

ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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Supreme Court Ruling Means Some Facilities Will No Longer Trigger Greenhouse Gas Permitting Requirements

In a highly anticipated decision issued June 23, 2014, the U.S. Supreme Court held that USEPA cannot require a stationary source to obtain a Prevention of Significant Deterioration (PSD) or Title V permit on the sole basis of its potential to emit greenhouse gas emissions. At the same time, however, the Court also held that USEPA may require a stationary source to implement best available control technology (BACT) for greenhouse gases if it already triggers PSD permitting anyway, based on its potential to emit conventional pollutants (known as “Anyway Sources”). *Utility Air Regulatory Group (UARG) v. USEPA*, U.S., No. 12-1146. The overall decision means that some stationary sources will no longer be subject to greenhouse gas permitting requirements. However, questions remain regarding the implementation of this decision by USEPA and state permitting authorities.

This ruling stems from the Supreme Court’s 2007 decision in *Massachusetts v. USEPA*, which held that USEPA was authorized to regulate greenhouse gas emissions from mobile sources if it made a necessary finding regarding such emissions and their contribution to endangerment of public health or welfare. Subsequently, USEPA indeed made the necessary endangerment finding and thereafter promulgated greenhouse gas emission standards for mobile sources. Importantly for stationary sources, USEPA also took the position that once greenhouse gases became regulated under any part of the Clean Air Act (the Act), namely the part regarding mobile sources, then stationary sources of greenhouse gas emissions could trigger the PSD and Title V permitting requirements of the Act. According to USEPA, PSD and Title V permitting would apply to *stationary* sources with the potential to emit greenhouse gases in excess of the following statutory thresholds: 100 tons per year (TPY) under Title V, and 100 or 250 TPY under the PSD program (depending on the type of source). Because greenhouse gas emissions tend to be much greater than conventional pollutant emissions on which the statutory thresholds are based, USEPA issued regulations to “tailor” the PSD program and Title V triggering thresholds with respect to greenhouse gases. Under the so-called Tailoring Rule, for example, a new stationary source would trigger PSD if it had the potential to emit at least 100,000 TPY of greenhouse gases. Additionally, USEPA required Anyway Sources to comply with BACT for greenhouse gases if they emitted at least 75,000 TPY of greenhouse gases. Numerous parties, including several states, challenged USEPA’s actions as exceeding the scope of the agency’s authority under the Act.

(over)

In *UARG*, the Supreme Court reviewed USEPA's determinations that: (1) a stationary source may trigger PSD and Title V permitting based solely on its greenhouse gas emissions; and (2) an Anyway Source is required to employ BACT for greenhouse gases. As to the first determination, the Supreme Court held that the Act neither compels nor permits USEPA to require a PSD or Title V permit based solely on greenhouse gas emissions. According to the Court, it was unreasonable for USEPA to presume that an "air pollutant" for one section of the Act, regarding mobile sources, is automatically a regulated "air pollutant" for another section of the Act, *i.e.*, Title V and PSD. The Court observed that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with the structure and design of the Act and would result in an exponential increase in permit applications and administrative costs, as well as decade-long delays for permit approval. The Court also held that USEPA lacked authority to "tailor" by regulation the unambiguous statutory thresholds of 100 or 250 TPY.

Although the Court found that USEPA had exceeded its authority with regard to PSD and Title V applicability, the Court upheld USEPA's second determination that Anyway Sources must comply with BACT for greenhouse gases. The Court reasoned that the specific phrasing of the BACT provisions, which requires BACT "for each pollutant subject to regulation under" the Act, does not suggest that the provision can bear a narrowing construction, and therefore supported USEPA's statutory interpretation.

While this ruling certainly suggests that stationary sources need not worry about triggering PSD for greenhouse gases absent triggering PSD for another pollutant, things may be different in practice. States tend to be the implementing authority for PSD permits. States may have adopted their own rules and had the rules approved by USEPA as part of the State Implementation Plan (SIP). It remains to be seen whether states will be willing to immediately implement the Supreme Court's ruling or if they will first require regulatory changes including possibly a revision to the SIP. It is also unclear how states will address PSD permits that have already been issued for greenhouse gases. Finally, the Court's decision left unclear the appropriate *de minimis* level for greenhouse gases to be applied in assessing BACT applicability for Anyway Sources. Subsequent action by USEPA on this issue is likely.

To determine what impact, if any, this ruling may have on your facility, or to obtain assistance with other greenhouse gas and air permitting issues, please contact Michael H. Winek at 412-394-6538 or mwinek@babstcalland.com, Meredith Odatto Graham at 412-773-8712 or mgraham@babstcalland.com, or Matthew L. Lambach at 412-253-8825 or mlambach@babstcalland.com.