

EPA Satisfied with Latest Supreme Court Ruling **By Jimmy Greenblatt**

In a recent Supreme Court case reviewing EPA greenhouse-gas regulations, *Utility Air Regulatory Group v. E.P.A.*, a divided Court upheld one EPA rule while striking down another - a move seen by many as giving each side a victory.¹ The EPA, however, sees the case as a “resounding win” for the agency.² Remarkably, the EPA believes that their biggest victory came before the case even went to trial.³ **How can this be?**

There are two reasons the EPA is so satisfied with the consequences of this case. First, the Supreme Court denied review for several important issues in this case, leaving those rules intact and enforceable. Those issues – the EPA’s scientific finding that greenhouse-gas pollution is dangerous to public health and welfare (the important legal basis for a number of new EPA rules) and the EPA’s greenhouse-gas restrictions and guidelines for motor vehicles – are, according to the EPA, “the most significant pieces” of the Agency’s overall approach to greenhouse-gas regulation.⁴

Second, while the Court struck down one EPA provision and upheld another, the EPA’s ability to regulate greenhouse-gas pollution using permits was left largely untouched. While the Court ruled that the EPA cannot interpret the Clean Air Act as requiring a stationary source of

¹ See Rita Ann Cicero, *Supreme Court Lets EPA Regulate Greenhouse Gases, With Limits*, 34 WESTLAW J. ENVTL. (2014). Some sources went even further, one calling the case a “. . . . [T]riumph for statutory interpretation, separation of powers, and common sense sharply limiting the EPA’s discretion.” Jonathan Keim, *Utility Air Regulatory Group v. EPA: Separation of Powers in the Balance*, NAT’L REV. ONLINE (July 18, 2014), <http://www.nationalreview.com/bench-memos/380999/utility-air-regulatory-group-v-epa-separation-powers-balance-jonathan-keim>.

² Avi Garbow, *Another Favorable Opinion from the Supreme Court*, EPA CONNECT BLOG (July 16, 2014, 1:55 PM), <http://blog.epa.gov/epaconnect/2014/06/another-favorable-opinion-from-the-supreme-court/>.

³ *Id.*

⁴ *Id.*

pollution to get a Title V or PSD (Prevention of Significant Deterioration) permit solely based on their greenhouse-gas emissions, the Court found that the EPA was allowed to require stationary sources that already need permits for their emission of ‘traditional’ pollutants⁵ to have to use “best available control technology” (“BACT”) to regulate their greenhouse-gas emissions as well as their other pollutants.⁶ The key fact here is that almost every pollution source that would require a permit for greenhouse-gas pollution is also a big emitter of non-greenhouse-gas pollution and thus already requires a permit for conventional pollutants.⁷ According to the EPA, while the rule that the Court struck down requiring permits for greenhouse-gas-only pollution sources would have covered 86% of stationary source greenhouse-gas producers, the rule the Court upheld requiring BACT on greenhouse-gas emissions for pollution sources that already need permits still covers 83% of greenhouse-gas producers.⁸ The EPA has to be happy to lose 3% of greenhouse-gas pollution coverage if it means they can still regulate 83% of stationary source greenhouse-gas producers.

The opinion, delivered by Justice Scalia, was joined in full by two Justices and joined in part by four other Justices. Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) wrote an opinion that concurred with Justice Scalia in applying BACT to greenhouse-gas regulation, but would have upheld the rule making greenhouse-gas only emissions part of PSD and Title V permit requirements. In contrast, Justice Alito’s opinion (joined by Justice Thomas)

⁵ To date the EPA has released NAAQs (National Ambient Air Quality standards) for six pollutants: sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead. *See* Clean Air Act Handbook 125 (J. Domike & A. Zacaroli eds., 3d ed. 2011).

⁶ *Utility Air Regulatory Group. v. EPA*, 134 U.S. 2443, 2447 (2014).

⁷ *Supra* note 2.

⁸ *Id.*

concluded with Justice Scalia in finding that PSD and Title V permits should not apply to greenhouse-gas only emissions, while arguing that BACT should not apply to greenhouse-gas emissions either.

Overall, it seems that the EPA has reason to be happy with both the conclusions of the *Utility* case as well as the issues that the Court decided not to review. In addition to leaving EPA's vehicle greenhouse-gas regulations and scientific finding of greenhouse-gas endangerment in place, the Court kept the EPA's comprehensive enforcement of BACT for greenhouse-gas emissions. Ultimately, while it would be fair to call a decision where one EPA rule was upheld and another rule was stricken a tie, it is not difficult to see why the EPA came away from *Utility Air Regulatory Group* claiming victory.

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