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Supreme Court Limits EPA's GHG Permitting Authority and Creates Questions Regarding Implementation

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By: ***Jeffrey R. Holmstead***

On Monday, June 23, the U.S. Supreme Court issued its long awaited decision in *UARG v. EPA*, the case that questioned EPA's authority to require stationary sources to obtain Prevention of Significant Deterioration (PSD) and Title V air permits for greenhouse gases (GHGs). Specifically, the Court considered: (1) whether a stationary source can be required to obtain a PSD or Title V air permit based solely on its potential to emit GHGs and (2) whether sources that have to obtain PSD and Title V permits based on their potential to emit traditional criteria pollutants (so called "anyway sources") must also obtain a permit limit based on the Best Available Control Technology (BACT) for controlling GHG emissions. Ultimately, the Court held that GHG emissions alone cannot trigger an obligation to obtain a PSD or Title V permit, but that EPA can require a source to have a BACT limit for GHGs in its PSD permit if the source is required to obtain a PSD permit for any other pollutant. **Overview of the Decision** The Court first addressed whether GHG emissions alone could trigger an obligation to obtain a PSD or Title V permit. The Clean Air Act requires permits for sources that are major emitters of "any air pollutant." Therefore, EPA contended that these permitting obligations apply to any facility that is or would be a major source of GHG emissions. The Court began its analysis by carefully considering how EPA has historically interpreted the term "air pollutant." The Court concluded that when EPA has developed permitting requirements, it has interpreted this term more narrowly than the definition provided in the Clean Air Act. The Act defines "air pollutant," as "any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." However, EPA's own regulations have limited the phrase "any air pollutant" in numerous other applications to air pollutants that were meant to be addressed by a particular regulatory program "“ and *not* to literally encompass any and all airborne substances (e.g., steam or oxygen). For example, EPA has limited the term "any air pollutant" in certain contexts to apply only to pollutants for which there are new source performance standards or pollutants

that impair visibility. Thus, the Court concluded that EPA has previously exercised discretion when interpreting "any air pollutant" when establishing other permitting requirements so that the term is reasonable and makes sense within the context of the Clean Air Act. Therefore, the Court concluded that EPA could not be said to be "compelled" to regulate GHGs in this situation. Next, the Supreme Court analyzed EPA's alternative argument that its interpretation was a reasonable construction of the Clean Air Act. The Court flatly rejected EPA's claim that it was reasonable for EPA to "tailor" the statute by changing the statutory PSD thresholds for GHG emissions. Congress set explicit thresholds in the Clean Air Act for PSD: 250 tons per year (TPY) or 100 TPY depending on the type of source. Because "applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with "“ in fact, would overthrow "“ the Act's structure and design," EPA created a much higher limit "“ 75,000 TPY "“ for GHG emissions. The Court referred to this interpretation as "patently unreasonable "“ not to say outrageous" because EPA was attempting to "seiz[e] expansive power that it admits the statute is not designed to grant." According to the Court, the more reasonable interpretation of the Clean Air Act is that GHG emissions should not be considered for purposes of determining whether a source or project "triggers" PSD or Title V permitting requirements. But if a source or project triggers those obligations, then GHG emissions can be included in that permit. As to whether EPA could require "anyway" sources to include permit limits based on BACT for GHG emissions, Petitioners were concerned that EPA would be authorized to micromanage the energy efficiency of projects down to the type of light bulbs installed. The Court disregarded this concern, noting that there are important limitations in place to avoid handing EPA unlimited regulatory authority. In particular, the Court noted that "BACT cannot be used to order a fundamental redesign of the facility" and BACT is only required for pollutants that the source emits. Therefore, the Court rationalized that EPA cannot use BACT to require "reductions in a facility's demand for energy from the electric grid."

The Impact of the Decision

In short, the Court has now clarified the following:

- If a project includes a physical or operational change at an existing source and it will cause a significant increase in conventional pollutants, that project will require a PSD permit, and that permit must include a BACT limit for GHGs or any other regulated pollutant.

- However, if a project does not trigger PSD for a conventional pollutant, then no PSD permit is required "“ even if the project will substantially increase the source's GHG emissions.

The Court's decision now leaves EPA to determine how to address the flaws that the Court identified in the existing GHG permitting program. By way of example, EPA (and State permitting authorities) will need to consider what to do about "non-anyway" sources or projects that have already received or applied for GHG PSD permits. The decision also creates uncertainty regarding what constitutes a *de minimis* level of GHG emissions. As the Court noted,

EPA avoided answering this question in the Tailoring Rule. For criteria pollutants, those thresholds are between 10 and 100 tons per year (TPY) depending on the pollutant. If EPA sets the *de minimis* threshold below 75,000 TPY, "anyway" projects with GHG emissions below 75,000 TPY may suddenly find themselves needing to establish BACT for GHGs. The decision will benefit various projects located in the State of Texas, but there is a possibility EPA may delay the transfer of GHG petting authority to Texas. At this time, Texas is still in the process of trying to obtain GHG permitting authority from EPA. On February 18, 2014, EPA issued a proposed rule to approve Texas's GHG PSD revisions to its State Implementation Plan (SIP). However, EPA has yet to take final action by approving Texas's rules and rescinding the Federal Implementation Plan (FIP) that addresses GHGs in Texas. The regulatory authorities and industry are optimistic that EPA will move forward with its final action on the Texas program without delay. Approving the transition of permitting authority to the Texas Commission on Environmental Quality (TCEQ) would place Texas on the same footing as all other SIP-approved GHG programs and would allow Texas to make any revisions to its SIP, if necessary, at a later time "“ an analysis that all other States would need to undertake as well in light of the *UARG* decision. Additionally, this decision should be kept top-of-mind as EPA moves forward with its plans to regulate carbon dioxide emissions from power plants. In particular, EPA should carefully consider whether its recently proposed rule to regulate emissions from existing power plants is another example of EPA expanding its regulatory authority without Congressional approval. As the Supreme Court has warned EPA, such announcements will be greeted "with a measure of skepticism" because the Court is "not willing to stand on the dock and wave goodbye as EPA embarks on [a] multiyear voyage of discovery."