

## Supreme Court GHG Ruling Q&A

On Monday the [Supreme Court ruled mostly in favor of the EPA's regulatory regime for greenhouse gas emissions](#) from new and modified stationary sources. But the court did not leave the agency's regulations intact. (You can [read the decision here](#).)

EnvironmentEnergyPro spoke to Seth Jaffe, partner and head of the environmental practice group at Foley Hoag, about the outcome of the case.

**It seems like everyone is claiming victory in this case, but Justice Scalia said EPA is "getting almost everything that it wanted." Do you agree with that?**

The EPA is getting most of it wants in terms of the volume of GHGs emitted that it now has authority to regulate under the Prevention of Significant Deterioration (PSD) program – because of the Supreme Court's ruling, this has fallen from 86 to 83 percent of GHG emissions from stationary sources.

**Can you explain the part of the decision that went against the EPA?**

The Supreme Court's ruling today doesn't change its decision in Massachusetts vs. EPA – GHGs are still considered pollutants. But GHGs are not "any pollutant" for the purposes of defining what sources are covered under the PSD program. That's why the court's ruling reduces the number of covered sources by three percentage points. But for sources that are covered by the PSD program for some other reason, can the EPA require that those sources demonstrate they meet a GHG threshold? Yes, the ruling allows that.

Here's how the argument went: after Massachusetts vs. EPA, the agency looked and saw that the PSD program applies to "any regulated air pollutant," and said that once the agency had issued a tailpipe rule, then GHGs are regulated air pollutants. It argued that not only could it therefore regulate stationary sources of GHGs, it *must* regulate them.

The Supreme Court said no – there are lots of places where statutes refer to "any air pollutant," and that should not be interpreted as "every air pollutant."

Then the EPA went to step two, which was to argue that even if they're not compelled to regulate every pollutant under this statute, they still have the discretion to do that. Scalia said no to that too, and threw out the tailoring rule.

[That is the EPA's 2010 rulemaking that tailored applicability criteria to determine which stationary sources would be subject to GHG permitting under the PSD. The EPA wrote this rule because the PSD starts regulating plants at the 100 or 250 tons-per-year level, a threshold that if applied to GHGs, would bring in much smaller facilities than the agency intended to regulate.]

**Who are these three percent that will now not be covered by PSD?**

They're be facilities just over threshold for GHG, just burning something like natural gas, but relatively clean otherwise.

## **What does today's decision mean for the proposed standard for existing power plants?**

In footnote 5, the court makes clear that it's only looking at the PSD program in today's case, and the court specifically says it's not issuing a decision about the New Source Performance Standard under section 111 of the Clean Air Act. So EPA and NGOs will look at this and say, "Don't read more into it." On the other hand the court specifically talks about the general notion of EPA regulating sources, and not necessarily regulating energy use generally. Those who oppose the NSPS will look at that and say, "That's precisely what the EPA is doing in the new source rule – they're regulating outside the fence."

I don't think you can extrapolate from this decision – the entire tenor of the decision is that you've got to look at each section of the act separately. And the whole case turned on the tailoring rule. The court couldn't get past the notion that the statute has written into it a literal, inflexible, pretty-darn-clear 250-ton threshold. But the definition determining applicability of NSPS is totally different – it centers on electric steam generating units. So I think five justices are going to say they don't have the same issues with NSPS as the court had with PSD – that, is they don't have to worry about the EPA essentially making up a threshold to make the rule work.

At the same time I think a court may have trouble getting around the notion that NSPSs are about sources (the clue's in the name), so it's not obvious what the EPA's authority is to go outside the source. Today's case doesn't really change that – I had that concern three days ago. I think the EPA will have some trouble defending their outside-the-fence toolbox for NSPS, but it's not obvious to me that they'll lose.

## **Any future court dates we should be watching out for, with either of these rules?**

As far as the NSPS, that's still a proposal. You can't challenge a proposed rule. Some people are trying, but they won't get through.

And as for PSD, this rule is pretty much done. It's conceivable people may still find a way to challenge it, but I think it's pretty much over.