

February 7, 2014

U.S. Supreme Court Briefing of Greenhouse Gas Cases Underway Oral Argument Scheduled for February 24, 2014

Briefing before the U.S. Supreme Court is currently underway in a matter involving challenges to the suite of greenhouse gas (GHG) cases decided by the U.S. Court of Appeals for the District of Columbia Circuit in December 2012. In October 2013, the Supreme Court granted six petitions for writ of *certiorari* filed by industry and state petitioners on the following single issue:

Whether EPA [(the U.S. Environmental Protection Agency)] permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

The Supreme Court did not grant review of other issues, such as whether the EPA properly found that GHG emissions from motor vehicles may reasonably be anticipated to endanger public health or welfare. Links to each of the briefs filed in the case before the Supreme Court are provided below. With respect to the permitting issue on which review was granted, the scope of the grant of *certiorari* includes the so-called “*situs*” issue briefed before the D.C. Circuit. The *situs* issue involves the question of whether the limiting language in Section 165 of the Clean Air Act cabins the scope of the pollutants that can trigger Prevention of Significant Deterioration (PSD) permitting requirements to those for which the EPA has established a national ambient air quality standard (NAAQS) and for which the area in question is designated attainment with that standard as well as the argument that PSD pollutants are limited to those with local effects. For a more thorough explanation of the *situs* issue, the article, “EPA’s Missed Opportunity to Ground Its Tailoring Rule in the Statute: What the *Situs* Argument Would Mean for the Future of the PSD Program,” provides an understandable summary, which may be easier to digest than reviewing the D.C. Circuit’s decision. The article, written by Katten attorneys Chuck Knauss and Shannon S. Broome, provides helpful insights into what a victory on that theory would mean for the scope of the PSD program. In addition, the grant includes the question of whether GHGs can be considered “PSD pollutants” at all given the purpose and structure of the PSD provisions.

Upcoming Deadlines

The reply briefs of petitioners in the case are due by **February 14, 2014**, and oral argument is scheduled for **February 24, 2014**.

Summary of the D.C. Circuit Decision

In the December 2012 decision, *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), a three-judge panel consisting of Chief Judge David B. Sentelle and Judges David S. Tatel and Judith W. Rogers ruled in favor of the EPA in a series of cases challenging the agency’s program for regulating GHG emissions from stationary sources under the Clean Air Act. The D.C. Circuit’s decision covered challenges to four different EPA actions:

1. The EPA’s finding that GHGs from cars may reasonably be anticipated to endanger public health or welfare (endangerment finding case).
2. Emissions standards for GHGs from motor vehicles (Tailpipe Rule case).
3. The EPA’s so-called “tailoring/timing rules,” which state that the Tailpipe Rule would automatically trigger the requirement for manufacturing facilities, homes, hospitals and other structures that emit GHGs to obtain preconstruction and operating permits under the Clean Air Act’s stationary source programs.

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4. The EPA's 30-year old PSD rules to the extent they concluded that any pollutant can cause a plant to require a preconstruction permit and stringent controls were based on an impermissible reading of the Clean Air Act.

In its 82-page opinion, the court first dismissed all of the industry arguments related to the endangerment finding and Tailpipe Rule, citing agency deference and the *Chevron* (*Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)) standard of review for agency findings based on the science. Having disposed of these cases, the court moved to the “historic regulations case” and the Tailoring Rule case, in which it upheld the EPA on less sweeping grounds but nonetheless found in EPA's favor. Two aspects of the opinion of particular note are:

- The court found that the EPA's reading of the Clean Air Act that PSD preconstruction permitting for stationary sources would be automatically triggered by the issuance of GHG requirements for cars was *compelled*. (If the court had found that the reading was not compelled, industry had argued that the EPA would have been forced to adopt the alternative reasonable interpretations of the statute offered by the industry petitioners because they would avoid the absurd results that the EPA claimed as justification for rewriting the statutory major source thresholds.)
- As a result of its conclusion noted above, the court found that the EPA's Tailoring Rule—rewriting the statute's major source thresholds from 250 tons to 100,000 tons—merely provided relief to industry and states, so these parties lacked injury in fact and standing. This allowed the court to find that the agency's invocation of administrative necessity and absurd results doctrines to rewrite the statute *was not reviewable*.

Thus, the court upheld the EPA's rules without actually reaching the merits of the Tailoring Rule's violence to the Clean Air Act.

Katten attorneys Chuck Knauss, Shannon S. Broome, Matt Paulson and Robert T. Smith represented parties in the case in the D.C. Circuit. They are representing *amicus* Texas Oil & Gas Association in the U.S. Supreme Court.

Article

[Charles H. Knauss and Shannon S. Broome, “EPA's Missed Opportunity to Ground Its GHG Tailoring Rule in the Statute: What the *Situs* Argument Would Mean for the Future of the PSD Program,” 42 *Env'tl. L. Rep.* 10,424 \(May 2012\).](#)

Merits Briefs

Petitioners

- [Brief of petitioners American Chemistry Council, *et al.* \(filed December 9, 2013\).](#)
- [Brief of petitioners Chamber of Commerce of the United States of America, *et al.* \(filed December 9, 2013\).](#)
- [Brief of petitioners Southeastern Legal Foundation, Inc., *et al.* \(filed December 9, 2013\).](#)
- [Brief of petitioner Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation, *et al.* \(filed December 9 2013\).](#)
- [Brief of petitioners Texas, *et al.* \(filed December 9, 2013\).](#)
- [Brief of petitioner Utility Air Regulatory Group \(filed December 9, 2013\).](#)
- [Brief of respondents Coalition for Responsible Regulation, Inc., *et al.* in support of petitioners \(filed December 9, 2013\).](#)

Amici Curiae in Support of Petitioners

- [Brief *amici curiae* of Texas Oil & Gas Association, *et al.* \(filed December 16, 2013\).](#)
- [Brief *amici curiae* of Pacific Legal Foundation, *et al.* \(filed December 12, 2013\).](#)
- [Brief *amici curiae* of political economists Henry N. Butler, *et al.* \(filed December 16, 2013\).](#)
- [Brief *amici curiae* of economists Thomas C. Schelling, *et al.* \(filed December 16, 2013\).](#)
- [Brief *amicus curiae* of Committee for a Constructive Tomorrow \(filed December 16, 2013\).](#)
- [Brief *amicus curiae* of Senator Mitch McConnell and other members of the US Congress \(filed December 16, 2013\).](#)

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- [Brief *amicus curiae* of Mountain States Legal Foundation \(filed December 16, 2013\).](#)
 - [Brief *amicus curiae* of Center for Constitutional Jurisprudence \(filed December 16, 2013\).](#)
 - [Brief *amici curiae* of State and Local Chambers of Commerce, and Other Business Associations \(filed December 16, 2013\).](#)
 - [Brief *amici curiae* of Administrative Law Professors, *et al.* \(filed December 16, 2013\).](#)
 - [Brief *amicus curiae* of American Road & Transportation Builders Association in support of neither party \(filed December 16, 2013\).](#)
 - [Brief *amici curiae* of five U.S. Senators \(filed December 16, 2013\).](#)
 - [Brief *amici curiae* scientists and economists \(filed December 16, 2013\).](#)
 - [Brief *amicus curiae* of Washington Legal Foundation \(filed December 16, 2013\).](#)
 - [Brief *amicus curiae* of Peabody Energy Corporation \(filed December 16, 2013\).](#)
 - [Brief *amicus curiae* of American Civil Rights Union \(filed December 16, 2013\).](#)
 - [Brief *amici curiae* of states of Kansas, *et al.* \(filed December 16, 2013\).](#)

Respondents

- [Brief of respondent Environmental Protection Agency \(filed December 21, 2013\).](#)
- [Brief of environmental organization respondents \(filed December 21, 2013\).](#)
- [Brief of respondents New York, *et al.* \(filed December 21, 2013\).](#)

Amici Curiae in Support of Respondents

- [Brief *amici curiae* of South Coast Air Quality Management District, *et al.* \(filed January 27, 2014\).](#)
- [Brief *amicus curiae* of Institute for Policy Integrity at New York University School of Law \(filed January 27, 2014\).](#)

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