Utility Air Regulatory Group v. EPA: A Foreshadowing of Things to Come?

By Paul Beard II and Daniel Cheung***

On June 23, 2014, the United States Supreme Court issued its decision in *Utility Air Regulatory Group v. EPA*, holding that under the Clean Air Act ("CAA" or "Act"), the emission of greenhouse gases ("GHGs") alone could not trigger requirements for the Prevention of Significant Deterioration ("PSD") or Title V programs.[1] The Court also held that the Act allows regulation of GHG emissions from sources which emit other pollutants that subject them to PSD requirements "anyway"—so-called "anyway sources";[2] more than 83% of the stationary sources that the Environmental Protection Agency ("EPA") sought to regulate were anyway sources.[3] The Court's decision highlights the Court's ambivalence with respect to the EPA's regulatory authority and may foreshadow its position on future GHG-related litigation.

I. Background

In 2007, the U.S. Supreme Court decided *Massachusetts v. EPA*, holding that the Act would authorize EPA to regulate GHGs from new motor vehicles if the agency determined that GHG emissions endangered public health or welfare.[4] The Court's opinion engendered a series of rulemakings to regulate GHGs that was "the single largest expansion in the scope of the [Act] in its history."[5] In its 2009 "Endangerment Finding," EPA determined that GHGs endanger public health and welfare by contributing to global climate change.[6] EPA then issued a determination that the regulation of GHGs from motor vehicles would "trigger" regulation of GHGs from stationary sources under Title V and Title I of the Clean Air Act ("Triggering Rule").[7] The EPA promulgated GHG emissions standards for new motor vehicles in its "Tailpipe Rule" (effective January 2, 2011), which—according to its Triggering Rule—triggered GHG standards for stationary sources.[8]

Realizing that a literal application of the original PSD and Title V statutory threshold would be administratively impracticable, EPA issued the "Tailoring Rule" to raise the permitting threshold from between 100 and 250 tons per year to between 7,500 and 10,000 tons per year.[9] Several states, industry groups, and nonprofit organizations filed actions in the United States Circuit Court of Appeals for the D.C. Circuit, challenging all of EPA's GHG-related actions, including the Endangerment Finding, the Triggering Rule, and the Tailoring Rule.[10] The D.C. Circuit agreed with EPA's interpretation of the statute, holding that "any air pollutant" could be interpreted only as "any air pollutant regulated under the Clean Air Act."[11] The court also reasoned that this definition should be applied to determine the scope of the PSD program.[12] The D.C. Circuit denied rehearing en banc, with Judge Brown dissenting on the grounds that the full court should consider the propriety of extending *Massachusetts v. EPA*,[13] and Judge Kavanaugh dissenting on the grounds that "any air pollutant" under the PSD program should be narrowly construed to include only those pollutants regulated under the National Ambient Air Quality Standards ("NAAQS").[14]

The United States Supreme Court granted review in October 2013 on the question of whether EPA permissibly determined that its motor vehicle GHG regulations automatically triggered permitting requirements under the Act for stationary sources that emit GHGs.[15]

II. The Decision

Justice Scalia delivered the majority opinion. Justices Breyer and Alito wrote separate opinions concurring in part and dissenting in part.

A. Justice Scalia's Majority Opinion

In announcing the majority opinion, Justice Scalia noted that the EPA, "is getting almost everything it wanted in this case."[16] But while the EPA did retain significant regulatory authority for stationary sources, the opinion is widely seen as a reprimand of the EPA's regulatory overreach and as a strong signal of the Court's skepticism of the EPA's regulation of GHGs.

The decision is fractured, but each section of Justice Scalia's opinion was supported by at least a majority of the justices. Justice Breyer, joined by three other justices, dissented but joined with respect to Part II-B-2, which held that Best Available Control Technology (BACT) standards can be applied to anyway sources.[17] Justice Alito wrote a concurring opinion, joined by Justice Thomas, but dissented with respect to Part II-B-2.[18]

The majority opinion begins with a brief overview of the Clean Air Act and the history of GHG regulation since *Massachusetts v. EPA*.[19] It then analyzes two questions: first, whether the Clean Air Act compelled or permitted EPA's interpretation of the Trigger Rule; and second, whether the EPA reasonably interpreted the Clean Air Act to require anyway sources to comply with permitting requirements for GHGs.

1. EPA's Triggering Rule Was Neither Compelled Nor Permitted

The EPA claimed that regulation of GHGs under Title II of the Clean Air Act both permitted and compelled regulation of GHGs under PSD and Title V.[20] The majority opinion begins with a sharp critique of this argument, saying that this conclusion was the result of a "flawed syllogism."[21] Under the PSD program, a "major emitting facility," defined as a stationary source "which emit[s], or [has] the potential to emit, one hundred tons per year or more of *any air*

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pollutant" is subject to permitting requirements.[22] A "major stationary source" under Title V is defined with nearly identical language.[23] EPA argued that "any air pollutant" had to mean "any air pollutant regulated under the Clean Air Act" because the Court held in *Massachusetts v. EPA* that the Act-wide definition of "air pollutant" "embraces all airborne compounds of whatever stripe."[24] However, the mere fact that the Act-wide definition of the term "air pollutant" includes GHGs does not mean that the same definition applies to this section. In fact, the EPA historically followed Justice Scalia's reading of the phrase "any air pollutant," narrowly limiting the types of pollutants and sources that were subject to regulation under this provision.[25] Justice Scalia points out that, given this fact, "It takes some cheek for EPA to insist that it cannot possibly give 'air pollutant' a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades."[26]

The opinion then shifts to whether the EPA's construction of the Clean Air Act was permissible in the first instance. Even within the *Chevron* framework—where agency interpretation of ambiguous statutes is given deference so long as that interpretation is a reasonable one—the majority concludes that the EPA's construction was impermissible.[27] Citing the EPA's own figures on the resulting increase in administrative costs (increasing the administrative costs for Title V permits from $62 million to $21 billion, for example), the Court holds that "the excessive demands on limited governmental resources is alone a good reason for rejecting [EPA's Triggering Rule]. EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[28]

Justice Scalia reserved his harshest words for the Tailoring Rule, which he addressed separately, saying that if the rule were upheld, "we would deal a severe blow to the Constitution's separation of powers."[29] Since the numerical permitting thresholds for PSD and Title V are written into the statute, the agency did not have authority to rewrite the requirements out of administrative convenience.[30] For the Court to allow the EPA to tailor regulation would be to, "stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery," and the Court had no intention of doing that.[31]

2. EPA Is Permitted To Regulate GHGs From Anyway Sources

While the majority opinion clearly rejects EPA's Triggering and Tailoring Rules, it does give the EPA authority to apply BACT standards to "anyway" sources – stationary sources that are already subject to PSD requirements.[32] While the definition of a "major emitting facility" does not specifically require regulation of all Act-wide pollutants, the BACT provisions apply "'for each pollutant subject to regulation under this chapter' (i.e., the entire Act)."[33] Since GHGs are a pollutant regulated under the Clean Air Act, they can be subject to BACT requirements.

B. Justice Breyer's Dissenting and Concurring Opinion

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, rejected all but Part II-B-2 of the majority opinion, joining only the holding that BACT could be applied to regulation of GHGs from anyway sources. Instead of reading EPA's rules as trying to exempt certain pollutants (in this case GHGs), Justice Breyer suggests applying the "tailoring" exemption to sources—in this case, smaller sources.[34] He reasons that Congress intended to regulate only those facilities which are significant contributors to air pollution and are able to bear the costs imposed by CAA regulations.[35] Applying the "tailoring" to the category of sources instead of pollutants would serve the Clean Air Act's purpose without straying from the statutory language.[36]

C. Justice Alito's Concurring and Dissenting Opinion

Justices Alito and Thomas agreed with most of the majority opinion, but took exception to its endorsement of regulating GHG emissions from anyway sources. Their opinion begins with an unequivocal rejection of the majority opinion in *Massachusetts v. EPA*, arguing that, "these cases further expose the flaws with that decision."[37] Justice Alito argues that the Clean Air Act was meant to regulate "conventional pollutants," and that it is not suited for regulation of GHGs. This conclusion also leads him to reject the majority's position that BACT analysis should apply to "anyway" sources, arguing that the nature of the PSD program, which emphasizes local harms, and BACT, which requires a case-by-case balancing of costs and benefits from control technologies, cannot be used to regulate GHGs.[38]

III. The EPA's Subsequent Regulatory Action

One month after the Supreme Court's decision, the EPA issued a memorandum saying that it would continue to enforce BACT standards for GHG emissions from anyway sources.[39] On December 19, 2014, the EPA issued further guidance on the rescission of PSD and Title V permits that were required solely because of the source's potential to emit GHGs.[40] It simultaneously issued a no-action letter assuring that sources would not be penalized for failure to comply with the terms of these permits in the interim.[41] On April 25, 2015, the D.C. Circuit amended its decision in accordance with the Supreme Court's opinion and vacated the relevant portions of the EPA's regulation.[42]

According to the EPA, this change will likely affect only a small group of sources, including municipal or commercial landfills that are large, but not large enough to be covered by other EPA regulations; pulp and paper facilities; electronics manufacturing plants; some chemical production plants; and beverage producers.[43]

IV. Impact of *UARG v. EPA*

The most immediate impact of this decision has been the restriction of EPA's toolkit for regulating GHGs. For example, the Court unanimously agreed that small sources are categorically exempt from PSD and Title V permitting requirements for GHGs.[44] The majority opinion also laid out explicit limitations on PSD-based emissions controls for larger sources, suggesting that EPA may not regulate energy efficiency, compel a fundamental redesign of facilities, or regulate the energy grid directly. Lastly, the Court suggested that GHGs can only be regulated under the PSD program for anyway sources if more than a "de minimis" amount is

emitted—what that threshold is was left open by the Court.[45]

The most significant impact of this opinion, of course, remains to be seen in the EPA's ongoing battle to regulate GHGs. Leading up to this case, the EPA issued the Tailpipe Rule, regulating GHG emissions from small and mid-sized motor vehicles under Clean Air Act Section 202(a).[46] Just weeks before the Court issued its opinion, the Obama administration released its proposed Clean Power Plan, which attempts to cut GHG emissions from existing—mostly coal-fired—power plants by up to 30 percent under Clean Air Act Section 111(d), a little-known and rarely-used provision in the Clean Air Act.[47] In June 2015, the EPA and Department of Transportation released GHG standards for new trucks, again under Section 202(a).[48]

According to some commentators, this case was a "warning shot" to the EPA that a majority of the Court is skeptical of its regulation of GHGs through the Clean Air Act.[49] The Court expressly invited future challenges of GHG regulation in its opinion, most notably by invoking *Brown & Williamson v. FDA*, a case establishing a canon of anti-deference in situations where "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'"[50] It is difficult to know whether this refers to the present case or to the Obama administration's Clean Power Plan, which is based on an obscure provision of the Clean Air Act.

It has also been pointed out, however, that the Court heard this case in the same term as *EPA v. EME Homer City Generation*, in which the Court deferred to the EPA on a question of cross-state NAAQS regulation.[51] The Court's holding in *EME Homer City Generation* stands in stark contrast to its holding in *UARG*, suggesting that the narrative about GHG regulation is still being written.[52] Is GHG regulation clearly permitted under the Clean Air Act such that EPA's interpretation of the statute is entitled to deference, or is the EPA forcing a round peg into a square hole by attempting to regulate GHGs under a statute ill-suited for that purpose?

V. Conclusion

As a practical matter, the Court's decision in *UARG v. EPA* did little to change permitting requirements for most stationary sources. However, it did reveal that the Court is deeply divided on the issue of whether the EPA can reasonably regulate GHGs under the Clean Air Act. Congressional action to *increase* regulation seems unlikely, because most bills currently before Congress are attempting to *block* regulation. The uncertainty around whether and how the EPA will regulate emission of GHGs continues, but the Court seems eager to decide on this issue in the near future. With the Clean Power Plan that came out in August 2015, it likely will have that opportunity very soon.

Endnotes

1 Util. Air Regulatory Group v. EPA (UARG), 134 S.Ct. 2427, 2446 (2014).

2 *Id.* at 2448.

3 *Id.* at 2438.

4 Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007).

5 Julie R. Domike & Alec C. Zacaroli, The Clean Air Act Handbook xxi (3rd ed. 2011)

6 *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1) ["Endangerment Finding"].

7 *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71) ["Triggering Rule"].

8 *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified in various sections of 42 and 49 C.F.R.) ["Tailpipe Rule"].

9 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71) ["Tailoring Rule"].

10 Coal. For Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom.* UARG, 134 S. Ct. 2427.

11 *Id.* at 133 (internal quotation marks omitted).

12 *Id.*

13 Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 WL 6621785, *3 (D.C. Cir Dec. 20, 2012) (Brown, J., dissenting from denial of rehearing en banc).

14 *Id.* at *15 (Kavanaugh, J., dissenting from denial of rehearing en banc).

15 Util. Air Regulatory Group v. EPA, 134 S.Ct. 418 (2013) (granting certiorari on the question of "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.").

16 Debra Cassens Weiss, *SCOTUS Partially Limits EPA's Greenhouse Gas Authority; Scalia Says EPA Got Most of What It Wanted*, ABA Journal (June 23, 2014), *available at* http://www.abajournal.com/news/article/scotus_partially_limits_epas_global_warming_authority.

17 UARG, 134 S.Ct. at 2455.

18 *Id.* at 2458.

19 *See id.* at 2435. For an excellent overview of the Clean Air Act and GHGs, *see also* Domike & Zacaroli, *supra* note 5, at 521-548.

20 UARG, 134 S.Ct. at 2439.

21 *Id.*

22 42 U.S.C.S. § 7479(1).

23 *Id.* at § 7602(j).

24 Massachusetts, 549 U.S. at 529.

25 *See* UARG, 134 S.Ct. at 2440.

26 *Id.*

27 Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

28 UARG, 134 S.Ct. at 2445.

29 *Id.* at 2446.

30 *See* Chevron, *supra*.

31 UARG, 134 S.Ct. at 2446.

32 *Id.* at 2448.

33 *Id.*, *citing* 42 U.S.C. § 7475(a)(4).

34 *Id.* at 2452-53.

35 *Id.* at 2453.

36 *Id.* at 2454.

37 *Id.* at 2455.

38 *Id.*

39 Memorandum from Janet G. McCabe, Acting Assistant Administrator, Office of Air and Radiation, and Cynthia Giles, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, to Regional Administrators, *Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in Utility Air Regulatory Group v. Environmental Protection Agency*, at 3 (July 24, 2014), *available at* http://www.epa.gov/region7/air/nsr/nsrindex.htm (last visited June 24, 2015).

40 Memorandum from Janet G. McCabe, Acting Assistant Administrator to Air Division Directors, *Next Steps for Addressing EPA-Issued Step 2 Prevention of Significant Deterioration Greenhouse Gas Permits and Associated Requirements* (Dec. 19, 2014), *available at* http://www.epa.gov/region7/air/nsr/nsrindex.htm (last visited June 24, 2015).

41 Memorandum from Cynthia Giles, Assistant Administrator to Janet McCabe, Assistant Administrator, Office of Air and Radiation, Regional Administrators, *No Action Assurance Regarding EPA-Issued Step 2 Prevention of Significant Deterioration Permits and Related Title V Requirements Following Utility Air Regulatory Group v. Environmental Protection Agency* (Dec. 19, 2014), *available at* http://www.epa.gov/region7/air/nsr/nsrindex.htm (last visited June 24, 2015).

42 Coal. for Responsible Regulation v. EPA, No. 09-1322, 2015 U.S. App. LEXIS 10619 at *1 (D.C. Cir. Apr. 10, 2015).

43 Robert Barnes, *Supreme Court: EPA Can Regulate Greenhouse Gas Emissions, With Some Limits*, Washington Post (June 23, 2014), http://www.washingtonpost.com/politics/supreme-court-limits-epas-ability-to-regulate-greenhouse-gas-emissions/2014/06/23/c56fc194-f1b1-11e3-914c-1fbd0614e2d4_story.html.

44 *See* UARG, 134 S. Ct. at 2443 (EPA acknowledges that PSD review is not suitable for "tens of thousands of smaller sources); *see also id.* at 2452 (Breyer, J., dissenting) (shifting the implicit permitting exception to "smaller sources that Congress did not mean to cover").

45 *Id.* at 2449.

46 Tailpipe Rule, *supra* note 8.

47 Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generation Units, 79 Fed. Reg. 34,830 (June 18, 2014); *see also* 42 U.S.C.S. § 7411(d).

48 *See* Greenhouse Gas Emissions and Fuel Efficiency Standards For Medium- and Heavy-Duty Engines and Vehicles – Phase 2, EPA-HQ-OAR-2014-0827 (proposed June 19, 2015) (to be codified at scattered provisions of 40 C.F.R.).

49 Jody Freemon, *Why I Worry About* UARG, 39 Harv. Envtl. L. Rev. 9 (2014).

50 UARG, 134 S.Ct. 2427 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156 (2000)).

51 EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014).

52 Ann E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation After* UARG *and* EME Homer, 39 Harv. Envtl. L. Rev. 23 (2014).