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## Zeroing In On EPA Authority Over Stationary Sources

Law360, New York (October 28, 2013, 12:38 PM ET) -- The U.S. Supreme Court has agreed to hear six cases related to the regulation of greenhouse gases from stationary sources. The Supreme Court granted certiorari on the narrow issue of whether the U.S. Environmental Protection Agency permissibly determined that its regulation of the emission of greenhouse gases from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases. In other words, when the EPA promulgated vehicle emission standards for greenhouse gases in 2010, did this automatically trigger the EPA's regulation of stationary source greenhouse gas emissions?

The issue comes to the Supreme Court from six D.C. Circuit cases that were consolidated with others in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012): *Utility Air Regulatory Group v. EPA*, *American Chemistry Council v. EPA*, *Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation v. EPA*, *Southeastern Legal Foundation v. EPA*, *Texas v. EPA* and *Chamber of Commerce v. EPA*.

These petitioners presented nuanced questions on the D.C. Circuit's holding on stationary-source greenhouse gas regulation in *Coalition for Responsible Regulation*, which the Supreme Court distilled into its single question above.

*Coalition for Responsible Regulation* challenged several EPA actions that followed the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). *Massachusetts v. EPA* held that greenhouse gases are an air pollutant within the meaning of the CAA, subject to regulation by the EPA. In fact, the *Massachusetts v. EPA* opinion stated that the EPA had a statutory obligation to regulate greenhouse gases, unless the EPA determined that greenhouse gases do not contribute to climate change or could provide a reasonable explanation for not exercising its discretion to determine whether they do.

Following this decision, in 2009, the EPA issued a finding that greenhouse gases contribute to climate change, which is reasonably anticipated to endanger both public health and public welfare. With this endangerment finding, the EPA was obligated under the CAA to establish motor-vehicle emission standards for greenhouse gases.

Consequently, in 2010, the EPA issued the tailpipe rule, setting greenhouse gas emission standards for cars and light trucks.

In 2010, the EPA also issued a rule requiring major stationary sources undertaking construction or modification, exceeding defined thresholds of greenhouse gas emission levels, to obtain permits under the existing CAA prevention of significant deterioration (PSD) program.

The PSD thresholds of 100 to 250 tons per year (tpy), when applied to greenhouse gas emissions, would have extended the PSD program to millions of new sources. To alleviate what would have been an overwhelming permitting burden, the EPA adjusted the PSD thresholds for greenhouse gases upward (tailoring rule). The EPA also determined that the tailoring rule would not take effect until the tailpipe rule went into effect (timing rule).

The D.C. Circuit upheld not only the endangerment finding and the tailpipe rule in *Coalition for Responsible Regulation* but also the EPA's interpretation that the tailpipe rule automatically triggered regulation of stationary source greenhouse gases under the PSD program.

In areas of the country that do not meet CAA national ambient air quality standards for (nongreenhouse gas) pollutants, the PSD program requires any major stationary source emitting "any air pollutant" above-defined thresholds to obtain a permit from the EPA prior to construction or major modification.

The EPA has long interpreted "any air pollutant" in this context to mean any air pollutant that is regulated under the CAA. The EPA's interpretation means that once the tailpipe rule set vehicle emission standards for greenhouse gases, greenhouse gases became a regulated air pollutant, requiring the EPA to regulate greenhouse gases under the PSD program. This interpretation is at the heart of the Supreme Court's review of *Coalition for Responsible Regulation*.

In *Coalition for Responsible Regulation*, the D.C. Circuit agreed with the EPA that the agency's longstanding interpretation of this PSD permitting trigger is statutorily compelled. The court found that the EPA's interpretation was supported under the plain language of the CAA and that the plain-language reading of the statute was buttressed by the finding in *Massachusetts v. EPA* that the CAA's overarching definition of "air pollutant" unambiguously included greenhouse gases.

The court parsed other provisions of the PSD statutory language, ultimately with "little trouble concluding that 'any air pollutant' [in relevant PSD program definitions] unambiguously means 'any air pollutant regulated under the CAA.'" The court explained its rejection of petitioners' various legal arguments against the EPA's interpretation. The petitioners will almost certainly sharpen some or all of these arguments before the Supreme Court.

The Supreme Court declined petitions for certiorari from Pacific Legal Foundation, *Coalition for Responsible Regulation* and the Commonwealth of Virginia, appealing *Coalition for Responsible Regulation v. EPA*. Pacific Legal Foundation and the Commonwealth of Virginia petitioned for certiorari only on questions related to the validity of the endangerment finding. *Coalition for Responsible Regulation's* petition for certiorari related only to the tailpipe rule.

Though granted in part, the state of Texas and the Chamber of Commerce's petitions were denied as to the tailoring rule and the endangerment finding. Therefore, the tailpipe rule and the endangerment finding will stand; only the scope of regulation of stationary source greenhouse gas emissions remains in question.

Stationary source permitting for greenhouse gases under the PSD program commenced in 2011. Since July 1, 2011, all new stationary sources with the potential to emit over 100,000 tpy of carbon dioxide equivalent (CO<sub>2</sub>e) and 100 to 250 tpy of greenhouse gases on a mass basis must obtain a PSD permit prior to construction. In addition, existing stationary sources undertaking major modifications resulting in an increase of 75,000 tpy of CO<sub>2</sub>e must also obtain a PSD permit.

Under the tailoring rule, some sources that would not otherwise have had to obtain a PSD

permit have faced this additional permitting burden under the PSD program. In addition to the time and expense of preparing a PSD permit application, which requires modeling and a comprehensive best available control technology (BACT) analysis, obtaining a PSD permit can take up to a year from the time a complete permit application is submitted to the EPA or a state permitting authority.

As construction cannot commence without a permit in hand, PSD permitting can be one of the longest lead items for a project. A PSD permit also carries with it the additional risk that the permit will be challenged by a project opponent through an appeal to the environmental appeals board or eventually to the courts. Additional or extended litigation risk can be especially troublesome in securing project financing.

Nevertheless, some concerns related to the extension of the PSD program to major greenhouse gas sources have not come to pass. For example, permit conditions to control greenhouse gas emissions have typically not been as onerous as anticipated.

The EPA has commonly determined that measures such as good combustion or operating practices, energy efficiency practices and design or using state of the art combustion technology is BACT for greenhouse gases. In other instances, the EPA has set readily achievable emission limits for greenhouse gases as BACT.

For greenhouse gas sources in the energy sector, the EPA's draft new source performance standards for power plants, currently proposed at 1,000 to 1,100 lb CO<sub>2</sub>e/megawatt-hour, are likely to serve as more of a practical limitation. The EPA's authority to regulate stationary source greenhouse gas emissions through new source performance standards would not be directly affected by the Supreme Court's review of Coalition for Responsible Regulation.

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