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VanNess Feldman

Supreme Court Will Review Whether EPA Clean Air Act Permitting Authority Extends to Greenhouse Gases

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INTRODUCTION

On October 15, 2013, the U.S. Supreme Court agreed to hear challenges to a determination by the U.S. Environmental Protection Agency (EPA or the Agency) that, under the Clean Air Act, increases in emissions of greenhouse gases (GHGs) from new and modified major stationary sources triggers a requirement for those sources to obtain Prevention of Significant Deterioration (PSD) permits. In 2012, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) upheld this EPA determination in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102. The Supreme Court has consolidated review of six separate challenges as *Utility Air Regulatory Group v. EPA*, and will hear one hour of oral argument in its October Term.

Notably, the Supreme Court denied petitions for *certiorari* challenging other EPA actions upheld by the D.C. Circuit, including the Agency's determination that GHGs endanger public health and welfare (the Endangerment Finding), and its promulgation of GHG emission standards for new light duty motor vehicles (the Tailpipe Rule). Finally, the Court did not take up the D.C. Circuit holding that none of the challengers had standing to challenge an EPA rule that restricted the application of PSD and Title V permitting only to those facilities with emissions of GHGs over certain numerical thresholds (the Tailoring Rule). A determination that increases in GHG emissions trigger an obligation to obtain Title V permits was not challenged in the D.C. Circuit, and therefore was not specifically addressed by the Supreme Court's grant of *certiorari*.

BACKGROUND

The PSD Program

The Clean Air Act's PSD provisions require any "major stationary" source that is either newly constructed or modified and that will cause a significant increase in emissions to obtain a preconstruction permit. The permit must include, among other things, an emissions limitation based on "best available control technology" (BACT) for each regulated air pollutant emitted from the new or modified source. PSD permits are generally issued by state permitting agencies or, in a few instances, by EPA. The BACT emission limitation is determined for each source on a case-by-case basis.

Under the Clean Air Act, a new or modified major stationary source is subject to the PSD permitting requirements if it emits more than – depending on the type of source – 100 or 250 tons per year (tpy) of "any air pollutant." The PSD provisions are found in a part of the Clean Air Act that otherwise mostly addresses "criteria" air pollutants, which are pollutants for which EPA has established National Ambient Air Quality Standards (NAAQS). However, since 1978, EPA has interpreted the statutory phrase "any air pollutant" to mean any air pollutant "subject to regulation" under the Clean Air Act, not just any criteria air pollutant.

GHG Regulation under the Clean Air Act

The regulation of GHGs by EPA originated with the Supreme Court's decision in Massachusetts v. EPA, 549 U.S. 497 (2007). In the 5-4 Massachusetts decision, the Supreme Court held that GHGs are "air pollutants" that can be regulated under the Act, but that EPA can regulate GHG emissions from new motor vehicles only if the Agency makes a science-based finding as to whether motor vehicle GHG emissions cause or contribute to the endangerment of public health and welfare. (See the April 2, 2007 VNF Alert). In December 2009, EPA issued the Endangerment Finding, which concluded that (1) six classes of GHGs endanger public health and welfare by causing global climate change, and (2) GHGs emitted from new motor vehicles contribute to such endangerment. (See the December 9, 2009 VNF Alert).

Based on this Endangerment Finding, EPA promulgated GHG emission standards for new light duty model year 2012-2016 motor vehicles in its April 2010 Tailpipe Rule. (See the April 6, 2010 VNF Alert). EPA has since expanded these emission standards to additional model years and vehicle classes.

In April 2010, EPA issued a "Timing" Rule that specified the date by which facilities would become subject to PSD and Title V permitting. Reaffirming its 1978 interpretation of the PSD provisions, as part of the "Timing Rule," EPA issued an interpretive rule that the regulation of GHGs under the Tailpipe Rule made them pollutants "subject to regulation," thereby triggering PSD and Title V permitting requirements for new and modified major stationary sources that emit GHGs. However, EPA did not and still has not determined that GHGs are "criteria" air pollutants, nor has EPA promulgated any NAAQS for GHGs.

In addition, the Agency issued the Tailoring Rule, which phased in application of the permitting requirements to facilities with GHG emissions in excess of certain numerical thresholds. These thresholds were far higher than the 100 tpy and 250 tpy thresholds specified in the statute (i.e., 75,000 to 100,000 tCO2e/yr). EPA justified the Tailoring Rule on the grounds that literal application of the statutory thresholds would yield "absurd results" – exposing millions of sources to permitting requirements, including relatively small facilities – making its phased-in approach an "administrative necessity."

DC CIRCUIT HOLDINGS

In *Coalition for Responsible Regulation v. EPA,* the D.C. Circuit upheld the Endangerment Finding and the Tailpipe Rule for GHG emissions. The court also affirmed EPA's determination that EPA's issuance of a final Tailpipe Rule triggered PSD and Title V permitting requirements for major stationary sources of GHG emissions by making GHGs pollutants "subject to regulation." The D.C. Circuit further held that industry and state petitioners did not have standing to challenge the Tailoring Rule because they had not, in fact, been injured by the rule, which has the effect of lessening the overall burden of the new GHG permitting requirements on major stationary sources.

Before evaluating EPA's determination that the Tailpipe Rule triggered application of the PSD permitting requirements, the D.C. Circuit first had to reject arguments by the Agency that the court had no jurisdiction over the

challenge. EPA pointed to provisions in the Clean Air Act that require any petitions for review of an Agency rule to be filed within 60 days of the publication of the rule in the *Federal Register*, and argued that these provisions bar new challenges to its 1978 interpretation of the statutory phrase "any air pollutant." The D.C. Circuit rejected this argument, reasoning that the 60-day bar should not apply to those petitioners that would not have had standing to support a legal challenge in that historical period. However, as explained above, the D.C. Circuit ultimately rejected those challenges on the merits, finding that EPA reasonably interpreted the term "any air pollutant" to encompass all pollutants subject to regulation, including pollutants that are not criteria air pollutants.

SUPREME COURT ACTION

In determining which issues to review from the D.C. Circuit, the Supreme Court explicitly did not grant *certiorari* on issues related to the Endangerment Finding and the Tailpipe Rule, leaving in place the D.C. Circuit decisions upholding those rules. The issue of EPA's authority to require Title V permits for major GHG stationary sources also was left unaffected. Finally, the Supreme Court did not grant *certiorari* on the D.C. Circuit's determination that it lacked jurisdiction to consider the challenge to the Tailoring Rule.

The Supreme Court granted *certiorari* only with respect to the following issue: "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." Accordingly, the Supreme Court will evaluate the validity of EPA's longstanding interpretation that the emission of a specified quantity of *any* pollutant already regulated under the Clean Air Act, rather than just criteria pollutants, triggers PSD permitting requirements for new and modified stationary sources. EPA will likely argue that petitioners are barred from challenging the rule, which was issued more than 60 days before the challenge, and that its interpretation of the Clean Air Act's PSD provisions is both the most valid reading and that it is reasonable. Even though the Tailoring Rule is not itself at issue before the Court, challengers will likely argue that EPA's finding that applying the statutory PSD thresholds of 100 and 250 tpy would lead to "absurd results" is itself evidence that Congress could never have intended PSD permitting requirements to apply to GHGs.

POSSIBLE IMPLICATIONS

PSD Permitting for Stationary Sources of GHG Emissions

There are at least three possible outcomes of the Supreme Court's consideration of EPA's PSD permitting authority. First, the Court could affirm the D.C. Circuit's decision. Alternatively, the Court could reverse the D.C. Circuit holding, and find that only emissions of criteria pollutants triggers the PSD permitting requirement, which would be a victory for the state and industry petitioners. A third possible outcome is that the Court could reverse the D.C. Circuit's jurisdictional determination, and hold that the state and industry petitions were precluded by the Clean Air Act's bar on petitions filed later than 60 days after the publication of a rule in the *Federal Register*. In effect, this would also leave in place EPA's longstanding interpretation of the scope of PSD permitting.

Other EPA GHG Regulations

Assuming the Supreme Court limits its attention to the issue for which it granted *certiorari*, its decision will not reach EPA initiatives to regulate GHG emissions under other Clean Air Act authorities. For example, it does not appear that the Court is set to reconsider *Massachusetts v. EPA*, the basis for other EPA regulation of GHGs under the Clean Air Act. Moreover, the Supreme Court's decision not to grant *certiorari* on the Endangerment Finding or the Tailpipe Rule suggests that those regulations will not be affected by the Court's decision.

In addition, a Supreme Court decision confined exclusively to EPA's authority under the PSD permitting provisions of the Clean Air Act appears unlikely to affect EPA's more recent initiatives to establish GHG performance standards for power plants. The latter initiatives are based on the agency's authority under a wholly separate provision of the Act: section 111. In September 2013, EPA proposed section 111 performance standards for certain new power plants. (See the September 24, 2013 VNF Alert). EPA is also working on separate regulations respecting performance standards for certain existing power plants. These section 111 standards are different from the PSD permitting requirements that are subject to review in the Supreme Court. To be sure, some element of a Supreme Court decision on the PSD provisions could impose a new wrinkle, requirement, or limitation that would impact EPA's section 111 rules, but such impacts are difficult to anticipate from the relatively narrow question on which the Court granted *certiorari.*

FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on air, water, and other environmental regulatory developments. If you would like more information about the EPA greenhouse gas regulations and related court proceedings, please contact Kyle Danish, Stephen Fotis, Britt Fleming, or any member of the firm's Environmental Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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