ALERTS

Supreme Court Issues Divided Ruling on EPA's Tailoring Rule

June 27, 2014

On June 23, 2014, the U.S. Supreme Court issued a decision in *Utility Air Regulatory Group v. EPA* , striking down one part of the Environmental Protection Agency's (EPA) Tailoring Rule but upholding another. The Court struck the section of the rule that required Prevention of Significant Deterioration (PSD) and Title V permits for stationary sources based solely on their emission of greenhouse gases (GHGs) above 75,000 or 100,000 tons per year (TPY). The Court left another section of the Tailoring Rule intact, however, allowing the EPA to require Best Available Control Technology (BACT) for GHGs at sources otherwise subject to PSD and Title V permits that emit (or have the potential to emit after a modification) over 75,000 TPY of GHGs. Although the first part of the decision is a blow to the EPA's Tailoring Rule, as a practical matter, given that most of the largest sources of GHG emissions are subject anyway to PSD and Title V permits, this ruling will likely have little impact on the EPA's implementation of GHG emissions reductions through PSD permit requirements under the Tailoring Rule.

Background

After *Massachusetts v. EPA*,[1] when the Supreme Court held that the definition of "air pollutants" under the Clean Air Act (CAA) could include GHGs so long as the EPA made an endangerment finding, the EPA made such a finding, determining that GHGs endanger public health and welfare. Accordingly, the EPA regulated GHG emissions levels from new motor vehicles. The EPA then took the position that once GHG became a

regulated pollutant for mobile sources, the EPA would then be obligated to regulate GHGs from stationary sources as well.

The EPA then issued a rule tailoring the PSD provisions and Title V operating permit provisions of the CAA to apply to GHGs (the Tailoring Rule). The EPA recognized that the statutory levels triggering a requirement for a source to obtain a PSD or Title V permit were too low to apply rationally to GHGs. Specifically, the statute makes PSD applicable to a "major emitting facility" or a modification thereof. The CAA defines this as any source that emits more than 250 TPY (or, in some cases, more than 100 TPY) of any regulated air pollutant. Similarly, Title V is applicable to "a major source," a stationary source with the potential to emit more than 100 TPY "of any air pollutant." The EPA determined that, in the case of GHGs, this would include thousands of previously unregulated sources, such as apartment buildings, retail stores, offices, schools and churches. Specifically, the EPA estimated that if the 100/250 TPY threshold were to apply, annual PSD permit applications would increase from approximately 800 to 82,000 and Title V permit applications would increase from less than 15,000 to 6.1 million. The EPA reasoned that this would not be administratively feasible to manage, that the great majority of these sources would be small sources that Congress had no intent to regulate and that were not the major contributors to GHG emissions, and that this would cripple the PSD and Title V permit programs, "severely undermin[ing] what Congress sought to accomplish."

Accordingly, in the Tailoring Rule, the EPA provided that the applicability of GHG to PSD and Title V would be phased in over three stages. During the first stage, sources that were subject to PSD and Title V anyway (called "anyway sources") would be required to comply with BACT for GHGs if they emitted (or were expect to emit) more than 75,000 TPY of GHGs. In the second stage, GHGs alone could trigger the requirements of PSD and Title V, as new sources that would emit more than 100,000 TPY of GHGs would be subject to PSD or Title V for their construction, and existing sources that made a modification that would increase their GHG emissions by more than 75,000 TPY would be subject to PSD. The rules of the third stage, which were intended to further reduce GHG emissions, were not finalized.

The Majority Decision

The Supreme Court held that the EPA's regulation of GHGs with respect to mobile sources did not compel the agency to regulate GHGs for stationary sources and that the EPA should not have done so because regulating GHGs under the PSD and Title V programs could not be done without exceeding the EPA's authority under the CAA. The Court struck down the part of the Tailoring Rule at issue in Stage 2, holding that the EPA did not have the authority to change the statutory threshold level triggering PSD and Title V permitting obligations from 100/250 TPY to 75,000/100,000 TPY. The Court held that given that the EPA's broad interpretation of the term "any air pollutant" would bring hundreds of thousands of previously unregulated sources under PSD and Title V regulation, such an interpretation could not be made by the agency and had to be made by Congress using its legislative powers. The Court held that the EPA's actions would "deal a severe blow to the Constitution's separation of powers."

On the other hand, the Supreme Court afforded the EPA *Chevron*[2] deference with respect to the Stage 1 part of the Tailoring Rule, holding that the EPA could interpret the BACT provision to allow the EPA to require reductions in emissions of any regulated pollutant, including GHGs, so long as the source was "anyway" subject to PSD and Title V permitting requirements for pollutants other than GHGs.

Authored by Howard B. Epstein.

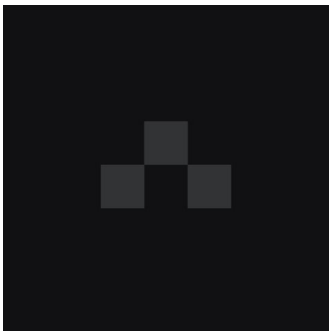
If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

---

[1] 549 U.S. 497 (2007).

[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Related People



Howard Epstein

Of Counsel

New York

Practices

ENVIRONMENTAL

Attachments

Download Alert