

High Court To Define EPA's Regulatory Latitude In GHG Case

By **Sean McLernon**

Law360, New York (February 20, 2014, 8:23 PM ET) -- The U.S. Supreme Court on Monday will consider if the U.S. Environmental Protection Agency's greenhouse gas rules for vehicles can trigger similar requirements for stationary sources, a case that attorneys say will likely turn on whether the EPA can justify altering statutory thresholds to accommodate absurd results.

The EPA has a unanimous D.C. Circuit decision on its side and will present its oral arguments to a court with a similar ideological makeup to the one that in 2007 found the agency can regulate greenhouse gases as pollutants under the Clean Air Act. But it will still have to answer tough questions about whether the law allows it to enact a so-called triggering rule that extends carbon emissions requirements for vehicles to stationary sources.

The crux of the Supreme Court proceedings will be how the justices engage the EPA on the absurd results that led it to regulate only at vastly high thresholds, Mayer Brown LLP partner Timothy S. Bishop said.

The EPA's own projections would have forced tens of thousands of new facilities like hospitals and commercial buildings to apply for emissions permits, because the threshold set by the Clean Air Act — which doesn't mention greenhouse gases — is as low as 100 tons of pollution per year. The agency argued that those absurd results allow it to raise the pollution minimum so that only a few hundred of the largest sources would face regulation.

"EPA's problem is that Congress, by setting the thresholds where it did — at levels that would encompass, for carbon dioxide emissions, large homes and almost all commercial buildings — obviously didn't have in mind that EPA would be regulating GHG emissions," said Bishop, who has argued five cases before the high court.

The government is arguing that it has a right to adjust the regulatory regime in order to avoid the absurd results — a claim that could be received with skepticism by some of the justices.

"Will the justices regard this as just a practical problem that EPA can fix by regulation, or will they see it as a basic disconnect between EPA's regulation and the statutory scheme? I expect this to be where the fireworks appear at argument," Bishop said.

The D.C. Circuit backed the EPA in a unanimous decision in June 2012 upholding the agency's triggering rule and validating its finding that greenhouse gas emissions threaten human health and welfare.

Several industry and state challengers appealed the case to the Supreme Court, which granted certiorari for six cases on one question: Does the Clean Air Act allow the EPA to regulate greenhouse gas emissions from stationary sources?

Industry groups contend the EPA is trying to fit the square peg of greenhouse gases into the round hole of the Prevention of Significant Deterioration and Title V permitting programs.

The EPA insists that it is not flatly exempting the tens of thousands of sources from the program, only delaying the process. Those smaller sources will eventually be phased into the permitting program, according to the EPA.

But the agency will have to convince the justices it will be able to follow through with this plan.

“EPA’s explanation is pretty clever,” Foley & Lardner LLP partner Richard G. Stoll said. “They say they are going to go at it piecemeal and that this is just the first phase. I think in reality, there’s no way that in the next 100 years they are going to get it down to 100 tons. There’s just no way. The argument is clever, but it’s hard to swallow.”

Government agencies are usually given broad deference by courts to interpret laws and regulations, and that is a big part of the agency’s argument in this case. Nonetheless, the agency has had to admit that some parts of the Clean Air Act don’t work well for greenhouse gases, Stoll said.

“It’s weird that the EPA has had to rely on the absurd results doctrine to defend going from the statutory numbers all the way up to 100,000 tons,” Stoll said. “The industry quite properly points out that it is further evidence that Congress could not have intended greenhouse gases to be covered.”

Lawmakers attempted a few years ago to pass legislation that explicitly covered carbon emissions with a cap-and-trade bill, but the measure died in the Senate. The Obama administration has vowed to act in place of Congress by doing everything it can on the regulatory side to address climate change.

The Supreme Court could throw a wrench into those plans by ruling in favor of industry in this case. The high court only narrowly gave the EPA authority to regulate greenhouse gases at all under the Clean Air Act, ruling 5-4 in the 2007 *Massachusetts v. EPA* case.

With the court’s conservative bloc unlikely to show much support for the EPA here, Akin Gump Strauss Hauer & Feld LLP partner Rex Heinke said Justice Anthony Kennedy will be the likely swing vote as the court considers whether the EPA can adjust the regulatory threshold.

“I assume the focus of the debate is going to be whether the EPA has this power,” said Heinke, who is co-head of Akin Gump’s Supreme Court and appellate practice. “The justices who are pressing the hardest on that are probably going to be the ones who are going to be the least sympathetic to the EPA’s position.”

The EPA claims greenhouse gas must be a pollutant because that’s what the Supreme Court has said, but the petitioners argue that the agency’s regulatory acrobatics wouldn’t be necessary if the Clean Air Act permitting programs were supposed to include greenhouse gases.

“They raised the limit by a huge amount, and that is different than the language in the statute, so the

petitioners are attacking this,” Heinke said. “They are saying that Congress resolved this, and because the interpretation creates an absurd result, air pollutant in this context can’t mean greenhouse gas emissions.”

There are still some justices who don't believe that greenhouse gases can be regulated at all under the Clean Air Act, unless they've changed their minds since the 2007 decision. Oral arguments give those justices a chance to press the EPA hard and try to persuade Justice Kennedy or anyone else wary about the EPA's regulatory adjustments.

“These justices who dissented from the Massachusetts decision might come in hard with questioning, asking how greenhouse gases could fit when EPA couldn't even begin to implement the law the way that Congress wrote it,” Stoll said.

If the EPA doesn't have good answers, the agency's greenhouse gas regulations could be in serious trouble.

--Editing by Kat Laskowski and Chris Yates.

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