U.S. Supreme Court decision limits greenhouse gas regulations

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On June 23, 2014, the U.S. Supreme Court decided Utility Air Regulatory Group v. Environmental Protection Agency (UARG v. EPA), in which the Court struck down the U.S. Environmental Protection Agency's (EPA) "tailoring rule," but otherwise reaffirmed the EPA's authority to regulate greenhouse gases (GHGs) under the Clean Air Act (CAA). The decision marked the first review of EPA's efforts to regulate GHGs since the Court's 2007 decision allowing EPA to regulate GHGs.

The regulations at issue in UARG v. EPA stemmed from the Court's ruling in 2007's Massachusetts v. Environmental Protection Agency, which allowed EPA to regulate emissions of GHGs from new motor vehicles if it found that they endangered public health or welfare. EPA made such a finding and set limits on emissions from new vehicles. Subsequently, EPA determined, in the regulations at issue in UARG v. EPA, that its regulation of GHGs from motor vehicles also triggered mandatory regulation of GHGs from large stationary sources under the Prevention of Significant Deterioration (PSD) and Title V programs of the CAA.

Under the CAA, the PSD and Title V programs cover all sources that can annually emit 100 or 250 tons of air pollutant. However, these statutory thresholds were designed for "conventional" pollutants, while GHGs are typically emitted in much greater amounts. Thus, if the statutory thresholds were applied literally to GHG emissions, millions of small sources, such as schools, hospitals, and churches would be subject to the PSD and Title V program permitting requirements. The EPA deemed this outcome as an "absurd result" and modified the statutory emission thresholds as they applied to GHGs so that only large industrial sources would be subject to the permitting requirements, known as the "tailoring rule."

In the 5-4 ruling, the Court rejected EPA's rulemaking as impermissible, holding that the CAA's PSD and Title V permitting requirements could not be applied to sources based solely on their GHG emissions. Additionally, the Court rejected the EPA's "tailoring rule" as at odds with the clear statutory text. However, in the 7-2 portion of the decision, the Court determined that EPA may nonetheless regulate GHG emissions from sources already subject to regulation under the PSD and Title V programs (also known as "anyway" sources).

In practice, large stationary sources that are already regulated under the PSD and Title V programs will have their GHG emissions regulated. However, sources that emit only GHGs, and not other pollutants triggering the PSD and Title V requirements will not become subject to EPA's regulatory authority under these provisions. As Justice Scalia noted in announcing this decision, the ruling allows EPA to regulate sources responsible for 83 percent of GHG emissions from stationary sources, which is just short of the 86 percent that would have been regulated under EPA's "tailoring rule."

Finally, it is important to note that this decision only applies to the PSD and Title V provisions of the CAA. It does not bar the EPA from regulating GHGs from new or existing sources under Section 111 of the CAA as the EPA recently proposed to do.

For manufacturers, the ruling does not offer much relief. Most large manufacturers employ air sources that are already regulated under Title V or PSD programs so they are "anyway" sources that will be subject to GHG regulations, including trying to determine "best available control technology" (BACT) for GHG emissions. Even the regulators are perplexed as to what constitutes the best available technology to control such a ubiquitous emission as CO^2.

Bricker & Eckler's environmental lawyers have a wealth of experience in helping clients comply with state and federal environmental regulations. For more information on this or other matters, please contact Frank Merrill at 614.227.8871, or Dylan Borchers at 614.227.4914.

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