

Supreme Court Action on EPA's Tailoring Rule for PSD and Title V

Summary

The Clean Air Act requires permits for stationary sources such as power plants. The Prevention of Significant Deterioration (PSD) provisions address permitting requirements for new construction or modifications of stationary sources. PSD permits establish emission limitations based on "best available control technology" (BACT) applied on a case-by-case basis. PSD requirements only apply in areas that are in attainment or unclassifiable with regard to criteria pollutants. Title V of the Clean Air Act requires permits for all major sources, wherever they are located. Since the metropolitan Washington area is designated as nonattainment, major sources in the region are permitted under the Title V program.

On June 23rd, 2014, the Supreme Court overturned portions of EPA's regulatory actions on greenhouse gases in PSD and Title V (called the "Tailoring" Rule). The court upheld the requirement that BACT be triggered for greenhouse gases if permits are needed for traditional criteria pollutants. However, the court found that the Clean Air Act does not permit EPA to require sources to obtain a PSD or Title V permit on the sole basis of its potential to emit greenhouse gases. Further, the court found that EPA lacked the authority to change the major source thresholds from those levels set in the statute (100 or 250 tons per year) to accommodate EPA's greenhouse gas-inclusive interpretation of the permitting triggers. The court did not reconsider the endangerment finding or the regulations on greenhouse gas emissions from motor vehicles, and the ruling did not address current regulatory proposals to regulate greenhouse gases under Section 111 of the Clean Air Act for new and existing power plants.

Background

On April 2, 2007, the Supreme Court found that GHGs, including carbon dioxide, are air pollutants covered by the CAA. *Massachusetts v. EPA*, 549 U.S. 497 (2007). The case arose from EPA's denial of a petition for rulemaking filed by environmental, renewable energy, and other organizations requesting that EPA control emissions of greenhouse gases from new motor vehicles under section 202 of the CAA.

The Court found that the EPA Administrator was required to determine whether emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. This determination is known as an "endangerment finding."

Greenhouse Gas Endangerment Finding

On December 7, 2009, EPA Administrator Lisa Jackson signed a final action, under Section 202(a) of the Clean Air Act, finding that six key well-mixed greenhouse gases constitute a threat to public health and welfare, and that the combined emissions from motor vehicles cause and contribute to the climate change problem.

Tailpipe Rule

EPA and the National Highway Traffic Safety Administration (NHTSA) promulgated rules to establish greenhouse gas emission limits and fuel economy standards for motor vehicles. Together, the enacted and proposed standards are expected to save more than six billion barrels of oil through 2025 and prevent more than 3,100 million metric tons of carbon dioxide emissions.

Greenhouse Gases and PSD

On August 30, 2007, EPA issued a PSD permit to Deseret Power Electric Cooperative, authorizing it to construct a new waste-coal-fired electric generating unit near its existing Bonanza Power Plant, in Bonanza, Utah. The permit did not include emissions control requirements known as best available control technology (BACT) limits for CO₂. EPA acknowledged the Massachusetts decision but found that decision alone did not require PSD permits to include limits on CO₂ emissions.

Congress established the NSR program as part of the 1977 Clean Air Act Amendments and modified it in the 1990 Amendments. NSR is a preconstruction permitting program that serves two important purposes:

- Ensures the maintenance of air quality standards or, where there are not air quality standards, it ensures that air quality does not significantly worsen when factories, industrial boilers, and power plants are modified or added. In areas that do not meet the national ambient air quality standards, NSR assures that new emissions do not slow progress toward cleaner air. In areas that meet the standards, especially pristine areas like national parks, NSR assures that new emissions fall within air quality standards.
- Ensures that state-of-the-art control technology is installed at new plants or at existing plants that are undergoing a major modification.

Sierra Club challenged the Deseret permit. On November 13, 2008, the Environmental Appeals Board (EAB) remanded the permit EPA to reconsider “whether or not to impose a CO₂ BACT limit in light of the ‘subject to regulation’ definition under the CAA.” The remand was based in part on EAB’s finding that there was not an established EPA interpretation of the regulatory phrase “subject to regulation.”

On December 18, 2008, then-Administrator Johnson issued a memorandum that established an interpretation of this regulatory phrase (*known as the Johnson Memo*). On December 31, 2008, Sierra Club and 14 other environmental, renewable energy, and citizen organizations petitioned EPA to reconsider the Johnson memo.

On February 17, 2009, Administrator Jackson granted a Petition for Reconsideration of the December 18, 2008 memorandum and initiated a rulemaking process to solicit comment on Administrator Johnson’s memorandum and related considerations reflected in the opinion of EPA’s environmental Appeals Board in the Deseret decision. The interpretation set forth in the December 18, 2008 memorandum remained in effect pending the reconsideration.

Final Greenhouse Gas Tailoring Rule

On May 13, 2010, EPA set greenhouse gas emissions thresholds to define when permits under the New Source Review Prevention of Significant Deterioration (PSD) and Title V Operating Permit programs are required for new and existing industrial facilities. This final rule “tailors” the requirements of these Clean Air Act permitting programs to limit covered facilities to the nation’s largest greenhouse gas emitters: power plants, refineries, and cement production facilities. This rule was partially overturned by the June 23, 2014 Supreme Court Decision.

Other Regulatory Initiatives for Stationary Sources

Carbon Pollution Standards for Power Plants

On June 2, 2014, the EPA issued a proposal to cut carbon pollution from existing power plants – the largest source of greenhouse gas emissions in the U.S. – also known as the 111d Rule. This rule would establish CO₂ emission rates for each state based on a best system of emission reduction (BSER). On September 20, 2013, the EPA issued a new proposal for carbon pollution from new power plants, also known as the 111b Rule. This rule would establish CO₂ emission limits for all new power plants. The June 23rd Supreme Court ruling did not directly address these two proposed rules.