



## Environmental ADVISORY ■

**FEBRUARY 26, 2014**

### High Court Split Over EPA's Greenhouse Gas Regulations

This week, the Supreme Court of the United States heard oral argument on the Environmental Protection Agency's (EPA) rules regulating greenhouse gas emissions from stationary sources under the Clean Air Act. The narrow question before the Court was whether EPA's regulation of greenhouse gases for new motor vehicles triggered similar permitting requirements for stationary sources.

The argument pitted EPA, environmental groups and several states against industry and a coalition of Republican-led states. As expected, the justices' questioning hinted that the Court was poised to fall along ideological lines, with Justice Kennedy as the swing vote.

#### **How Did We Get Here? EPA's Growing Presence in Greenhouse Gases**

EPA has gradually increased its oversight of greenhouse gases since the Court held that greenhouse gases were an "air pollutant" subject to EPA's regulation in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Three major EPA pronouncements led up to this case:

- 1. Endangerment Finding:** In 2009, EPA issued an "Endangerment Finding" that greenhouse gases contribute to climate change and are reasonably anticipated to endanger public health and welfare.
- 2. Tailpipe Rule:** On the heels of the Finding, EPA set greenhouse gas emission standards for new cars and light trucks ("Tailpipe Rule"). As part of this rule, EPA asserted that the regulation of greenhouse gases from motor vehicles automatically triggered certain permitting requirements for stationary sources under the Clean Air Act's Prevention of Significant Deterioration (PSD) and Title V programs.
- 3. Tailoring Rule:** To avoid absurd results (i.e., suddenly requiring thousands of unregulated sources from having to obtain a new greenhouse gas permit), EPA issued the Tailoring Rule. The Tailoring Rule changed the statutory threshold for greenhouse gases under PSD from 100 or 250 tons per year to 75,000 or 100,000 tons per year, respectively.

These three steps convey EPA's deliberate approach to regulating greenhouse gases in the face of partisan gridlock in Congress.

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To EPA's credit, its strategy seems largely to have paid off. In 2012, a three-judge panel in the United States Court of Appeals for the District of Columbia upheld both the Endangerment Finding and the Tailpipe Rule, while dismissing the challenge to the Tailoring Rule on technical grounds. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). A year later, when the Supreme Court granted certiorari, it agreed to hear only the limited issue of whether EPA permissibly determined that regulation of new motor vehicles emissions triggered permitting requirements for stationary sources.

Due to the narrow scope of certiorari, both the Endangerment Finding and Tailpipe Rule are now settled law. The Tailoring Rule's fate, however, is uncertain.

### **Recapping Monday's Oral Argument**

Parties used Monday's oral argument to fortify the arguments advanced in their briefs. Industry and state opponents cast EPA's actions as an unauthorized power grab that rewrote the letter of Congress and created a cumbersome permitting program for a common air pollutant.

EPA countered that the agency's interpretation was consistent with current law (e.g., the Clean Air Act and *Massachusetts v. EPA*) and avoided the absurd results by gradually transitioning the permitting thresholds to the statutory levels.

The Court was starkly divided. Four justices—Ginsberg, Breyer, Kagan and Sotomayor—appeared supportive of EPA. Justice Kagan even suggested that the case deserved “the apex of *Chevron* deference,” due to the complicated issues. Meanwhile, Justices Scalia and Alito, and to a lesser extent Chief Justice Roberts, criticized EPA's arguments, pointing out that no other federal agency has ever acted in this manner. (Justice Thomas, as usual, remained silent.)

With the Court falling along ideological lines, Justice Kennedy will likely issue the deciding vote. Although he sided with the liberal bloc in *Massachusetts v. EPA*, Kennedy expressed concern with the administration's argument, at one point telling EPA's counsel, “I couldn't find a single precedent that strongly supports your position.”

### **The Outcome Will Affect Future Challenges to Federal Regulation**

The Court will have until the end of the term to issue its opinion. If the Court sustains EPA's interpretation, the permitting program will be upheld and future challenges to greenhouse gas regulations will become more difficult. If, however, the Court curtails EPA's interpretation, the ruling will invalidate EPA's greenhouse gases permitting program for stationary sources, delivering a blow to the Obama Administration's climate initiatives. Both sides agree, however, that this ruling will not affect how EPA regulates motor vehicle emissions.

Regardless of the outcome, this will not be the end of legal challenges to EPA's regulation of greenhouse gases. We will likely see lawsuits contesting EPA's set of stricter regulations for coal-fired power plants that are due later this year.

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