carbon dioxide, in particular—are emitted in vastly greater quantities, such that the 100-or 250-tpy thresholds would be exceeded by many common sources, including schools, hospitals and office buildings. To avoid the insurmountable permitting burden that would result if all of these sources were now subject to PSD or Title V permitting, EPA therefore said it needed to "tailor," i.e., increase, the threshold for GHGs from 100-tpy to 100,000 tpy CO<sub>2</sub>e. EPA attempted to justify its departure from the statutory text based

upon the legal doctrines of “absurd results,” “administrative necessity” and “one step at a time.” The D.C. Circuit elided altogether the question of whether the EPA’s departure was lawful, finding instead that the industry petitioners were not harmed by, and therefore lacked standing to challenge, the Tailoring Rule because, by increasing the threshold, EPA only afforded industry relief from requirements that would otherwise apply.

On June 23, 2014, in a majority opinion issued by Justice Scalia in the case of *Utility Air Regulatory Group v. EPA*, No. 12-1146 (hereinafter, “*UARG*”), the Supreme Court, held that the EPA “had taken a wrong interpretive turn” when it decided that, upon the effective date of the Tailpipe Rule’s standards, “any air pollutant” necessarily included GHGs (for purposes of determining applicability of the PSD and Title V permitting programs) and then replaced the unambiguous statutory thresholds—100 or 250 tpy of any air pollutant—with a threshold of 100,000 tpy CO<sub>2e</sub> for GHGs. See slip op. at 21-24.

In the majority’s view, the EPA should have given a more limited construction to the words “any air pollutant” and found instead that PSD and Title V permitting were not automatically triggered for GHGs by the Tailpipe Rule’s. The Court reconciled its decision with *Massachusetts v. EPA*, which found that GHGs unambiguously fit within the CAA’s “capacious” definition of “air pollutant,” observing that “*Massachusetts* does not strip EPA of authority” to apply a narrower understanding of the term “any air pollutant,” where inclusion of GHGs “would be inconsistent with the statutory scheme.” Slip op. at 14.

## Separate Majority Upholds Requiring GHG BACT for Anyway Sources

While the majority opinion threw out the Tailoring Rule’s thresholds and the application of PSD permitting based solely on source emissions of GHG, a separate majority of the Court also upheld EPA’s requirement that “anyway sources”—i.e., those that already trigger PSD and Title V permitting by virtue of emissions of conventional pollutants—must meet BACT. Once a source is subject to PSD permitting, the CAA requires that the source be “subject to the best available control technology” for “each pollutant subject to regulation under [the CAA].” 42 U.S.C. §7475(a)(4).

A majority of the Court found that, given the lack of any ambiguity in the scope of the BACT requirement—it applies to “each pollutant subject to regulation under [the CAA]”—Congress’s expectation was clearer and, therefore, it was reasonable for the EPA to require “anyway sources” to meet BACT for GHGs. See slip op. at 27. Although it upheld the EPA’s authority to require GHG BACT for anyway sources, the Court does not uphold the Tailoring Rule’s threshold for what constitutes a “significant” emissions rate triggering the BACT requirement. According to the majority, EPA may require GHG BACT “only if the source emits more than a *de minimis* amount of greenhouse gases” *Id.*, at 28-29. However, upon promulgating the Tailoring Rule, the EPA expressly said that a truly *de minimis* amount might be much less than the rule’s 75,000-tpy threshold. *Id.*, at 8 note 3. Thus, at the very least, EPA must now justify this or another, presumably lower threshold as *de minimis* if it should wish to continue requiring BACT for anyway sources.

Importantly, a majority of the Court clearly rejected Justice Alito’s view (in his concurring and dissenting opinion joined by Justice Thomas) that *Massachusetts* was wrongly decided and GHGs should never have been subject to regulation under the CAA in the first place. According to Justice Scalia’s majority opinion, “[w]e are not talking about extending EPA jurisdiction over millions of previously unregulated entities, but about moderately increasing the demands EPA (or a state permitting authority) can make of entities already subject to its regulation.” See *id.*, at 28. Countering views that requiring BACT for GHGs would be an unwieldy exercise that would lead into examination of

the light bulbs used in a facility's cafeteria, Justice Scalia cites to the experience of one amicus, which has obtained several PSD permits (Calpine Corporation) and observed that, for anyway sources, the GHG analysis was only a small part of the overall permitting process. *Id.* at 26. For these reasons, the Court was able to distinguish between the term "any air pollutant" for purposes of determining the scope of the permitting obligation in the first instance, and the term "each pollutant subject to regulation" for purposes of determining the scope of the BACT requirement; only in the latter case would it allow EPA to read GHGs as being included.

The Court's decision in this respect evinces its desire to forge a middle ground. The Solicitor General revealed at oral argument that "anyway sources" accounted for 83% of stationary source GHG emissions, whereas the additional coverage afforded through the Tailoring Rule amounted to only 3% more. See slip op. at 12-13. Thus, by preserving the EPA's authority to require BACT for GHGs from anyway sources, the EPA would presumably still be able to target nearly all the emissions that might otherwise be subject to the BACT requirement, without triggering a cascade of potential permitting obligations for other sources.

## Implications

The most immediate impact of the Court's decision is that many smaller sources, such as gas-fired power plants, which would not require a PSD permits but for their emissions of GHGs, may no longer require such a permit. Additionally, many modifications to existing sources that would result in greater than a 75,000-tpy increase in GHG, but no significant increase of any criteria air pollutant, may no longer be required to obtain PSD permits. Thus, notwithstanding the emphasis placed by the Solicitor General and the Court's decision on the fact that anyway sources account for 83% of stationary source emissions and all the rest captured by the Tailoring Rule only accounted for 3% more, there may actually be many projects currently in the planning stages, including retrofits to existing coal-fired power plants needed to achieve the EPA's Mercury and Air Toxics Standards, that will now escape the PSD permitting obligation and the BACT requirement for GHGs.

Those new sources or modifications to existing plants might nevertheless be subject to regulation under EPA's proposed New Source Performance Standards (NSPS) for fossil fuel-fired electric utility generating units (see related alert [here](#)) or its more recently proposed Clean Power Plan (also known as the existing source performance standards (ESPS)) (see related alert [here](#)); so the absence of a requirement to meet BACT for GHGs may not mean such sources will actually be emitting GHG in amounts that would not otherwise occur if the Court had upheld the Tailoring Rule, which leads to the question of whether the Court's ruling in *UARG* has any bearing on the proposed NSPS or ESPS and EPA's authority to pursue regulation of such sources under Section 111 of the CAA. Apart from the fact that *UARG* dealt with the EPA's authority to interpret the CAA in a case involving its regulation of stationary source GHG emissions, it is not clear that the Court's decision will impact on the outcome of any litigation challenging the final version of either the NSPS and ESPS.

At first take, one might make much of the Court's statement that, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, . . . we typically greet its announcement with a measure of skepticism." Slip op. at 19 (internal citations omitted). While such an admonition to the EPA might suggest that a majority of the Court would view the far-reaching and ambitious interpretation of section 111(d) reflected by the proposed ESPS with a similar dose of skepticism, the EPA ostensibly has greater authority to interpret what constitutes the "best system of emission reduction" from existing sources, than to multiply a statutory threshold by 1,000.

Thus, *UARG* may tell us little about how a majority of the Court would rule on the interpretive questions posed by the EPA's proposed Clean Power Plan. Further, on the question of whether the EPA has authority to regulate GHG emissions under section 111 in the first instance or must similarly adopt a narrow reading of "any air pollutant" in section 111(d)(1)(A), a footnote elsewhere in the opinion affirms that the Court's decision in *American Electric Power Company v. Connecticut*, 564 U. S. \_\_\_\_ (2011) was premised upon the EPA having authority to regulate GHG emissions under section 111 of the CAA. See slip op. at 14 note 5. Critics of the EPA's proposed approach would therefore be wrong to presume that the Court's decision in *UARG* means EPA's proposed ESPS will suffer a similar fate. Indeed, there are strong reasons to think that the proposed ESPS are more legally durable, given that the "building blocks" are established independently of one another and are deemed to be severable by the EPA.

More immediate questions arise with respect to the direct implications of the Court's ruling on the rules states adopted as part of their State Implementation Plans (SIPs) pursuant to the Tailoring Rule. Many such rules did not simply incorporate by reference the definitions and requirements of EPA's regulations, but separately established GHG permitting obligations as part of the state's New Source Review (NSR) permitting program. It is not necessarily the case that those rules are no longer enforceable and we might expect that the EPA will provide guidance on the status of those SIP-approved rules and pending permit applications in the near term.

## Conclusion

While critics of the EPA's regulatory campaign to address GHG emissions and climate change in the absence of Congressional action may have scored a significant victory, the Supreme Court's decision in *UARG* does not represent the undoing of those efforts. The EPA will undoubtedly continue with its proposed rules to achieve significant reductions in power sector emissions and nothing in *UARG* blocks it from doing so.

The author obtained the first PSD permit to regulate GHGs issued under the CAA (for a 619-MW combined cycle gas fired power plant now in operation in California) and subsequently obtained the first PSD permits to regulate GHG emissions from renewable (geothermal) power plants under the Tailoring Rule.

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