

Debrief of the Supreme Court's GHG Rulemaking Oral Argument

The Rules, the Decision, and the Issue

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Massachusetts v. EPA (2007)

- EPA denied petitions seeking regulation of motor vehicle GHG emissions under CAA Section 202
 - EPA must regulate emissions of a “**pollutant**” from new motor vehicles if it finds such emissions are “**reasonably anticipated to endanger public health or welfare**”
 - EPA argued that GHGs were not “pollutants,” that CAA was not suited for GHG regulation, and that there were policy reasons not to regulate
- Supreme Court ruled, 5-4, that **GHGs are** “pollutants” and that EPA must **make regulatory decision based on science** or explain why it can’t

The Suite of Greenhouse Gas Regulations

- ***GHG Endangerment Finding***
 - Mix of six gases, including CO₂, is a pollutant that contributes to climate change (an effect on welfare)
 - Automobiles emit some of these gases and contribute to air pollution leading to climate change
- ***Light Duty Vehicle Rule***
 - Required reductions in GHG emissions starting with MY 2012 vehicles
 - Roughly equivalent to 34.5 MPG CAFE standard by 2016

How This Implicates Stationary Sources

- Prevention-of-Significant Deterioration (PSD)
 - Generally directed at NAAQS pollutants, but...
 - “Major emitting facility” is defined in § 7479(1) to be one that emits more than threshold amount of “**any air pollutant**”
 - § 7475(a)(4): BACT required “**for each pollutant subject to regulation** under this chapter [the CAA] emitted from...such facility”
- Since 1980, EPA has interpreted these provisions to mean that once a pollutant (even a non-NAAQS pollutant) is regulated under the Act, PSD preconstruction permitting program applies

So, Two More Rules to Address Stationary Sources

- ***Timing Decision***
 - EPA determines that GHGs will be “pollutants subject to regulation” on January 2, 2011 (date that motor vehicle GHG rules first apply to a new vehicle)
 - Therefore, stationary sources of GHGs became subject to PSD as of that date
- ***Tailoring Rule***
 - Statutory PSD thresholds are 100 – 250 tons per year, much too low for GHGs
 - EPA asserts “administrative necessity” and “absurd results” and raises thresholds to 75,000 – 100,000 tons per year, ***at least temporarily***

Plus...

- ***Challenges to EPA's historic PSD regulations***
 - Generally, must challenge a rule within 60 days
 - Parties argued that they could not have challenged before because EPA had not asserted authority to regulate GHGs
 - Argued that the regulations must be revisited based on EPA's assertion of absurd results
 - Generally, an ambiguous statute must be read to avoid any absurd results

D.C. Circuit Decision

- Three-judge panel (Sentelle, Rogers, Tatel) upholds in *per curiam* decision
 - Key holding for the Supreme Court: EPA’s broad reading of “any pollutant subject to regulation” is compelled by statute; therefore, PSD applies to stationary GHG sources
- ***En banc*** review denied, with two dissents
 - Brown: questions regulation of GHGs under CAA; would revisit ***Massachusetts***
 - Kavanaugh: to avoid absurd results, EPA must read statute to limit PSD such that it is triggered only by above-threshold emissions ***of a criteria pollutant***

The Issue Before the Supreme Court

- Many proposed issues, including:
 - Revisit *Massachusetts*
 - Science behind Endangerment Finding
 - Failure to consider possible effects on stationary sources when determining to regulate autos
- Only one issue granted:
 - “Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit greenhouse gases.”
 - Differing views on what issues are subsumed within the Question Presented