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Supreme Court "Not Willing to Stand on the Dock and Wave Goodbye" as EPA Explores How It Can Regulate Greenhouse Gases from Every Possible Source

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In 2007, the Supreme Court told the U.S. Environmental Protection Agency (EPA) it was wrong to conclude that it lacked the authority to regulate greenhouse gases (GHGs) emitted from vehicles, because GHGs are an "air pollutant." Since then, the energy and power industries in particular have watched as the EPA took that ruling and developed regulations focused on limiting GHG emissions from stationary sources. EPA not only regulated GHGs from utilities, but expanded the program to almost any source of GHGs (landfills, electronics manufacturers, office buildings), and then "tailored" the rule to limit what everyone agreed were onerous and unnecessary impacts. In a 5-4 decision, the Supreme Court again reversed the EPA, this time telling it that it cannot regulate entities' GHG emissions if they do not otherwise need a Clean Air Act (CAA) permit. While the decision provides relief to building owners, hospitals, bakeries, dry cleaners, many manufacturers, and just about every other type of business that uses heating and air conditioning, the power industry itself (meaning those that need CAA permits anyway) did not fare as well because the Court upheld EPA's authority to require them to implement "best available control technology" (BACT) to limit GHGs. This alert describes the decision, and addresses the question most relevant to the regulated community: How much will this decision matter?

What did the Court say?

In *Utility Air Regulatory Group v. Environmental Protection Agency*,[1] the Supreme Court revisited challenges to the EPA's "Timing/Triggering"[2] and "Tailoring"[3] Rules for GHGs. The *Utility Air* decision affirmed in part and reversed in part the decision of the D.C. Circuit,[4] and answered two questions. First, it said that the agency does not have the power under the CAA to regulate GHG emissions from non-major stationary sources (entities other than utilities, for the most part) not already subject to CAA Title V and "Prevention of Significant Deterioration" (PSD) permitting for other pollutants regulated by the CAA. As a result, the Timing/Triggering and Tailoring Rules, to the extent they were designed to "ease" the pain of regulation for the non-major sources, were invalidated. Second, it said that the EPA may impose BACT limits to control GHGs from major sources that need CAA Title V and PSD permits for other pollutants regulated under the CAA.

In addressing the first question, the Court examined whether it was within EPA's powers under the CAA to determine that a source may be subject to the PSD requirements and Title V operating permitting requirements on the basis of its potential to emit GHGs. The EPA reasoned that *Massachusetts v. EPA*, 549 U.S. 497 (2007), authorized the regulation of

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GHGs and that such regulation would impact PSD and Title V permitting requirements for all stationary sources with the potential to emit GHGs in excess of the statutory thresholds set forth in the CAA. Since the statutory thresholds would likely prove unworkable for GHGs, the EPA issued its Tailoring Rule, which "tailored" the statutory thresholds to numbers it asserted were more fitting for GHGs.[5] The Court highlighted the distinction between the term "air pollutant" as found in the act-wide definition, and the term as it is used in the CAA's operative provisions. In *Massachusetts v. EPA*, the Court held that the Act-wide definition of "air pollutant" (as applied to mobile sources) includes GHGs, but, here, the Court determined that the operative provisions applying that term to stationary sources do not necessarily cover GHGs. The Court pointed to several other examples of instances where the EPA has interpreted the term "air pollutant" in a way that does not encompass each substance falling within the broad Act-wide definition.[6] The Court found that the EPA's insistence on using the broader definition throughout was incompatible with the regulatory structure of the Act and the agency's own interpretations. The Court reasoned that the very structure of the PSD and Title V programs, with their "heavy substantive and procedural burdens" indicate that Congress never intended they be applied beyond a few large sources.[7] The Court further indicated that the intensive programmatic demands that EPA's interpretation would have necessitated should have served as a clear indicator to the agency that its interpretation was an impermissible expansion of its power under the Act.[8] The Court held that the rewriting of the statutory thresholds to alleviate these concerns was impermissible and, in turn, that it was not within the EPA's powers to determine that a source may be subject to PSD and Title V requirements on the basis of its potential to emit GHGs in the first place. Five Justices concurred on these points.

The Court next considered whether the EPA permissibly determined that a source already subject to the PSD program (a source subject to PSD "anyway," regardless of GHG emissions) may be required to limit its GHG emissions by applying BACT. Reading the language of the statute closely and finding it sufficiently clear and broad, the Court found that it was within the EPA's powers to require BACT for GHGs emitted by sources already subject to PSD review ("anyway sources"). Seven Justices concurred in this portion of the decision.

To whom does this decision matter?

Without a doubt, this decision matters to the utility industry. While the Court said EPA could regulate GHGs through the BACT process, it also suggested both questions and limits on that authority. It noted that "the record before us does not establish that the BACT provision as written is incapable of being sensibly applied to greenhouse gases."[9] Justice Scalia specifically noted EPA guidance suggesting that BACT should not require every possible change that could yield minor energy improvements, should focus on facility equipment that uses large amounts of energy, and that BACT can only be applied to pollutants that the source itself emits.[10] These questions may be magnified given Justice Alito's observations regarding how the climate change impacts of a single project can be realistically assessed. The majority observed that "we cannot say that it is impossible for EPA and state permitting authorities to devise rational ways of complying with the statute's directive to determine BACT for greenhouse gases 'on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.'"[11]

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The majority opinion seems to suggest that "anyway" sources means those that trigger review under PSD and Title V permit review. But these are two different triggers, and it is entirely possible that a facility may need to amend its Title V permit without triggering PSD review (e.g., changes that do not significantly increase the potential to emit other regulated pollutants). If PSD is not triggered but a Title V permit still needs to be amended, is it clear that EPA may not regulate that entities' GHG emissions?

Also, for facilities that need to comply with PSD requirements because of their emission of non-GHG pollutants, what is the ongoing relevance of the current 75,000 ton GHG "significance" threshold that triggers GHG BACT review? The Court indicated that EPA has not properly supported this threshold as a *de minimis* exception from BACT requirements. Does that mean sources that were previously exempt from GHG BACT requirements even though they triggered PSD review, have been brought back under the regulatory umbrella? Can EPA continue to exempt sources that emit less than 75,000 tons of GHGs from BACT requirements until it changes that rule?

What does the decision mean to EPA's other efforts to regulate GHGs?

Although EPA may claim victory, the decision rebukes the agency harshly for its disregard of the CAA in favor of its preferred policy outcome and signals the Court will scrutinize further rulemaking for adherence to the statute.[12] This could have an impact on EPA's two pending proposals to regulate CO_2 emissions from new[13] and existing[14] power plants under Section 111 of the CAA, which each rely upon generous interpretations of its authority to support novel applications of the section governing New Source Performance Standards.[15]

Will Congress react and, if so, how?

Despite this narrow ruling, the decision will likely fuel the current debate in Congress over EPA's proposal to regulate new and existing power plants. Supporters of EPA will read the decision as a reaffirmation of EPA's authority to regulate GHGs including from electric generating units. Opponents will cite the Court's decision as another example of EPA overreach and overregulation and use it to muster support for defunding EPA through the appropriations process so it cannot finalize the rule.

What does this decision mean to new energy sources, such as natural gas?

At one level, because the decision does not impose substantive limits on EPA's rules as they relate to major sources, the EPA and the Obama Administration's continued plan to reduce the role of coal and certain other fossil fuels used by "major sources" from its "all of the above" energy strategy has been left unchanged.

On the other hand, Justice Alito's dissent creates collateral questions relevant to anyone undertaking any energy project. Justice Alito observed that by definition, individual facilities cannot realistically be evaluated in terms of their impacts on global climate change. How will this consideration play into the reviews that many federal (and state) agencies (such as the Federal Energy Regulatory Commission) undertake when they review potential climate change impacts of federally permitted or sponsored projects under the National Environmental Policy Act (NEPA)?[16] Does his observation signal a potential that climate

change review in the context of a single project is impracticable? Will it cause agencies to shift to greater use of "programmatic" environmental impact statements for these kinds of projects?

What does this decision mean for the application of ***Chevron*** principles to agency rulemaking?

Justices Scalia and Breyer unambiguously disagree over whether EPA permissibly interpreted the Clean Air Act. At oral argument, Justice Kagan described this case as presenting "the apex of Chevron deference." Justices Scalia and Breyer agreed that EPA's decision to require BACT for GHGs emitted by "anyway" sources constitutes a permissible interpretation of the CAA. Where the Justices most significantly disagreed was on the question of whether EPA had the discretion to decide that sources would not become newly subject to PSD or Title V permitting on the basis of their potential to emit GHGs in amounts less than 100,000 tons per year, a threshold different than that established by statute for each program.

Justice Scalia, writing for the majority, reasoned that the different ways the term "air pollutant" was used throughout the CAA provided EPA with the discretion to specify what pollutants are covered under individual programs, but not to rewrite statutorily established thresholds in order to make an overall interpretation of the CAA reasonable. Approaching the issue of *Chevron* deference through a lens more focused on statutory construction, Justice Scalia's opinion essentially concludes that a statutorily established threshold is an unambiguous term and that the question of applying *Chevron* deference ends there.

Pushing back against the majority's conclusion that numerical permitting thresholds are unambiguous, Justice Breyer argued that EPA's decision to raise the threshold rather than exclude direct regulation of GHGs was reasonable because Congress intended for the PSD and Title V thresholds to limit the scope of regulated sources, not the scope of regulated air pollutants. Although it remains unknown how lower courts will understand and follow this decision concerning the application of *Chevron* deference, Justice Kennedy's decision to side with the majority will not go unnoticed.

The fact that the EPA has for years defined "air pollutant" differently for different purposes, and is now more or less bound by that approach (at least until it changes the regulations that contain these definitions), may impact the authority of agencies generally to change their positions for some purposes under a statute, but not for others.

What does the decision tell us about agency efforts to address GHGs generally?

EPA has embraced the decision as a victory, as it leaves intact those parts of the Tailoring Rule that apply to more than 80 percent of the GHG emissions at issue – those from major sources like utilities. EPA may actually be pleased with the Court's decision to vacate those parts of the rule that would regulate GHG emissions from stationary sources that are not otherwise already covered by the PSD program. This essentially takes EPA off the hook from continuing to assert that it will eventually regulate sources of GHG emissions down to the statutory thresholds. States, who bear the brunt of PSD and Title V permitting, will be

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especially pleased. EPA may also likely underscore the fact that the decision was authored by one of the Court's conservative justices and joined by several others, suggesting that EPA's preferred interpreation of its GHG authority (at least the portion that remains intact) enjoys support from across the jurisprudential spectrum.

Justice Alito's cogently reasoned dissent, joined by Justice Thomas, accepts arguments made by some petitioners that EPA may not regulate GHGs under the PSD preconstruction permitting program because the CAA requires EPA to first assess and quantify the adverse impacts of GHGs on local air quality, and EPA concedes these impacts are global and not locally discernable.[17] Justice Alito further observes that the BACT analysis that permitting authorities are required to perform occurs on a case-by-case basis and requires balancing the cost of GHG controls against the air quality benefits they achieve, which cannot be meaningfully done when local air quality impacts are unknown or nonexistent. EPA dodged a bullet when only two justices concluded the agency exceeded its authority under the CAA in this respect. Congress, however, may embrace these arguments in Justice Alito's dissent to craft a legislative response around the notion that the PSD program was not intended, and is ill-suited, to regulate GHG emissions.

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[1] *Utility Air Regulatory Grp. V. EPA*, No. 12-1146, slip op. (June 23, 2014).
[2] 75 Fed. Reg. 17,004 (April 2, 2010).
[3] 75 Fed. Reg. 31,514 (June 3, 2010).
[4] *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012); for additional information on the decision underlying the Supreme Court's decision, see our prior alert on this topic: D.C. Circuit Upholds EPA Regulation of Greenhouse Gas Emissions from New Motor Vehicles and Major Stationary Sources.
[5] 75 Fed. Reg. 31,514 (June 3, 2010).
[6] *Utility Air*, slip op. at 12-13.
[7] *Id.* at 18.
[8] *Id.* at 24.
[9] *Id*. at 28.
[10] *Id.* at 26-28.
[11] *Id.* at 29, n.9.
[12] As the court said, "We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery." *Id*. at 23.
[13] 79 Fed. Reg. 1430 (Jan. 8, 2014).
[14] 79 Fed. Reg. 34,830 (June 18, 2014).
[15] For more information, see our prior alerts on these proposals: EPA Proposes Major Reductions in Greenhouse Gas Emissions from Existing Power Plants Affecting Everyone Who Produces and Uses Energy and EPA Proposes Strict Greenhouse Gas Emissions Standards on New Electric Utilities.
[16] For more information on the NEPA requirements applicable to FERC reviews of proposed projects, see our prior alert: D.C. Circuit to FERC: Environmental Review of "Related" Pipeline Expansion Projects Must Consider Cumulative Effects, Even After They Are Already Built.
[17] *Utility Air*, slip op. at 1-8 (Alito, J., dissenting).