

CLIMATE REGULATION UNDER
THE CLEAN AIR ACT IN THE WAKE OF
UTILITY AIR REGULATORY GROUP V. EPA

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In Utility Air Regulatory Group v. EPA, the Supreme Court largely upheld the U.S. Environmental Protection Agency's regulation of greenhouse gases under the Clean Air Act's Prevention of Significant Deterioration program for new or modified major stationary sources of air pollution. Although the Court rejected the Environmental Protection Agency's claim that it was statutorily compelled to consider a source's greenhouse gas emissions as triggering the Prevention of Significant Deterioration program's permitting requirements, it held that sources already subject to the program based on their emissions of other pollutants could then be required to apply Prevention of Significant Deterioration pollution-control technology to their greenhouse gas emissions as well. In this Symposium, eight authors explore the Court's decision and consider its implications for the Environmental Protection Agency's authority to regulate greenhouse gases under the Clean Air Act.

INTRODUCTION

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On April 2, 2007, the U.S. Supreme Court issued a momentous decision in the field of environmental law: *Massachusetts v. EPA*.¹ The Court, in an opinion authored by Justice Stevens, held that the U.S. Environmental Protection Agency (“EPA”) has authority to regulate greenhouse gas emissions from new motor vehicles under section 202(a)(1) of the Clean Air Act (“CAA”).² This authority stems from the fact that greenhouse gases “fit well within the Act’s capacious definition of ‘air pollutant,’”³ a definition that “embraces all airborne compounds of whatever stripe.”⁴ The Court’s holding was bolstered by sweeping language regarding the “well-documented rise in global temperatures,”⁵ the “serious and well recognized” harms associated with climate change,⁶ and the

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¹ 549 U.S. 497 (2007).

² *Id.* at 532.

³ *Id.*

⁴ *Id.* at 529.

⁵ *Id.* at 504.

⁶ *Id.* at 521.

fact that a “reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”⁷

Massachusetts thus paved the way for EPA to address climate change using its authority under the CAA. However, EPA had not yet made an endangerment finding concerning the effect of greenhouse gases on public health and welfare. An endangerment finding refers to a judgment by the EPA Administrator that a particular air pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare,”⁸ and is a necessary predicate to regulating emissions from motor vehicles under section 202(a)(1) of the CAA.⁹ Indeed, EPA’s refusal to make such a finding spawned the litigation in *Massachusetts*.¹⁰ Though *Massachusetts* stated that EPA could refrain from making such a finding, EPA could do so only if it provided a reasoned explanation for its actions.¹¹ If EPA did issue an endangerment finding for greenhouse gases, the Court held that EPA would then be authorized—and required—to regulate greenhouse gas emissions from new motor vehicles.¹²

EPA ultimately published an endangerment finding for greenhouse gases on December 15, 2009.¹³ Accordingly, EPA determined that greenhouse gases, defined as an aggregate group of six key gases, “may reasonably be anticipated both to endanger public health and to endanger public welfare.”¹⁴ Based on that finding, EPA then issued a rule promulgating emissions standards for motor vehicles, known as the “Tailpipe Rule.”¹⁵

In EPA’s view, the Tailpipe Rule in turn set off a chain reaction under the CAA. Under the CAA’s Prevention of Significant Deterioration (“PSD”) program, major stationary sources in certain areas that emit, or have the potential to emit, 250 tons per year (“tpy”) or more of any air pollutant, or 100 tpy for specific industrial sources, are required to obtain preconstruction permits.¹⁶ Sources are also required to install the Best Available Control Technology (“BACT”) for “each pollutant subject to regulation under this [Act]”¹⁷

⁷ *Id.* at 526.

⁸ 42 U.S.C. § 7521(a)(1) (2012).

⁹ *Id.* (directing EPA to set emissions standards for new motor vehicles for any air pollutant for which an endangerment finding has been made).

¹⁰ *Massachusetts*, 549 U.S. at 511–12.

¹¹ *Id.* at 534. Furthermore, that reasoned explanation could not be divorced from the statute, meaning it had to be based on scientific judgments rather than policy concerns. *See id.* at 533–34.

¹² *Id.* at 533; 42 U.S.C. § 7521(a)(1).

¹³ *See generally* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

¹⁴ *Id.* at 66,497. These six gases are: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.* at 66,516.

¹⁵ *See generally* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010); John M. Broder, *U.S. Issues Limits on Greenhouse Gas Emissions from Cars*, N.Y. TIMES (Apr. 1, 2010), <http://perma.cc/93DM-9ZMZ>.

¹⁶ *See* 42 U.S.C. §§ 7475(a)(1), 7479(1).

¹⁷ *Id.* § 7475(a)(4). This requirement aims to achieve the goal of the PSD program, which, as the program’s title suggests, is to ensure that any permitted increases in a facility’s emissions do not conflict with the attainment and maintenance of national ambient air quality standards. *Id.* § 7470.

Under Title V, meanwhile, major stationary sources in certain areas that emit, or have the potential to emit, 100 tpy or more of any air pollutant are required to obtain operating permits.¹⁸

Since 1978, EPA has interpreted these provisions to mean that, once a pollutant becomes regulated under the CAA, any major source that emits, or has the potential to emit, over 100/250 tpy of that pollutant is subject to PSD and Title V requirements (the “PSD Trigger”).¹⁹ As a result, EPA’s interpretation meant that, once the Tailpipe Rule went into effect, all stationary sources with the potential to emit over 100/250 tpy of greenhouse gases would be subject to the permitting and BACT requirements of PSD and Title V.²⁰ But many sources, including schools, churches, and small businesses, emit greenhouse gases in far greater volumes than conventional pollutants.²¹ As a result, tens of thousands of previously unregulated sources would be swept into the PSD program, and millions of sources would be swept into the Title V program.²² EPA anticipated that these increases would place overwhelming cost and permitting burdens on both the Agency and the sources themselves.²³

Faced with such an outcome, EPA first issued the “Timing Rule,” which clarified that already-regulated PSD and Title V sources would not be required to control their greenhouse gas emissions until the Tailpipe Rule went into effect.²⁴ More significantly, EPA subsequently issued the “Tailoring Rule,” which increased the triggering threshold for emitting sources under PSD and Title V from 100/250 tpy to 100,000 tpy of carbon dioxide equivalent (“CO₂e”).²⁵ Under this heightened threshold, only the largest stationary sources

¹⁸ See 42 U.S.C. §§ 7602(j), 7661a(a).

¹⁹ See, e.g., Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980) (explaining that section 165(a) of the CAA requires PSD review of “all pollutants subject to regulation under the Act emitted by the source provided that the source is major for *some* pollutant and is located in a clean air area for *some* pollutant”); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,554 (June 3, 2010) [hereinafter Tailoring Rule] (noting that EPA “continues to maintain its interpretation . . . that the provisions governing title V applicability for a ‘major stationary source’ can only be triggered by emissions of pollutants subject to regulation”).

²⁰ *Id.* at 31,516.

²¹ See *id.* at 31,535 (“[I]t takes a relatively large source to generate emissions of conventional pollutants in the amounts of 100/250 tpy or more, but many sources combust fossil fuels for heat or electricity, and the combustion process for even small quantities of fossil fuel produces quantities of CO₂ that are far in excess of the sources’ quantities of conventional pollutants and that, for even small sources, equal or exceed the 100/250 tpy levels.”).

²² *Id.* at 31,533, 31,556, 31,563 (estimating that the number of PSD sources would increase from 800 to 82,000, while the number of Title V sources would increase from 14,700 to 6.1 million).

²³ *Id.* at 31,557 (highlighting that the costs of administering the PSD program would increase from \$12 million to \$1.5 billion, and that the workload would increase from 150,795 work hours to 19.5 million work hours).

²⁴ Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

²⁵ Tailoring Rule, 75 Fed. Reg. at 31,516. Specifically, the rule states that the PSD program will apply to all new sources that have the potential to emit 100,000 tpy, and to all modified sources that increase net emissions by 75,000 tpy. *Id.* For simplicity’s sake, this Introduction refers only to the 100,000-tpy threshold.

would be triggered.²⁶ The Tailoring Rule then aimed to slowly expand PSD and Title V permitting requirements to smaller sources, giving EPA a chance to first evaluate the process and to streamline its permitting techniques.²⁷

EPA offered three independent legal justifications for the Tailoring Rule. First, EPA invoked the “absurd results” doctrine, arguing that Congress never intended for EPA to regulate such an extraordinary number of small sources.²⁸ Second, EPA relied on the “administrative necessity” doctrine, citing the insurmountable permitting burdens that EPA would face as a result of the massive increase in regulated sources.²⁹ Finally, EPA employed the “one-step-at-a-time” doctrine, authorizing it to implement the PSD and Title V programs using a phased approach that targeted the already-regulated and largest sources first.³⁰

Several industry groups and states brought suit against EPA challenging these rules.³¹ In a major victory for EPA, the D.C. Circuit unanimously upheld the Endangerment Finding and Tailpipe Rule, found that EPA’s longstanding interpretation regarding the PSD Trigger was statutorily compelled, and determined that the petitioners lacked standing to challenge the Timing and Tailoring Rules.³² In doing so, the D.C. Circuit relied heavily on *Massachusetts* and emphasized that greenhouse gases are “indisputably an ‘air pollutant’” under the CAA.³³

Petitioners subsequently filed a petition for rehearing en banc.³⁴ Though the petition was denied, Judges Brown and Kavanaugh each filed a dissent.³⁵ In Judge Brown’s view, EPA’s decision to interpret greenhouse gas emissions as triggering the PSD and Title V programs, even in the face of absurd results, was a clear violation of its regulatory authority.³⁶ Judge Kavanaugh’s dissent echoed these concerns. In Judge Kavanaugh’s view, the statutory language was sufficiently ambiguous so as to allow for multiple interpretations.³⁷ Because EPA’s PSD Trigger interpretation—that “any air pollutant” included greenhouse gases—produced absurd results, EPA should have been barred from adopting

²⁶ *Id.* at 31,541 (explaining that, under this approach, the number of sources covered by the PSD program would expand by only 917 sources per year, while the number of sources covered under Title V would expand by only 190 sources per year for the first three years).

²⁷ *Id.* at 31,526.

²⁸ *Id.* at 31,541–43.

²⁹ *Id.* at 31,543–44.

³⁰ *Id.* at 31,544–45.

³¹ *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 116 (D.C. Cir. 2012).

³² *See id.* at 113.

³³ *Id.* at 134.

³⁴ *Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *1 (D.C. Cir. Dec. 20, 2012) [hereinafter *Denial for Rehearing En Banc*].

³⁵ *See id.*

³⁶ *Id.* at *9.

³⁷ *Id.* at *15. Specifically, this language reads: “[t]he term ‘major emitting facility’ means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of *any air pollutant* from the following types of stationary sources” 42 U.S.C. § 7479(1) (2012) (emphasis added).

that interpretation.³⁸ Instead, EPA should have adopted an alternative interpretation—that “any air pollutant” referred only to those air pollutants for which National Ambient Air Quality Standards (“NAAQS”) had been set.³⁹ After the Tailpipe Rule went into effect, Judge Kavanaugh maintained, facilities already subject to the PSD program would then be required to install BACT for greenhouse gas emissions.⁴⁰ This scheme is referred to as the “‘anyway’ source approach,” because only facilities that were already being regulated—i.e., regulated “anyway”—under the PSD program would be required to control their greenhouse gas emissions.⁴¹

Following the denial for rehearing en banc, petitioners filed nine separate petitions for writ of certiorari to the Supreme Court offering a wide range of questions presented.⁴² Of these, the Supreme Court granted six in a consolidated case, *Utility Air Regulatory Group v. EPA* (“*UARG*”).⁴³ Despite the number of issues raised by petitioners, the Supreme Court limited the case to only one question: “whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit greenhouse gases.”⁴⁴

On June 23, 2014, the Supreme Court, in a 5–4 ruling, answered that question in the negative.⁴⁵ In an opinion authored by Justice Scalia, the Court rejected the notion that EPA’s interpretation of the PSD Trigger was statutorily compelled.⁴⁶ The Court further held that EPA’s interpretation of the PSD Trigger was not permissible because it would “place plainly excessive demands on limited governmental resources” and would “bring about an enormous and trans-

³⁸ Denial for Rehearing En Banc, *supra* note 34, at *16 (“When an agency is faced with two initially plausible readings of a statutory term, but it turns out that one reading would cause absurd results, I am aware of no precedent that suggests the agency can still choose the absurd reading . . .”).

³⁹ *Id.* Under section 108 of the CAA, the EPA Administrator is required to develop a list of pollutants (“criteria pollutants”) that, “in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7408(a). Then, under section 109, the Administrator must set NAAQS for those pollutants at a level that protects the public health. *Id.* § 7409. NAAQS have been promulgated for six criteria pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. *National Ambient Air Quality Standards (NAAQS)*, EPA, <http://perma.cc/L6N-MRFR>.

⁴⁰ Denial for Rehearing En Banc, *supra* note 34, at *17 (explaining that BACT provisions apply to “each pollutant subject to regulation under this chapter” and so include greenhouse gases (quoting 42 U.S.C. § 7475(a)(4))).

⁴¹ See Tailoring Rule, 75 Fed. Reg. at 31,541.

⁴² Ann Carlson, *Supreme Court Grants Cert on One Aspect of Greenhouse Gas Emissions Suit*, LEGALPLANET (Oct. 15, 2013), <http://perma.cc/QT2Z-7GC3>.

⁴³ *UARG*, 134 S. Ct. 418 (2013).

⁴⁴ *Id.* at 418.

⁴⁵ *UARG*, 134 S. Ct. 2427, 2444, 2446 (2014).

⁴⁶ *Id.* at 2439–41 (noting that while *Massachusetts* gave the definition of “air pollutant” a “‘sweeping’ and ‘capacious’ interpretation,” that definition is “not a command to regulate, but a description of the universe of substances EPA may consider regulating under the Act’s operative provisions”). This portion of the opinion was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* at 2432.

formative expansion in EPA's regulatory authority without clear congressional authorization."⁴⁷

On a 7–2 vote, however, the Court went on to adopt the “anyway approach,” as suggested by Judge Kavanaugh, holding that BACT could apply to greenhouse gas emissions for sources that were otherwise already subject to PSD review.⁴⁸ This approach, the Court noted, would allow EPA to regulate eighty-three percent of all greenhouse gas emissions from stationary sources, compared with eighty-six percent under EPA's interpretation.⁴⁹ Thus, Justice Scalia maintained, “[EPA] is getting almost everything it wanted in this case.”⁵⁰ Indeed, EPA characterized the decision as “a win for our efforts to reduce carbon pollution because it allows [EPA] . . . to continue to require carbon pollution limits in permits for the largest pollution sources.”⁵¹

Other efforts by EPA to reduce carbon pollution involve its authority under section 111 of the CAA. This provision calls for EPA, together with the states, to set “standards of performance” for certain air pollutants from stationary sources in order to achieve emission reductions.⁵² On January 8, 2014, EPA used its authority under section 111(b) to propose standards that set greenhouse gas emissions limitations for new power plants.⁵³ And on June 18, 2014, EPA proposed a set of guidelines under section 111(d) to set state-specific greenhouse gas emission-reduction goals for existing power plants.⁵⁴ Together, these rules form a crucial component of President Obama's efforts to combat climate change.⁵⁵ The section 111(d) rule, moreover, marks the first time that existing power plants will be required to regulate their greenhouse gas emissions.⁵⁶ If successful, the section 111(d) rule will achieve a thirty-percent cut below 2005 levels of domestic greenhouse gas emissions by the year 2030.⁵⁷

⁴⁷ *Id.* at 2444. As will be shown in the following essays, *infra*, it is unclear whether Justice Scalia's analysis here follows the traditional *Chevron* framework for analyzing an agency's interpretation of statutory language.

⁴⁸ *Id.* at 2448. This portion of Justice Scalia's opinion was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. *Id.* at 2432.

⁴⁹ *See id.* at 2438–39.

⁵⁰ Adam Liptak, *Justices Uphold Emission Limits on Big Industry*, N.Y. TIMES (June 23, 2014), <http://perma.cc/Z5L9-CFQD>.

⁵¹ *Id.*

⁵² *See* 42 U.S.C. § 7411(a)(1) (2012). Section 111(b) authorizes standards of performance for new and modified sources, while section 111(d) authorizes standards for existing sources. *Id.* § 7411(b), (d).

⁵³ Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430, 1430 (Jan. 8, 2014). Under this rule, new coal- or petroleum-coke-fired power plants would have to install partial carbon capture and storage (“CCS”) technology, while new large natural gas plants would have to incorporate the latest combined-cycle technology. *Id.* at 1433.

⁵⁴ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,830 (June 18, 2014).

⁵⁵ EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 6 (2013), <http://perma.cc/R2TG-EJUD>.

⁵⁶ *EPA Proposes First Guidelines to Cut Carbon Pollution from Existing Power Plants*, EPA (June 2, 2014), <http://perma.cc/K67L-XBBV>.

⁵⁷ *Id.*

Massachusetts set the stage for EPA action on climate change. How does *UARG* fit into that picture? The Essays that follow address this question by discussing *UARG* in more detail and assessing its broader implications for EPA's authority to regulate greenhouse gas emissions under the CAA.

This Symposium begins with Jody Freeman's *Why I Worry About UARG*, which takes a close look at the Court's language in *UARG* and sees it as a warning to EPA that it should be careful not to exceed its congressionally delegated regulatory authority with respect to greenhouse gas regulation.⁵⁸ Next, Ann E. Carlson and Megan M. Herzog's *Text in Context: The Fate of Emergent Climate Regulation After UARG and EME Homer* examines both *UARG* and another important CAA case from the Court's October 2013 Term, *EPA v. EME Homer City Generation, L.P.* ("*EME Homer*").⁵⁹ Carlson and Herzog suggest two contextual frameworks in which the Court might consider a potential legal challenge to EPA's proposed regulation of greenhouse gas emissions from existing stationary sources under CAA section 111(d).⁶⁰

The third, fourth, and fifth Essays focus specifically on Justice Scalia's majority opinion. In *The Opinion Assignment Power, Justice Scalia's Un-Becoming, and UARG's Unanticipated Cloud over the Clean Air Act*, Richard J. Lazarus explains the importance of Chief Justice Roberts assigning the *UARG* opinion to Justice Scalia and Justice Scalia's subsequent use of this opportunity to arguably promote his own policy preferences instead of adhering to his usually strict rules of statutory interpretation.⁶¹ In *UARG—Not a Chef d'Oeuvre of Opinion Writing*, Craig N. Oren examines the language of Justice Scalia's majority opinion and concludes that although the Court's holding was ultimately correct, Justice Scalia mischaracterized the lower court's opinion and disregarded the language of the CAA in arriving at that result.⁶² Lastly, in *Anti-Regulatory Skewing and Political Choice in UARG*, William W. Buzbee finds that the *UARG* majority opinion is laden with judicial policymaking that goes against the textualism traditionally espoused by the Roberts Court, which may cut away at EPA's authority to regulate greenhouse gases in the future.⁶³

In the following Essay, *But What about Texas?: Climate Disruption Regulation in Recalcitrant States*, Thomas O. McGarity considers the impact of *UARG* on a state that has long resisted, and is still adamantly opposed, to the federal regulation of greenhouse gases.⁶⁴ Finally, in *Toward a More Rational Environmental Policy*, Richard L. Revesz argues that U.S. environmental policy

⁵⁸ Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9 (2015).

⁵⁹ 134 S. Ct. 1584 (2014); Ann E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation After UARG and EME Homer*, 39 HARV. ENVTL. L. REV. 23 (2015).

⁶⁰ See *supra* text accompanying notes 52–57.

⁶¹ Richard J. Lazarus, *The Opinion Assignment Power, Justice Scalia's Un-Becoming, and UARG's Unanticipated Cloud over the Clean Air Act*, 39 HARV. ENVTL. L. REV. 37 (2015).

⁶² Craig N. Oren, *UARG—Not a Chef d'Oeuvre of Opinion Writing*, 39 HARV. ENVTL. L. REV. 51 (2015).

⁶³ William W. Buzbee, *Anti-Regulatory Skewing and Political Choice in UARG*, 39 HARV. ENVTL. L. REV. 63 (2015).

⁶⁴ Thomas O. McGarity, *But What about Texas?: Climate Disruption Regulation in Recalcitrant States*, 39 HARV. ENVTL. L. REV. 79 (2015).

should operate in accordance with five major components of rationality and demonstrates how the Court's decisions in *UARG* and *EME Homer* furthered the use of, or were otherwise consistent with, those principles of rationality.⁶⁵

⁶⁵ Richard L. Revesz, *Toward a More Rational Environmental Policy*, 39 HARV. ENVTL. L. REV. 93 (2015).