Can the EPA ignore statutory tonnage triggers for regulations for GHG?



# SUPREME COURT OF THE UNITED STATES

Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, and 12–1272

UTILITY AIR REGULATORY GROUP,
PETITIONER
12–1146 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

AMERICAN CHEMISTRY COUNCIL, ET AL.,
PETITIONERS
12–1248 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

ENERGY-INTENSIVE MANUFACTURERS WORKING GROUP ON GREENHOUSE GAS REGULATION, ET AL., PETITIONERS
12–1254 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL., PETITIONERS
12–1268 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

TEXAS, ET AL., PETITIONERS
12–1269 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.; AND

CHAMBER OF COMMERCE OF THE UNITED STATES, ET AL., PETITIONERS
12–1272 *v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 23, 2014]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

In *Massachusetts* v. *EPA*, 549 U. S. 497 (2007), this Court considered whether greenhouse gases fall within the Clean Air Act's general definition of an air "pollutant." *Id.,* at 528–529. The Environmental Protection Agency cautioned us that "key provisions of the [Act] cannot cogently be applied to [greenhouse gas] emissions," Brief for Federal Respondent in *Massachusetts* v. *EPA*, O. T. 2006, No. 05–1120, p. 22, but the Court brushed the warning aside and had "little trouble" concluding that the Act's "sweeping definition" of a pollutant encompasses greenhouse gases. 549 U. S., at 528–529. I believed *Massachusetts* v. *EPA* was wrongly decided at the time, and these cases further expose the flaws with that decision.

I

As the present cases now show, trying to fit greenhouse gases into "key provisions" of the Clean Air Act involves more than a "little trouble." These cases concern the provisions of the Act relating to the "Prevention of Significant Deterioration" (PSD), 42 U. S. C. §§7470–7492, as well as Title V of the Act, §7661. And in order to make those provisions apply to greenhouse gases in a way that does not produce absurd results, the EPA effectively amended the Act. The Act contains specific emissions thresholds that trigger PSD and Title V coverage, but the EPA crossed out the figures enacted by Congress and substituted figures of its own.

I agree with the Court that the EPA is neither required nor permitted to take this extraordinary step, and I there-

fore join Parts I and II–A of the Court's opinion.

II

I do not agree, however, with the Court's conclusion that what it terms "anyway sources," *i.e.*, sources that are subject to PSD and Title V permitting as the result of the emission of conventional pollutants, must install "best available control technology" (BACT) for greenhouse gases. As is the case with the PSD and Title V thresholds, trying to fit greenhouse gases into the BACT analysis badly distorts the scheme that Congress adopted.

The Court gives two main reasons for concluding that BACT applies to "anyway" sources, one based on text and one based on practical considerations. Neither is convincing.

A

With respect to the text, it is curious that the Court, having departed from a literal interpretation of the term "pollutant" in Part II–A, turns on its heels and adopts a literal interpretation in Part II–B. The coverage thresholds at issue in Part II–A apply to any "pollutant." The Act's general definition of this term is broad, and in *Massachusetts* v. *EPA*, *supra*, the Court held that this definition covers greenhouse gases. The Court does not disturb that holding, but it nevertheless concludes that, as used in the provision triggering PSD coverage, the term "pollutant" actually means "pollutant, other than a greenhouse gas."

In Part II–B, the relevant statutory provision says that BACT must be installed for any "pollutant subject to regulation under [the Act]." §7475(a)(4). If the term "pollutant" means "pollutant, other than a greenhouse gas," as the Court effectively concludes in Part II–A, the term "pollutant subject to regulation under [the Act]" in §7475(a)(4) should mean "pollutant, other than a green-

house gas, subject to regulation under [the Act], and that is subject to regulation under [the Act]." The Court's literalism is selective, and it results in a strange and disjointed regulatory scheme.

Under the Court's interpretation, a source can emit an unlimited quantity of greenhouse gases without triggering the need for a PSD permit. Why might Congress have wanted to allow this? The most likely explanation is that the PSD permitting process is simply not suited for use in regulating this particular pollutant. And if that is so, it makes little sense to require the installation of BACT for greenhouse gases in those instances in which a source happens to be required to obtain a permit due to the emission of a qualifying quantity of some other pollutant that is regulated under the Act.

B

The Court's second reason for holding that BACT applies to "anyway" sources is its belief that this can be done without disastrous consequences. Only time will tell whether this hope is well founded, but it seems clear that BACT analysis is fundamentally incompatible with the regulation of greenhouse-gas emissions for at least two important reasons.

1

First, BACT looks to the effects of covered pollutants in the area in which a source is located. The PSD program is implemented through "emission limitations and such other measures" as are "necessary . . . to prevent significant deterioration of air quality *in each region*." §7471 (emphasis added). The Clean Air Act provides that BACT must be identified "on a case-by-case basis," §7479(3), and this necessarily means that local conditions must be taken into account. For this reason, the Act instructs the EPA to issue regulations requiring an analysis of "the ambient air

quality . . . *at the site of the proposed major emitting facility and in the area potentially affected* by the emissions from such facility for each pollutant regulated under [the Act]." §7475(e)(3)(B) (emphasis added). The Act also requires a public hearing on "the air quality *at the proposed site and in areas which may be affected* by emissions from such facility for each pollutant subject to regulation under [the Act] which will be emitted from such facility." §§7475(a)(2), (e)(1) (emphasis added). Accordingly, if BACT is required for greenhouse gases, the Act demands that the impact of these gases in the area surrounding a site must be monitored, explored at a public hearing, and considered as part of the permitting process. The effects of greenhouse gases, however, are global, not local. See PSD and Title V Permitting Guidance for Greenhouse Gases 41–42 (Mar. 2011) (hereinafter Guidance). As a result, the EPA has declared that PSD permit applicants and permitting officials may disregard these provisions of the Act. 75 Fed. Reg. 31520 (2010).

2

Second, as part of the case-by-case analysis required by BACT, a permitting authority must balance the environmental benefit expected to result from the installation of an available control measure against adverse consequences that may result, including any negative impact on the environment, energy conservation, and the economy. And the EPA itself has admitted that this cannot be done on a case-by-case basis with respect to greenhouse gases.

The Clean Air Act makes it clear that BACT must be determined on a "case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." §7479(3). To implement this directive, the EPA adopted a five-step framework for making a BACT determination. See New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattain-

ment Area Permitting (Oct. 1990).[1] Under the fourth step of this analysis, potentially applicable and feasible control technologies that are candidates for selection as BACT for a particular source are eliminated from consideration based on their "collateral impacts," such as any adverse environmental effects or adverse effects on energy consumption or the economy.

More recently, the EPA provided guidance to permitting authorities regarding the treatment of greenhouse-gas emissions under this framework, and the EPA's guidance demonstrates the insuperable problem that results when an attempt is made to apply this framework to greenhouse gas emissions. As noted above, at step 4 of the framework, a permitting authority must balance the positive effect likely to result from requiring a particular source to install a particular technology against a variety of negative effects that are likely to occur if that step is taken. But in the case of greenhouse gases, how can a permitting authority make this individualized, source-specific determination?

The EPA instructs permitting authorities to take into

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[1] The EPA describes these steps as follows:

(1) The applicant must identify all available control options that are potentially applicable by consulting EPA's BACT clearinghouse along with other reliable sources.

(2) The technical feasibility of the control options identified in step 1 are eliminated based on technical infeasibility.

(3) The control technologies are ranked based on control effectiveness, by considering: the percentage of the pollutant removed; expected emission rate for each new source review (NSR) pollutant; expected emission reduction for each regulated NSR pollutant; and output based emissions limit.

(4) Control technologies are eliminated based on collateral impacts, such as: energy impacts; other environmental impacts; solid or hazardous waste; water discharge from control device; emissions of air toxics and other non-NSR regulated pollutants; and economic impacts.

(5) The most effective control option not eliminated in step 4 is proposed as BACT for the pollutant and emission unit under review.

consideration all the adverse effects that the EPA has found to result from *the overall increase* in greenhouse gases in the atmosphere. These include an increased risk of dangerous heat waves, hurricanes, floods, wildfires, and drought, as well as risks to agriculture, forestry, and water resources. Guidance 40–41. But the EPA admits that it is simply not possible for a permitting authority to calculate in any meaningful way the degree to which any potential reduction in greenhouse gas emissions from any individual source might reduce these risks. And without making such a calculation in even a very rough way, a permitting authority cannot do what the Clean Air Act and the EPA's framework demand—compare the benefits of some specified reduction in the emission of greenhouse gases from a particular source with any adverse environmental or economic effects that might result from mandating such a reduction.

Suppose, for example, that a permitting authority must decide whether to mandate a change that both decreases a source's emission of greenhouse gases and increases its emission of a conventional pollutant that has a negative effect on public health. How should a permitting authority decide whether to require this change? Here is the EPA's advice:

> "[W]hen considering the trade-offs between the environmental impacts of a particular level of GHG [greenhouse gas] reduction and a collateral increase in another regulated NSR pollutant,[2] rather than attempting to determine or characterize specific environmental impacts from GHGs emitted at particular locations, EPA recommends that permitting authorities focus on the amount of GHG emission reductions

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[2] "New source review pollutants" are those pollutants for which a National Ambient Air Quality standard has been set and a few others, such as sulphur dioxide. See 40 CFR 51.165(a)(1)(xxxvii) (2013).

> that may be gained or lost by employing a particular control strategy and how that compares to the environmental or other impacts resulting from the collateral emissions increase of other regulated NSR pollutants." Guidance 42.

As best I can make out, what this means is that permitting authorities should not even try to assess the net impact on public health. Instead of comparing the positive and negative public health effects of a particular option, permitting authorities are instructed to compare the adverse public health effects of increasing the emissions of the conventional pollutants with the amount of the reduction of the source's emissions of greenhouse gases. But without knowing the positive effects of the latter, this is a meaningless comparison.

The EPA tries to ameliorate this problem by noting that permitting authorities are entitled to "a great deal of discretion," Guidance 41, but without a comprehensible standard, what this will mean is arbitrary and inconsistent decisionmaking. That is not what the Clean Air Act contemplates.[3]

* * *

BACT analysis, like the rest of the Clean Air Act, was developed for use in regulating the emission of conventional pollutants and is simply not suited for use with respect to greenhouse gases. I therefore respectfully dissent from Part II–B–2 of the opinion of the Court.

This is a setup for a major analysis -

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[3] While I do not think that BACT applies at all to "anyway sources," if it is to apply, the limitations suggested in Part II–B–1 might lessen the inconsistencies highlighted in Part II of this opinion, and on that understanding I join Part II–B–1.