

NOS. 12-1146 AND CONSOLIDATED CASES

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

**On Writs of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit**

**REPLY BRIEF OF PETITIONER
UTILITY AIR REGULATORY GROUP**

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CORPORATE DISCLOSURE STATEMENT

The Utility Air Regulatory Group (UARG) is a not-for-profit association of individual electric utilities and electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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INTRODUCTION

The Court has asked whether the United States Environmental Protection Agency (EPA) permissibly determined that regulation of greenhouse gas (GHG) emissions from new motor vehicles under Title II of the Clean Air Act (CAA), 42 U.S.C. § 7521(a)(1), triggered permitting requirements under the Prevention of Significant Deterioration (PSD) and Title V programs.¹ That question must be answered in the negative.

The PSD program is designed to prevent deterioration of “air quality,” 42 U.S.C. § 7471, a term used throughout Title I of the CAA to focus regulation on a particular kind of air pollution. The key to that term’s meaning is found in 42 U.S.C. § 7408(a)(2), which defines the “criteria” for “air quality” in terms of the degree to which the “presence of ... [a] pollutant in the ambient air” has “identifiable effects on public health or welfare.” While the term “air pollution” can cover health and welfare effects that result from the presence of a pollutant anywhere in the atmosphere, see, *e.g.*, *id.* § 7521(a)(1) (addressing “air pollution which may ... endanger public health or welfare”); *Massachusetts v. EPA*, 549 U.S. 497, 529 n.26 (2007), “ambient air” is only that portion of the atmosphere to which the general public has access.²

¹ As UARG’s opening brief and Industry Petitioners’ Joint Reply explain, GHGs should not trigger Title V permitting.

² EPA in 1971 adopted a CAA legislative rule defining “[a]mbient air” as only “*that portion* of the atmosphere, external to buildings, to which the general public has access.” 40 C.F.R. § 50.1(e) (emphasis added); see also *Train v. Natural Res. Def.*

(Continued)

Accordingly, a program to “prevent significant deterioration of air quality” focuses on emissions that change the quality of the air people breathe. See also 42 U.S.C. § 7407(d) (“ambient air quality” and “air quality” used interchangeably to describe pollutant concentrations governing designation of “air quality control regions”).

From the PSD program’s inception, large facilities that emit regulated pollutants that deteriorate air quality have been required to obtain preconstruction permits. Over the years, new pollutants regulated under the CAA were included in PSD without changing the nature of the pollution being addressed or the permit program’s source coverage. When EPA adopted the Motor Vehicle Rule regulating GHGs, however, EPA had to confront the fundamental differences between GHGs and all previously regulated pollutants.

If EPA were to treat carbon dioxide as it has treated every previously regulated pollutant, the program’s source coverage would expand to tens of thousands of small emitters never previously subject to PSD. Moreover, unlike emissions of every previously regulated PSD pollutant, carbon dioxide emissions do not deteriorate air quality. See JA 915. Accordingly, if EPA were to treat GHGs the same as every other regulated pollutant, the PSD program’s nature and coverage would have fundamentally changed without any revision to EPA’s PSD regulations. EPA there-

Council, 421 U.S. 60, 65 (1975). That regulation is binding on EPA, the public, and courts. See also *infra* note 4.

fore had to treat GHGs differently from every previously regulated pollutant under PSD.³

For the reasons given herein, in UARG's opening brief, and in Industry Petitioners' Joint Reply (which UARG incorporates by reference to avoid duplication), it was incumbent on EPA to revise its regulations to exclude GHGs from the PSD program. A pollutant that does not deteriorate air quality, and is emitted by innumerable small, non-industrial sources in amounts exceeding 250 tpy, is not the type of "air pollutant" Congress intended be regulated under PSD.

ARGUMENT

1. EPA identifies as "[t]he central PSD program requirement at issue here ... the requirement that facilities subject to the PSD program limit their emissions based on BACT [Best Available Control Technology] 'for each pollutant subject to regulation under [the CAA] emitted from, or which results from, such facility.'" EPA Br. 25-26 (quoting 42 U.S.C. § 7475(a)(4)). EPA argues that because GHGs "are an

³ EPA defines GHGs to include carbon dioxide and five other substances collectively. JA 290. The record established that carbon dioxide (which dominates this group of substances) is emitted by myriad small sources in amounts exceeding 250 tons per year (tpy) and that stationary source emissions of carbon dioxide do not deteriorate ambient air. *Id.* at 355-56, 915. EPA did not resolve in this rulemaking whether each (or any) of the other GHG substances individually deteriorates ambient air or would bring very small sources into the PSD program; these questions were irrelevant to EPA's "automatic trigger" interpretation.

‘air pollutant’ as that term is defined in the CAA” and are “subject to regulation under [the CAA]” due to EPA’s Motor Vehicle Rule, “it is crystal clear that PSD permittees must install BACT for [GHGs].” *Id.* at 26 (quoting JA 242). This argument underpins EPA’s entire response to the petitions.

EPA’s argument ignores that the BACT requirement’s purpose is to protect ambient air from significant deterioration. PSD program elements, including BACT requirements, are “determined under regulations” promulgated by EPA that require that “each ... implementation plan ... contain *emission limitations* and such other measures *as may be necessary* ... to *prevent significant deterioration of air quality*” in specific geographically defined areas within a state. 42 U.S.C. § 7471 (emphases added). BACT is “an *emission limitation*” for “pollutant[s] subject to regulation under” the CAA that the permitting authority establishes for each PSD facility based on site-specific factors. *Id.* § 7479(3) (emphasis added).

Because, as EPA has never disputed, carbon dioxide emissions do not deteriorate air quality in the vicinity of a stationary source, see UARG Br. 2-3; JA 915, a BACT “emission limitation” for carbon dioxide cannot be “*necessary* ... to prevent significant deterioration of air quality,” 42 U.S.C. §§ 7471, 7479(3). Given the statute’s language and context, the “pollutant[s] subject to regulation” for which BACT is established must potentially deteriorate air quality due to their presence in the ambient air.⁴ The legislative

⁴ “Air quality” and “ambient air quality” are used interchangeably in CAA Title I. See, e.g., 42 U.S.C. § 7407(d). Since 1971,
(Continued)

history that respondents cite affirms this conclusion. States Br. 17-18 (“the [BACT] requirements should be applicable to all pollutants emitted from any new major emitting facility so that the maximum degree of emission reduction would be achieved *in order to minimize potential deterioration*” (quoting 123 Cong. Rec. at S18,021 (daily ed. June 8, 1977) (statement of Sen. Muskie) (emphasis added)); see also *Alabama Power Co. v. Costle*, 636 F.2d 323, 406-07 n.81 (D.C. Cir. 1979).

2. The States and NRDC (but not EPA) argue that regulating GHGs under PSD is permissible be-

EPA’s regulations have defined “ambient air” as the air at the earth’s surface “to which the general public has access.” *Supra* at 1-2 & note 1. EPA relies on footnote 26 in *Massachusetts* to assert that “‘ambient air’ refers ... to outdoor air that exists throughout the atmosphere.” EPA Br. 31. But that is not what the Court said. Footnote 26 addressed the term “air pollution agent,” explaining that, to be an “air pollutant,” an “air pollution agent” need only be “‘any ... substance ... which is emitted into or otherwise enters the ambient air.’” *Massachusetts*, 549 U.S. at 529 n.26 (quoting 42 U.S.C. § 7602(g)) (emphasis in original). According to the Court, in defining “air pollutant,” “the text ... uses the phrase ‘the ambient air’” to identify – “without distinguishing between atmospheric layers” – the air into which an “air pollution agent” must be released. *Id.* (emphasis added). Although the reference to “ambient air” in 42 U.S.C. § 7602(g) may not “distinguish[] between atmospheric layers,” neither does it define the term “ambient air.” The footnote simply does not say that “ambient air” exists throughout the entire atmospheric column, as EPA would have it. Had footnote 26 defined “ambient air” as spanning the troposphere (beginning on earth’s surface) to the exosphere (over 6,000 miles aloft), that definition would have been dicta that was contravened by a binding EPA legislative rule.

cause GHGs *do* deteriorate air quality. NRDC asserts that “greenhouse gas pollution exacerbates local smog problems.” NRDC Br. 19 (citing EPA’s Endangerment Finding, JA 803); see also States Br. 25. But EPA did not attribute “local smog problems” to air quality deterioration caused by local or regional GHG emissions. Instead, increases in “ozone levels ... over broad areas of the country” were, according to EPA, related to increases in temperatures from GHGs entering the worldwide atmosphere and dispersing globally. JA 907-08.

As EPA explained, “[a]ll of the[] ... effects on human health” that served as a basis for its Endangerment Finding are those “associated with *the effect on climate* from elevated atmospheric concentrations of [GHGs].” *Id.* at 915 (emphasis added). “None of these human health effects,” EPA acknowledged, “are associated with direct [ambient] exposure to greenhouse gases.” *Id.* Thus, no basis exists in the record for arguing that any major emitting facility’s GHG emissions are responsible for deteriorating ambient air quality in any PSD area affected by any such facility.

3. As UARG’s opening brief explains, 42 U.S.C. § 7475(e) underscores that “each pollutant subject to regulation” cannot be construed to include GHGs such as carbon dioxide. To do so would compel the conclusion that Congress intended that PSD permit applicants undertake a wholly useless air quality analysis to identify carbon dioxide concentrations everywhere in the country. UARG Br. 26-28. EPA conceded there is no feasible way to “evaluat[e] or quantify[] end-point impacts [that are] attributable to

the emissions of GHGs from a single source,” even though that is the express point and purpose of a PSD air quality analysis. *Id.* at 27 (internal quotation omitted). GHGs do not – and cannot be made to – “fit” within the PSD program’s regulatory parameters, as EPA has acknowledged. 73 Fed. Reg. 44,354, 44,501 (July 30, 2008) (“The PSD program is designed to provide a detailed case-by-case review for the sources it covers, and that review is *customized to account for the individual characteristics of each source and the air quality in the particular area where the source will be located.*”) (emphasis added).

EPA argues that “even if [UARG] were correct that the analysis provisions [of § 7475(e)] impliedly exclude greenhouse-gas emissions, that would provide no reason to exclude greenhouse-gas emissions from the coverage of PSD program requirements (like the BACT requirement) that are both literally *and* practically applicable.” EPA Br. 32-33 (emphasis in original). But § 7475(e)(1), by its express terms, requires an air quality analysis “for each pollutant subject to regulation under [the CAA]” – i.e., the identical phrase that, according to EPA, when used in the § 7475(a)(4) BACT provision can *only* be construed as embracing GHGs. In light of the purpose of the air quality analyses and the use of the same phrase in § 7475(a)(4), GHGs must be excluded from BACT’s scope. Because BACT is an “emission limitation[]” that is to be imposed only “as may be necessary ... to prevent significant deterioration of air quality,” 42 U.S.C. § 7471, context compels exclusion of GHGs that do not deteriorate air quality.

NRDC concedes GHGs “do not implicate some of the factors required to be analyzed under Section 7475(e)” but argues this is “no basis for an *exemption* of greenhouse gases from PSD permitting.” NRDC Br. 21 (emphasis in original). This misses the point. The *reason* GHGs do not implicate those factors is that the purpose of PSD air quality analyses is to evaluate the effect that a source’s emissions may have on the quality of ambient air in impacted PSD areas. Because carbon dioxide emissions from a stationary source will not have deleterious effects on – will not “deteriorate” – the ambient air in PSD areas, the reference in § 7475(e) to “each pollutant subject to regulation under” the CAA must be construed to refer to regulated pollutants that deteriorate ambient air quality.⁵

4. Respondents cite § 7475(a)(3)(C) – which requires that the proposed facility “demonstrate[] ... that emissions from ... such facility will not cause [an exceedance] ... of any ... applicable emission standard or standard of performance under” the CAA – to argue that GHGs must be deemed the sort of “air pollutant” Congress intended to regulate under PSD. States Br. 13; see also EPA Br. 30; NRDC Br. 15.

To be sure, a proposed PSD source must demonstrate it would satisfy any “applicable” NSPS, including any applicable NSPS limiting GHG emissions.

⁵ Thus, just as the visibility program references “any pollutant” but limits program coverage *only* to “visibility-impairing pollutants,” EPA Br. 46 n.12, PSD applies only to ambient-air-quality “deterioration” pollutants, 42 U.S.C. § 7471; see also UARG Br. 24.

But determining whether there would be compliance with an NSPS for GHGs does not entail any regulation of GHGs *under the PSD program*. This is illustrated by the facts that § 7475(a)(3)(C) also applies to any “applicable emission standard” for hazardous air pollutants under 42 U.S.C. § 7412 and that those pollutants are exempted from PSD regulation, 42 U.S.C. § 7412(b)(6). A demonstration of compliance with standards established under other, non-PSD CAA programs begins and ends with the degree of pollutant regulation provided for in *those* standards. No more, no less.

5. From Congress’s complete silence in 1990 about ozone-depleting substances and the PSD program, EPA infers congressional design. EPA Br. 33. It vanishes with analysis. Before and after the 1990 CAA amendments, man-made chemicals that affect stratospheric ozone were regulated by EPA and, as regulated pollutants, were also subject to PSD. By their nature, these man-made chemicals, which include air toxics such as carbon tetrachloride, were no different in kind from other PSD-regulated pollutants. They deteriorated air quality in the affected PSD areas. Nothing in the language of Title VI (addressing stratospheric ozone) or its legislative history suggests Congress was even aware that ozone-depleting substances were PSD-regulated pollutants, much less decided that every regulated pollutant belongs in the PSD program irrespective of whether it deteriorates ambient air quality. Similarly, Congress’s removal of hazardous air pollutants – pollutants that clearly deteriorate air quality – from the PSD program is irrelevant to whether carbon dioxide,

a gas that occurs naturally in ambient air and does not deteriorate air quality, can be a PSD pollutant.⁶

6. Limiting PSD to pollutants that deteriorate ambient air will ensure that PSD permitting applies only to the relatively small number of large sources that Congress identified as “major emitting facilit[ies].” 42 U.S.C. § 7479(1); JA 454-55. Before 1977, PSD permitting applied to listed industrial source categories, regardless of whether they emitted ten tpy of a pollutant or a thousand. 39 Fed. Reg. 42,510, 42,514 (Dec. 5, 1974). In the 1977 CAA amendments, Congress listed “major emitting facilities” and added the 100- and 250-tpy thresholds that Congress understood would limit permitting to large facilities that, “due to their size,” could “bear the substantial regulatory costs imposed by ... PSD.” *Alabama Power*, 636 F.2d at 353.

The numerical thresholds established in 1977 – based on annual emissions of pollutants like sulfur dioxide, particulate matter, nitrogen oxides, and other pollutants regulated in 1977 – drew a bright line separating major emitting facilities from small sources that did not threaten local air quality. These major facilities could be asked to cope with the complex, costly pre-construction permit program that was needed to address the significant threat to air quality the facilities posed. Inclusion of small sources with

⁶ Whether EPA must exclude from PSD any pollutant regulated for atmospheric effects regardless of whether the pollutant deteriorates air quality need not be resolved to reject EPA’s inclusion of carbon dioxide in PSD.

insignificant emissions simply could not be justified. That line is obliterated if a “major emitting facility” includes thousands of apartment buildings, schools, and other non-industrial sources that in 1977 and today do not even approach emitting 250 tpy of the pollutants known to Congress when it enacted the thresholds. The line between “major” and “small” was drawn in 1977 and did not change when EPA addressed a new pollutant, GHGs, over 30 years later.⁷

7. As EPA recognizes, PSD has been implemented through legislative rules at Congress’s direction. 42 U.S.C. § 7471; see EPA Br. 11-12. When newly regulated pollutants could be folded into PSD permitting without expanding or otherwise changing the program, no PSD rule revisions were required. This has been the case for over 30 years.

GHGs demanded a departure from EPA’s pollutant coverage rules. EPA agreed, responded, and got it wrong. As EPA explains in a lengthy footnote, because GHGs do not fit the existing PSD rules, it undertook rulemaking to address what GHGs are regulated under PSD and how. EPA Br. 16-18 n.4. But, because adding GHGs would expand PSD permitting

⁷ NRDC observes “possible tension” between the “unambiguous[]” statutory thresholds and congressional “expectations in 1977.” NRDC Br. 36-37 n.16. The tension is of EPA’s creation. An interpretation that any source of GHGs over 250 tpy triggers PSD permitting is flatly inconsistent with congressional “expectations in 1977” that PSD be limited to “major” sources and that “small” sources be left to other, less demanding programs. *Cf.* 42 U.S.C. § 7602(x) (definition of “small source”).

coverage to small sources and would extend PSD coverage to pollutants that do not deteriorate ambient air, the statute required that EPA's rules exclude GHGs like carbon dioxide from PSD.

Finally, for reasons discussed above and in Industry Petitioners' Joint Reply, excluding GHGs from PSD neither prevents regulation of GHG emissions (including stationary-source GHG emissions) under other CAA programs (e.g., § 7411), provided statutory prerequisites for regulation are met, see *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011), nor requires EPA to "abandon[]" its longstanding PSD rules, EPA Br. 39 (emphasis omitted). By contrast, EPA's "automatic trigger" interpretation creates "anomalies," *id.* at 45, by: (i) subjecting, "one step at a time," innumerable small sources to PSD; (ii) regulating pollutants that do not deteriorate the quality of ambient air; and (iii) ignoring statutory and regulatory limits on PSD's reach. These anomalies are avoided only if GHGs are excluded from PSD.

CONCLUSION

The judgment below should be reversed.

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