GHG Permitting in the Aftermath of *UARG v. EPA*

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Overview of *UARG v. EPA*

- *Utility Air Regulatory Group v. EPA*, No. 12-1146 Slip op. (U.S. Supreme Court filed June 23, 2014) (*UARG*).
- Appeal by industry trade associations and Texas of June 2012 D.C. Circuit decision in favor of EPA in consolidated cases challenging rules implementing EPA's GHG PSD program (*CRR*).

Overview of *UARG v. EPA* (cont.)

- October 2013, Supreme Court grants 6 petitions for writ of certiorari filed by industry and state petitioners but limits scope of review to a single question:
  - "Whether EPA permissibly determined that its regulation of GHG emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit GHGs."

Overview of *UARG v. EPA* (cont.)

- Two arguments before the Court:
  - GHGs do not qualify as "air pollutants" under the PSD and Title V Programs and therefore cannot be regulated under either program; and
  - Even if GHGs are "air pollutants" within the meaning of the PSD Program, a source must be located within an area that EPA has designated attainment with a GHG National Ambient Air Quality Standard (NAAQS), and because there is no GHG NAAQS, GHGs could not themselves trigger the requirement to obtain a PSD permit.

Overview of *UARG v. EPA* (cont.)

- Holding:
  - The CAA neither compels nor permits EPA to adopt an interpretation of the Act requiring a source to obtain a PSD or Title V permit on the sole basis of its potential GHG emissions (5-4, Scalia, Roberts, **Kennedy**, Thomas, Alito).
  - EPA reasonably interpreted the Act to require sources that would need permits based on their emission of conventional pollutants to comply with BACT for GHGs (7-2, Scalia, Roberts, Kennedy, Breyer, Kagan, Sotomayor, Ginsburg).

Overview of *UARG v. EPA* (cont.)

- A closer look – GHG-only sources:
  - Pollutants encompassed by the broad, Act-wide definition of "air pollutant", which *Mass. v. EPA* determined included GHGs, are not necessarily the same "air pollutants" covered under the Act's operative provisions. *Mass. v. EPA* did not foreclose the agency's use of statutory context.
  - Rather than interpreting "air pollutant" more narrowly in the permitting context, EPA interpreted it as broadly as possible, and then to mitigate the absurd outcome of that interpretation, "tailored" unambiguous statutory terms.

Overview of *UARG v. EPA* (cont.)

- A closer look – "anyway" sources:
  - Unlike the statutory phrase "any air pollutant" in the permitting triggers, the Act requires BACT "for each pollutant **regulated** under [the Act.]"
    - The former suggests a role for agency judgment in interpreting statutory language (not misinterpreting and then rewriting the statute to fix the misinterpretation)
    - The latter suggests that the necessary judgment has already been made by Congress

Overview of *UARG v. EPA* (cont.)

- A closer look – "anyway" sources (cont.):
  - EPA may only require BACT for "anyway" sources if the source emits more than a *de minimis* amount of GHGs.
  - The Tailoring Rule's thresholds were not arrived at by identifying the *de minimis* level.
  - 75,000 tpy may in fact be a reasonable *de minimis* level, but EPA has to justify it on proper grounds.

Post-UARG Developments

- GHG-Only Sources
  - EPA - Permitting requirement no longer enforced.
  - But what about issued permits?
    - Enforcement of permit conditions?
    - Formal rescission? No action assurance letters?
- "Anyway" Sources
  - EPA - Business as usual.
  - But what about *de minimis* levels?

The Texas Predicament

- Dual permitting program created by involuntary FIP.
- Prior to UARG, transition of permitting authority to TCEQ was imminent.
- Post-UARG / pre-EPA guidance, many questions were asked about EPA's authority to continue requiring any permits, even for "anyway" sources.
- Post-UARG / post-EPA guidance, questions remain, but practical realities are driving a possible interim solution.

The Texas Predicament (cont.)

- Three options for transition of GHG "anyway" source permitting authority to TCEQ pending decision in *UARG* remand:
  - Use existing authority in currently approved SIP;
  - EPA approval of long-pending SIP submittal on definition of "federally-regulated NSR pollutant";
  - Full approval of recent SIP submittal with "no action" on GHG-only provisions.

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