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COMMENTARY

Utility Regulatory Group v. EPA: U.S. Supreme Court Stops EPA's Rewrite of the Clean Air Act

In its third encounter with greenhouse gas emissions in the context of the Clean Air Act, the United States Supreme Court, in *Utility Air Regulatory Group v. EPA*, No. 12-1146, 573 U.S. _____ (June 23, 2014) ("*UARG*"), reinforced bedrock separation of powers principles—not to mention conventional canons and settled principles of administrative law—by emphatically rejecting the claim of authority of the Environmental Protection Agency ("EPA" or "Agency") to rewrite indisputably unambiguous statutory language that not only disregarded the text and context of the statute, but that could have transformative, economic, social, and systemic impacts (if unchecked). Despite EPA's early and predictable declaration of victory for the decision, the Court's opinions suggest that the cascade of further greenhouse gas regulations triggered by the Court's earlier decision in *Massachusetts v. EPA* are likely to be vulnerable to legal challenge if they are incompatible with the Clean Air Act text or regulatory scheme. Indeed, *UARG* could be read as suggesting that nothing in *Massachusetts v. EPA* imposed a generalized and uncabined statutory obligation to regulate GHGs—potentially leaving room for a future presidential administration to move in a different direction than the current one.

Following the Supreme Court's decision in *Massachusetts v. EPA*, EPA promulgated regulations setting standards for emissions of greenhouse gases from new motor vehicles. EPA then took the position that these motor vehicle regulations automatically triggered Prevention of Significant Deterioration ("PSD") and Title V permitting requirements for stationary sources that emit greenhouse gases (the "Triggering Rule"). However, because regulating all sources with greenhouse gas emissions above statutory thresholds would make the mostly state-run programs unadministrable, EPA promulgated regulations "tailoring" the permitting requirements, such that, among other things, only sources with the potential to emit more than 100,000 tons per year would be subject to the greenhouse gas regulations (the "Tailoring Rule"). The United States Court of Appeals for the District of Columbia denied numerous challenges to EPA's actions. The D.C. Circuit held that EPA's interpretation of the PSD permitting program was compelled by statute and that the parties were without standing to challenge EPA's Tailoring Rule and Triggering Rule. The D.C. Circuit denied rehearing en banc.

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The Decision

The Supreme Court granted six petitions for certiorari to decide only one 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." *UARG*, Slip. Op. at 9. The Supreme Court heard oral argument on February 24, and the opinion of the Court authored by Justice Scalia was announced on June 23.

Although the Court agreed to hear argument only on one specific issue, Justice Scalia's opinion divides the issue into two distinct challenges to EPA's greenhouse gas regulations. First, according to Justice Scalia, the Court had to determine "whether EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source's potential to emit greenhouse gases." *Id*. Second, the Court determined "whether EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants (an "anyway" source) may be required to limit its greenhouse-gas emissions by employing the 'best available control technology' for greenhouse gases." *Id*.

As to the first issue, the Court disagreed with EPA and the D.C. Circuit's position that the Clean Air Act compels EPA to regulate greenhouse gas emissions from stationary sources under either the PSD or Title V programs. *Id*. at 10. According to Justice Scalia, the Supreme Court's holding in *Massachusetts v. EPA* that the Clean Air Act's general definition of "air pollutant" includes greenhouse gases does not invalidate EPA's ability to apply narrower definitions of "air pollutant" to the operative provisions of the Act, which EPA has routinely done in other situations under the Clean Air Act. *Id*. at 11–14. The Act-wide definition that was analyzed in *Massachusetts v. EPA* "is not a command to regulate, but a description of the universe of substances EPA may *consider* regulating under the Act's operative provisions." *Id*. at 14 (emphasis in original). As a result, the Court held that there was no "insuperable textual barrier" preventing EPA from interpreting the PSD and Title V provisions to exclude greenhouse gases. *Id*. at 15.

Even if the Clean Air Act did not compel it to include greenhouse gases, EPA argued that its interpretation was reasonable and should be accorded deference under *Chevron*. *Id*. at 16. The Court disagreed and found that EPA's interpretation was impermissible because (i) its interpretation would expand the PSD and Title V programs beyond the statutory purpose of regulating only a handful of large sources capable of shouldering the burdens of the programs; (ii) it would place excessive demands on the permitting authority; and (iii) it impermissibly rewrote the express statutory thresholds in clear violation of the Constitution's separation of powers. *Id*. at 16–24.

However, as to the second issue, the Court concluded that EPA's decision to require Best Available Control Technology ("BACT") for greenhouse gases emitted by sources otherwise subject to PSD requirements is a permissible interpretation of the statute because the BACT provisions specifically apply to "each pollutant subject to regulation" under the Act. *Id*. at 25. The Court held that this language proves that Congress had made the decision on which air pollutants were subject to the provisions. *Id*. In addition, the Court held that even if the statutory provisions were not so clear, EPA's interpretation would be reasonable because "applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority." *Id*. at 28. The Court made it clear, however, that it was not ruling on the appropriateness of EPA's current approach to requiring BACT for greenhouse gases but was simply holding that "nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by 'anyway' sources" that emit "more than a *de minimis* amount of greenhouse gases." *Id*.

Justices Breyer and Alito authored separate opinions concurring in part and dissenting in part. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred with Justice Scalia's opinion as to the application of BACT for greenhouse gases to anyway sources but dissented from the Court's opinion that the term "air pollutant" in the PSD and Title V permitting requirements should be read to exclude greenhouse gases. Instead, Justice Breyer would have read

an exception for small-scale greenhouse gas emissions into the phrase "any source" in the PSD and Title V provisions. Justice Alito, joined by Justice Thomas, concurred with Justice Scalia's opinion as to EPA's interpretation of the PSD and Title V programs but dissented as to the Court's ruling that EPA can permissibly require anyway sources to apply BACT for greenhouse gases.

The Implications for Future Claims or Future Regulation of GHGs

Despite EPA's initial claim of victory, the decision should give it some, if not considerable, pause as it moves forward regulating greenhouse gas emissions from stationary and other sources. Unlike the deference the Court a few weeks earlier afforded EPA in its regulation of conventional pollutants under the CAA, *see EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014), it seems future claims of deference by EPA in the context of greenhouse gas regulation will, at a minimum, be closely scrutinized. The *UARG* decision could effectively stop any future effort by EPA to arrogate to itself unlimited power and discretion as to what GHG sources to regulate and when—to the point of rewriting the CAA. As the Supreme Court indicated years earlier in describing EPA's authority under the CAA, the Agency's actions must be guided by a congressionally established "intelligible principle," and Congress "must provide substantial guidance on setting all standards that affect the entire national economy." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472, 475 (2001). *UARG* reinforces that fundamental principle by flatly rejecting the notion that EPA can turn a blind eye to congressional judgments and legislative compromise in setting greenhouse gas rules. *See Alabama Power Co. v. Castle*, 636 F.2d 323, 350, 353 (D.C. Cir. 1979) (*per curiam*) (noting the PSD and Title V programs were structured by Congress to avoid economic disruption).

Most immediately, the impact of the decision on the pending EPA rules under Section 111 of the CAA for greenhouse gas emissions from new and existing power plants will be a source of continuing debate and litigation. Although the Court recognized that its prior decision on the CAA's displacement of federal common law nuisance claims in *American Electric Power Co. v. Connecticut* was based on the authorization in Section 111 to establish standards for greenhouse gas emissions from power plants, the Court noted that the scope of the Section 111 authorization was not at issue in *American Electric Power* or *UARG*. *UARG*, at 14, n.5. But while *American Electric Power* assumed EPA's potential authority to regulate greenhouse gas emissions from fossil-fuel fired power plants, the decision reasonably contemplated the possibility that EPA might lawfully "decline to regulate [those sources] altogether at the conclusion of its pending rulemaking." 131 S.Ct. 2527 at 2538–39. Thus, industry members or a future presidential administration will have an opportunity to argue that nothing in *Massachusetts v. EPA* or *UARG* compels EPA to regulate greenhouse gas emissions, particularly where, as might be the case for the proposed rules for existing electric generating units (or any number of other sources subject to petitions filed by groups asking for EPA to initiate a rulemaking), the regulations are arguably "incompatible" with "the substance of Congress' regulatory scheme." *UARG*, at 18 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 156 (2000)). *See*, e.g., Petition for Extraordinary Writ, at 8, *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. June 18, 2014) and Brief of the States of West Virginia, Alabama, Alaska, Kentucky, Nebraska, Ohio, Oklahoma, South Carolina, and Wyoming as *Amici Curiae* in Support of the Petitioner, *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. June 25, 2014).

Moreover, the Court's discussion of BACT in the PSD process for "anyway sources" has obvious relevance to EPA's determination of the best system of emission reduction for electric generating units under Section 111 of the CAA. The Court noted that BACT does not give EPA unbounded authority, recognizing that it cannot be used to order a fundamental redesign of a facility. *UARG*, at 26. As many in the industry have noted, attempting to establish a standard for the best system of emission reduction that is expressly based on reducing the utilization of coal fired units arguably constitutes a fundamental redesign. It is not a question as to whether these arguments will get made; instead, it is simply a matter of how soon. *UARG* suggests that the Court will not sit idly by and defer to any further EPA effort to "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *UARG*, at 19.

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