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Thoughts On Oral Arguments In Supreme Court GHG Case

Law360, New York (February 25, 2014, 9:20 PM ET) -- On Feb. 24, 2014, the U.S. Supreme Court again delved into the world of climate change and greenhouse gas regulation, hearing oral argument in Utility Air Regulatory Group v. EPA.

It is perhaps fitting that the court's consideration happened on the very same day that Congressman John Dingell announced that he would be retiring after nearly 60 years in the House of Representatives and having taken up the mantle of a balanced approach to environmental regulation during his tenure as the longest serving congressman in American history.

For it was Rep. Dingell who presciently warned back in 2008 of the "glorious mess" that could ensue if Congress did not take on and create a customized legislative approach to addressing climate change, but instead left these issues to regulatory action.

All sides in arguments heard Feb. 24, 2014, would likely agree that the issues under consideration are indeed somewhat messy, due in large measure to the difficult challenge of fitting existing Clean Air Act authorities to crafting a comprehensive and reasonable solution to the unique problems posed by climate change.

The court examined the planned next steps by the U.S. Environmental Protection Agency in its efforts to regulate greenhouse gases.

Building upon its 2009 finding that greenhouse gases endanger public health and the environment and its consequent regulation of automotive sector emissions, the EPA in 2010 developed a suite of permitting rules for stationary sources of carbon emissions, such as refineries, manufacturing facilities and power plants.

Arguments heard on Feb. 24, 2014, focused on whether the EPA permissibly concluded that stationary sources of such emissions had to be regulated through state administered permit programs under the Clean Air Act as a necessary consequence of this prior treatment of greenhouse gases as pollutants.

The challenge facing the EPA though is that the statute is designed with conventional sources of pollution in mind, and contains explicit thresholds reflecting those kinds of pollutants in requiring that larger emitting new facilities install the "best available control technology."

In the case of greenhouse gases, however, those thresholds could subject potentially millions of facilities to permitting requirements due to the high rate and pervasive character of greenhouse gas emissions — an admittedly unworkable outcome. So the EPA crafted an administrative approach to "tailor" the

permitting requirements to a more manageable and focused number of sources — those emitting 100,000 tons of carbon each year, rather than the statutory limits of 100 or 250 tons per year, depending on the affected industry.

A range of petitioners challenged the decision of the D.C. Circuit that upheld the EPA's predicate finding that greenhouse gases endanger public health and the environment, the EPA's and the U.S. Department of Transportation's regulation of motor vehicle emissions and the EPA's prevention of significant deterioration ("PSD") permitting rules.

The en banc Court of Appeals likewise did the same, although that consideration yielded a dissent focused on EPA's lack of authority to rewrite the permitting thresholds. Despite a broad challenge to the Court of Appeals' holdings, the Supreme Court allowed much of the EPA's construct to stand by declining to grant certiorari on most of the issues raised.

The question for argument yesterday was limited to whether the EPA permissibly determined that its regulation of motor vehicles necessarily triggered new permitting requirements for greenhouse gases from stationary sources.

Having seen this issue unfold over many years during my tenure at the White House Council on Environmental Quality and earlier at the EPA, upon hearing yesterday's oral argument I was particularly struck by several features, including:

- Foremost among them that the court had determined to consider this case at all. This is the third time in just seven years that the court has taken up greenhouse gas issues, thereby involving itself in many aspects of this developing regulatory framework and demonstrating a unique appetite for this area, confirming the continuing high-profile nature of climate issues.

- The level of engagement by the court. In an unusual move, the already expanded argument time (90 minutes in the consolidated petitions) was extended by Chief Justice John Roberts during the lively argument, and he repeatedly attempted to function as an air traffic controller for the multiple layers of simultaneous questions the advocates for each side faced from the justices.

- The court's unwavering adherence to its bedrock 2007 ruling in Massachusetts v. EPA that the Clean Air Act contains sufficient authority for the EPA to regulate greenhouse gases as pollutants. When counsel for the coalition of industry petitioners suggested during the argument that the result might be clearer without consideration of the Supreme Court precedent in that case — thereby delicately inviting the Court to revisit that decision — Chief Justice Roberts and Justice Anthony Kennedy each quickly indicated that both that case and American Electric Power v. Connecticut (2011) — declining to find a common law nuisance cause of action for power plant greenhouse gas emissions on the strength of nascent EPA regulatory efforts under the related new source performance standard provisions — remain plainly and unquestionably binding on the court. Any hope harbored by petitioners that the cert grant in this case could be broadened into a fundamental challenge to EPA's climate authority now seems improbable.

- The acknowledgement by all of the parties that the current Clean Air Act is less than an ideal fit for solving the climate problem, and that simply applying the statute as written on its face, could lead to "absurd," "unworkable," "extreme" and perhaps "counterintuitive" results that would be "unrecognizable" to the Congress that authored these Clean Air Act provisions. The EPA

defended its finding that the application of basic stationary source permitting thresholds under the Act — designed for conventional air pollutants — would lead to “absurd” numbers of facilities subject to regulation by claiming that its administrative adjustment of these thresholds was a reasonable exercise of its discretion. As Justice Stephen Breyer put it, “Does [the] EPA have the authority to implement the statute in a way that [the] EPA itself thinks makes sense?” The petitioners, in contrast, argued that the better approach would be to find that the EPA’s permitting requirements are not triggered solely by the regulation of greenhouse gases in other areas — either because the EPA cannot regulate such emissions at all under these provisions or because they themselves cannot be the sole trigger for imposing permits on sources that do not otherwise qualify. The court’s decision seems to come down to a choice between: (1) the reasonableness of finding ambiguity in the initial determination to apply the statute in the face of relatively clear statutory language, contrary to the EPA’s consistent interpretation for over 30 years of the phrase “any air pollutant”, and thereby importing into the permitting provisions some limiting factor such as the existence of area or regional air quality impacts, or (2) simply adjusting the low numerical thresholds for implementing the requirements as the EPA did — despite that the statute clearly specifies the actual emissions levels for implementing the permitting requirements.

- The court’s struggle to understand the real-world consequences of this dispute. Chief Justice Roberts pursued a theme of questioning stemming from his seeming unease that the control of carbon emissions, unlike for other pollutants, is more tied to avoided energy usage and enhanced and potentially proscriptive efficiency measures, than to more typical end-of-the-pipe controls. Roberts asked Solicitor General Donald Verrilli Jr. to explain what Best Available Control Technology – the standard for EPA’s permitting limits — might look like for greenhouse gases. In response, the Solicitor General cited to an industry amicus brief setting forth developing technological approaches and the feasibility of meeting these standards.

The arguments in this case unfold in the face of other EPA efforts to regulate carbon emissions — most notably, the signature feature of President Obama’s "Climate Action Plan," which calls for the development of new source performance standards for power plant emissions.

While the EPA’s proposal for controlling greenhouse gases from new power plants and its rule development and public dialogue around existing power plants arise under separate provisions of the Clean Air Act, the overall impression of regulatory stability or chaos that the court’s decision will create may either ease or greatly complicate the Obama administration’s effort to wrap up its comprehensive regulatory project during the president's second term.

The solicitor general himself wove a picture of the relationship between the PSD permitting efforts and the EPA’s ongoing new source performance standard power plant rulemakings where the two are intended to be complementary and mutually reinforcing, so that the consequences of any ruling may be in the eye of the beholder as well.

For now, though, this case may be too close to call, and all signs are that a decision may not come before the end of the court’s term in June. In the end, the outcome of this case may turn as much on the impression left by the EPA’s actions, as painted by the advocates in court yesterday, than on these conflicting legal theories.

Do the EPA’s permitting requirements not seem extraordinary or out of the norm, or was the agency

being selective in its application of statutory ambiguity to find nonexistent authority to design a comprehensive climate change program going well beyond congressional contemplation?

More than half of the states have lined up on one side or another of the briefing in this case — significantly raising its visibility — and the several petitioners presented a wide — and some of the high court's justices suggested a somewhat inconsistent — array of theories to get to their ends. While the expected support predictably played out for the EPA from the more typically liberal wing of the court (Justice Kagan referred to these circumstances as "the apex of Chevron discretion") and skepticism of the agency was registered from the more reliably conservative wing (Justice Scalia suggested that rewriting a statute was more troubling than revisiting an agency's here-to-fore consistent interpretation), some of the liberal justices strikingly asked the Solicitor General for thoughts on how, if the case goes against the EPA, the ruling should be written — aiding perhaps their preparation for damage control in the event the EPA should fail to find a fifth justice disposed to its interpretation.

While Justice Kennedy — often seen as the bellwether indicator of where a divided court will wind up — expressed some skepticism derived from the seeming absence of precedential support for the EPA's adjustment of the permitting thresholds ("I couldn't find a single precedent that strongly supports your position") he also seemed to discount at the same time one of the petitioners' principal authorities ("Brown & Williamson I think is distinguishable ...").

One thing not in doubt is that regulatory stability on this high profile issue remains elusive and that Rep. John Dingell's vision of a "glorious mess" may be the most salient lesson.

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