UARG v. EPA: Practical implications for GHG PSD permitting in the field

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On June 23, the U.S. Supreme Court issued its opinion in Utility Air Regulatory Group v. EPA, 189 L. Ed. 2d 372 (2014) (UARG). *UARG* involved the scope of the Environmental Protection Agency's (EPA or the Agency) authority to require large industrial sources to control emissions of greenhouse gases (GHGs) under specific Clean Air Act (CAA or the Act) permitting provisions. The Court held: (1) an industrial facility's GHG emissions alone cannot be the basis for subjecting the source to Prevention of Significant Deterioration (PSD) and Title V permitting requirements, but (2) if the facility undertakes a project that would be subject to permitting under these provisions for more conventional pollutants (e.g., particulate matter, nitrogen oxides, and sulfur dioxide), permitting authorities may impose Best Available Control Technology (BACT) requirements on GHG emissions associated with the capital project.

The Court evaluated, in part, the legality of EPA's Tailoring Rule, which EPA promulgated in steps and established threshold levels of GHG emissions that triggered PSD and Title V requirements for two categories of sources. Step 1 required sources already subject to PSD on the basis of emissions of the conventional pollutants to also implement BACT for GHG emissions if those GHG emissions exceeded 75,000 tons per year (tpy). The Court, in *UARG*, said that these "anyway" sources could still be required to implement BACT for their GHG emissions as long as the GHG emissions exceeded a de minimis level, which must be justified by EPA and may or may not be 75,000 tpy. Step 2 of the Tailoring Rule applied similar GHG triggering thresholds and BACT requirements to what the Court described as "non-anyway" sources—sources that would not otherwise be subject to PSD and Title V requirements. The Court held that the Agency lacked the authority to impose PSD and Title V requirements on non-anyway sources.

Since the Supreme Court's decision, numerous articles have dissected the bases for the Court's holdings. This article, however, attempts to identify some immediate, practical considerations that sources potentially affected by the Court's decision should consider—and to discuss potential "Big Picture" implications of the decision. Note that on July 24 EPA released preliminary guidance providing some insight into how the Agency now interprets its PSD and Title V permitting authority for GHG emissions post-UARG. We also consider some of the Agency's viewpoints below, although this article was submitted on August 1, 2014, and only covers guidance issued up to that point. See Memorandum from J. McCabe and C. Giles to EPA Regional Administrators (July 24, 2014) (Guidance), available at www.epa.gov/nsr/documents/20140724memo.pdf.

Practical considerations for sources subject to PSD and Title V

Are GHG PSD permits issued to non-anyway sources now invalid?

By our count, roughly 11 percent of PSD permits that impose BACT on GHG emissions associated with a capital project (25 of 230) were issued to non-anyway sources. The Court did not provide any guidance for this subset of permittees. However, generally applicable Supreme Court precedent suggests that the GHG terms in these permits are now void, and any subsequent permits issued based upon the source's status as major because of its GHG emissions should also be void. In its Guidance, EPA stated that it may be appropriate to remove the GHG BACT limitations from such permits and convert them into minor source permits where feasible and that minor source requirements remain applicable.

In general, Supreme Court decisions that affect matters of federal law are retroactive in their effect. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). This principle was applied in the air context in the Clean Air Mercury Rule (CAMR) litigation. The D.C. Circuit vacated CAMR in 2008. *See New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir.). A district court concluded that the effect of the vacatur was as if CAMR had never been promulgated and permits issued pursuant to CAMR were void. *Alliance for Clean Energy v. Duke Energy Carolinas*, LLC, 2008 U.S. Dist. LEXIS 97485 (W.D.N.C. 2008). Non-anyway sources should strongly consider discussing their GHG PSD permit's validity with the state permitting authority before disregarding permit requirements because of complicated State Implementation Plan (SIP) issues discussed below.

How does UARG affect state permitting programs and regulations?

State-issued PSD permits are generally issued either pursuant to federally approved SIP regulations or under delegation from EPA to enforce the federal regulations. In the latter case, our advice above regarding the validity of GHG terms for non-anyway sources should be the same. For SIPs, there are some additional considerations. A SIP consists of rules promulgated by the state agency, typically under state law, that are approved by EPA if they are consistent with, or no less stringent than, the corresponding federal rules. All states with the authority to issue PSD permits that included BACT requirements for GHGs had incorporated some version of the Tailoring Rule into the state regulations and then had those regulations approved by EPA as part of its SIP. EPA takes the position in its Guidance that states may continue to require non-anyway sources to obtain PSD and Title V permits only if there is independent state authority to do so, but EPA says that it will not enforce federal or state, SIP-approved regulations that are inconsistent with the Court's decision in UARG.

For anyway sources now applying for PSD permits, what is the de minimis level of emissions for GHGs?

One of the key issues arising out of UARG is the apparent absence of a tons-per-year "significance" level of GHG emissions that would trigger BACT requirements for anyway sources. The Court, citing EPA's preamble to the Tailoring Rule, noted that the 75,000-tpy limit established in the Tailoring Rule was not a *de minimis* level, which, under PSD, is the level of emissions of a particular pollutant that a source must exceed before triggering BACT requirements for that pollutant. Rather, EPA claimed that its choice of 75,000 tpy had been made out of administrative necessity and lacked the justification required of *de minimis* levels. The Court held that an anyway source will only be required to comply with BACT for its GHG emissions if those emissions exceed a *de minimis* level and EPA must justify whatever *de minimis* level it chooses, if it chooses to establish a *de minimis* level at all.

In its Guidance, EPA chose to continue applying the 75,000 tpy threshold to determine if an anyway source is subject to BACT for its GHG emissions, while considering "whether to promulgate a *de minimis* level and what level would be appropriate." Guidance at 4. While it may be an interim approach, the conflict between the Guidance (maintaining the 75,000 tpy threshold but not justifying it as the *de minimis* level) and *UARG* (only emissions in excess of a *de minimis* level can be the basis for requiring BACT) muddies the waters for anyway sources as they determine whether their project may trigger BACT requirements for GHG emissions. Again, sources should consult with the applicable permitting authority on this issue.

What can anyway sources do to avoid triggering BACT requirements for GHGs?

For anyway sources that are potentially subject to BACT requirements for GHG emissions, there are traditional PSD strategic options that may avoid triggering these requirements. One can become a non-anyway source, for example, by limiting facility or project potential emissions of conventional pollutants below threshold limits for PSD in several ways—identifying contemporaneous increases and decreases of emissions that will allow the project to "net out" of PSD review, altering a project's design or scope to lower emission increases, choosing to install control technologies for specific pollutants to reduce emissions, and accepting lower emission limits via enforceable operational reductions to make the source a "synthetic minor." Alternatively, an anyway source could accept an emission limit for GHGs below the 75,000 tpy threshold.

Are anyway sources subject to GHG BACT if they only trigger requirements under NNSR?

Assume a project would trigger requirements under the Nonattainment New Source Review (NNSR) program for one or more of the conventional pollutants without triggering PSD requirements. After *UARG*, we believe the project should not be subject to BACT requirements for GHGs. The Court did not rule on this issue explicitly. EPA stated in the preamble to the Tailoring Rule, however, that there "is no NAAQS [National Ambient Air Quality Standard] for CO2 [carbon dioxide] or any of the other well-mixed GHGs, nor has EPA proposed any such NAAQS; therefore, unless and until we take further such action, we do not anticipate that the nonattainment NSR program will apply to GHGs." 75 Fed. Reg. 31,514, 31,520 (June 3, 2010). Thus, because (1) the Agency does not have the authority to require a source to comply with PSD requirements based solely on GHG emissions, and (2) the Agency has taken the position that GHGs are not subject to NNSR requirements, if a project triggers requirements for conventional pollutants under NNSR alone, the project should not be subject to BACT requirements for GHGs.

Big picture implications: Who won and who lost?

As you might expect, the answer to this question depends on who is answering. EPA and environmental groups tout the Court's second holding regarding GHG BACT for anyway sources as a major win for the Agency and dismiss the first holding as a relatively minor revision of the Agency's authority. In its decision, the Court reiterated the government's contention that approximately 83 percent of stationary source GHG emissions are attributable to anyway sources compared with 3 percent attributable to non-anyway sources, so, measured in that way, EPA argues that its authority over GHG emissions remains largely untouched. Many in the regulated community, however, highlight the Court's first holding

regarding entry into the PSD system in the first instance as a strong rebuke of the Agency's overreach, arguing that the case foreshadows a higher degree of scrutiny of EPA GHG-related regulations in the future. Industry observers cite specifically to the following language in the opinion that may bear on whether EPA's broad Section 111(d) NSPS carbon regulation for existing power plants is lawful—"[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *UARG* at 394.

In sum, just as the Court's decision in *UARG* clarified EPA's authority to issue permits with BACT requirements for GHG emissions, it also muddied the waters in the short-term implementation of the PSD program and created some real questions for GHG regulation under other provisions of the Act that will undoubtedly be litigated in the future. Sources should engage with permitting authorities as early as practicable in the application process to flesh out these issues and determine a best course of action.