

UARG v. EPA, June 23, 2014

Booker Harrison
Senior Attorney
TCEQ

Introduction

- * EAB cases – “subject to regulation” debate
- * *Massachusetts* Title II decision (regulate GHG emissions from new motor vehicles if formed a judgment that such emissions contribute to climate change)
- * Endangerment (current and projected concentrations of GHGs in the atmosphere threaten public health and welfare)
- * Cause or Contribute to Finding (combined emissions of GHGs from new motor vehicles and new motor vehicle engines contribute to GHG concentrations which threatens public health and welfare)
- * Johnson Memo / Timing Rule / Triggering Rule (final decision that vehicle GHG standards would trigger stationary source permitting requirements)
- * Tailpipe Rule (effective date of motor vehicle standards January 2, 2011)
- * Tailoring Rule (Step 1 – January 2-June 30 – anyway sources; Step 2 – July 1-June 30 – new GHG at 100,000 CO₂e, modified GHG at 75,000 CO₂e)

I. Background

- * Stationary-Source Permitting
 - Permitting obligations under Title I and Title V
 - Title I – walks through NAAQS, SIPs, and PSD
 - Title V – operating permits

I. Background

- * EPA's GHG Regulations
 - *Massachusetts* Title II decision
 - NPR for comment on how to respond to *Mass.*
 - Endangerment / Cause or Contribute to Finding
 - Johnson Memo / Timing Rule / Triggering Rule
 - Tailpipe Rule
 - Tailoring Rule

I. Background

- * Decision Below

- Upheld Endangerment Finding and Tailpipe Rule
- Petitioners were without standing to challenge limits of PSD and Title V through the Timing and Tailoring Rule
- EPA's interpretation of PSD applying to "any regulated air pollutant" including GHGs was "compelled by the statute."
- "[C]rystal clear that PSD permittees must install BACT for greenhouse gases."

II. Analysis

- * Granted six petitions but limited the review to one question:
 - * 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.

II. Analysis

- * Two distinct challenges to EPA's position
 - 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.
 - Whether EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants may be required to limit its greenhouse-gas emissions by employing BACT for GHGs.

II. Analysis

- * Standard of Review
 - *Chevron* analysis
 - When an agency administered statute is ambiguous, Congress has empowered the agency to resolve the ambiguity
 - Question for the reviewing court is whether the agency has acted reasonably and remained within the bounds of its statutory authority

A.1. PSD and Title V Triggers Interpretation not Compelled

- * “The statute compelled EPA’s greenhouse-gas-inclusive interpretation with respect to neither the PSD program nor Title V.” p. 10
- * In the *Massachusetts* opinion the “Act-wide” definition of air pollutant is “all-encompassing” and includes GHGs
- * “But where the term “air pollutant” appears in the Act’s operative provisions, EPA has routinely given it a narrower, context-appropriate meaning.” p. 11
 - NSPS
 - NAAQS
 - Regional Haze
- * “It takes some cheek for EPA to insist that it cannot possibly give “air pollutant” a reasonable, context-appropriate meaning in the PSD and title V contexts when it has been doing precisely that for decades.” p. 12

A.1. PSD and Title V Triggers Interpretation not Compelled

- * *Massachusetts* did not hold that EPA must always regulate greenhouse gases as an air pollutant every time that term appears in the statute, only that the reasons for action or inaction must be grounded in statute
- * *Massachusetts* did not foreclose the Agency's use of statutory context
- * The broad interpretation of air pollutant in *Massachusetts* was not a command to regulate but a “description of the universe of substances the EPA may consider regulating under the Act's operative provisions.” p. 14

A.1. PSD and Title V Triggers Interpretation not Compelled

- * In sum, there is no insuperable textual barrier to EPA's interpreting "any air pollutant" in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.
P.15-16

A.2. PSD and Title V Triggers Interpretation is not permissible

- * Next consider EPA's alternative position that its interpretation was justified as an exercise of discretion to adopt a reasonable construction of the statute
- * "We conclude that EPA's interpretation is not permissible." p. 16

A.2. PSD and Title V Triggers Interpretation is not permissible

- * EPA repeatedly acknowledged that applying PSD and Title V requirements to GHGS would be “inconsistent with – in fact, would overthrow – the Act’s structure and design.” p. 17
- * PSD and Title V designed to apply to, and can not reasonably be extended beyond, a “relative handful of large sources capable of shouldering heavy substantive and procedural burdens.” p.18
- * Interpretation is also unreasonable because “it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.” p. 19

A.3. PSD and Title V Triggers Rewriting Thresholds is Impermissible

- * “We conclude that EPA’s rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency’s interpretation of the triggering provisions. An agency has no power to “tailor” legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.” p. 21
- * Enforcement discretion – not a refusal to enforce, but an alteration of the requirements that would not be a violation of the Act

A.3. PSD and Title V Triggers Rewriting Thresholds is Impermissible

- * “Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution’s separation of powers.” p. 23
- * “We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. EPA therefore lacked authority to “tailor” the Act’s unambiguous numerical thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers.” p. 24

B. BACT for “Anyway” Sources

- * Court recognized that some petitioners urged a holding that EPA may never require BACT for GHGs
- * Petitioners argued BACT is fundamentally unsuited to GHG regulation
 - BACT is more end-of-the-stack controls
 - GHG would be energy efficiency
- * Light bulb argument

B. BACT for “Anyway” Sources

- * Court noted that EPA’s guidance document for permitting GHGs states “compulsory improvements in energy efficiency will be the ‘foundation’ of greenhouse-gas BACT... .”p. 26
- * However, without deciding the issue, the Court also noted that there are important limitations on BACT that may mitigate petitioners’ concerns
 - BACT cannot be used to redefine the source
 - Only source emitted pollutants; not used to require reductions on the grid
 - Guidance provides have to consider “whether the regulatory burden outweighs any reduction in emissions to be achieved... .” p. 27

B. BACT for “Anyway” Sources

- * “The question before us is whether EPA’s decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review is, as a general matter, a permissible interpretation of the statute under Chevron. We conclude that it is.” p. 27
- * “Our narrow holding is that nothing the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by “anyway” sources.” p. 28
- * *De minimis* threshold

EPA Guidance

July 24, 2014

- * EPA will no longer require PSD or Title V permits for Step 2 sources (major only for GHG)
- * For Step 1 (“anyway” sources) the threshold is 75,000 CO₂e
- * For Step 2 (GHG only PDS) the permitting authority, in conversation with the Regional Office “should examine whether, in light of the Supreme Court decision, there is flexibility under state, local and tribal laws to determine that Step 2 sources no longer are required to obtain PSD permits [or Title V permits] prior to the completion of any actions to repeal or revise such regulations to in light of the Supreme Court decision.”

What's Next?

- * Back to the D.C. Circuit
 - Vacate the Timing and Tailoring Rules
 - Remand to establish the de minimis threshold
- * FIP/SIP litigation would continue

Questions?