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Briefing: “The Supreme Court and EPA Carbon Rules,” sponsored by the Environmental and Energy Study Institute
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Speakers

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On March 6, 2014, the Environmental and Energy Study Institute (EESI) held a briefing discussing the Supreme Court oral arguments for *Utility Air Regulatory Group v. Environmental Protection Agency (EPA)* held on February 24, 2014. Speakers Michael Gerrard, Professor and climate change law expert at Columbia Law School, and Amanda Leiter, Professor at American University College of Law and former Beagle/HLS Fellow at the Natural Resources Defense Council, provided insight into the background, events, and possible implications of the Supreme Court of the United States (SCOTUS) decision on the EPA’s regulatory power and President Obama’s Climate Action Plan.

Prior to SCOTUS evaluation, the U.S. District of Columbia Circuit Court of Appeals upheld a sequence of provisions which grant EPA the ability to regulate greenhouse gas (GHG) emissions from stationary sources, including power plants. The sequence began with EPA’s interpretations of U.S. Code 7479 of the Clean Air Act (CAA) which define “major emitting facilities” as those that produce 100 tons or more of pollutants per year. SCOTUS’ 2007 *Massachusetts v. EPA* decision determined that EPA had authority to regulate GHG emissions from non-stationary sources, such as automobiles, based on interpretation of U.S. Code 7602 of the CAA to include GHG’s in its definition of “any air pollutant.”

These confirmations combined with SCOTUS’ 2011 *American Electric Power Co. v. Connecticut* decision, which solidified EPA’s ability to regulate GHG’s, provided an avenue for EPA to expand or “trigger” GHG regulation of stationary sources. Stationary sources had previously had only been regulated with respect to National Ambient Air Quality Standards (NAAQS) pollutants defined in the original CAA.

Upholding the sequence of provisions created a problem, however, with regard to schools, apartment complexes, etc., which produce over 100 tons of the newly defined “air pollutants” (GHG’s) annually. In order to exclude these emitters from regulation, EPA most recently implemented the Tailoring Rule. The Tailoring Rule sidesteps the precedent of U.S. Code 7479 by declaring that only emissions facilities producing 100,000 tons of GHG’s per year or more must be regulated, a class exclusive to power plants.

The D.C. Circuit Court upheld these EPA determinations as legitimate interpretations of Congressional intention when passing the CAA. D.C. Circuit Court Judge Kavanaugh’s dissent argued that EPA has no basis to regulate GHG’s under the CAA permitting statute Prevention of Significant Deterioration (PSD) because PSD only applies to regionally measured NAAQS pollutants, and EPA’s selective interpretation of “any air pollutant” in this section allows for unwarranted manipulation of the law in the Tailoring Rule. This argument provided the opportunity for SCOTUS to grant “writ of certiorari” to hear the case. An in-depth summary of oral argument proceedings is available [here](#).

According to Leiter, likely possible outcomes of the case include a complete separation of trigger from non-stationary to stationary

source regulation or the specific cancelation of the 100,000-ton inference by EPA coupled with finding an alternative trigger. EPA counsel Donald Verilli submitted a consolation argument to allow EPA to regulate CO₂ from stationary sources via the trigger while excluding all other GHG's.

A decision to only regulate NAAQS pollutants from stationary sources is not likely because EPA already regulates other non-local pollutants via PSD such as sulfuric acid mist. Other unlikely outcomes include SCOTUS owing complete deference to agency, or conversely a complete overhaul of laws with regard to EPA air pollution regulation. Because SCOTUS only granted certiorari in a narrow section of the Tailoring Rule, an EPA loss would not totally repeal its ability to regulate CO₂.

Gerrard concluded that SCOTUS' decision will have "marginal" effects on the Administration's Climate Action Plan (CAP) because CAP relies entirely on New Source Performance Standards (NSPS), not PSD. Based on Section 111(b) of CAA, CAP aims to increase NSPS for new natural gas and coal plants. Industry does not plan to build new coal plants due to the advent of new natural gas extraction techniques and regulatory concerns.

According to Gerrard, the SCOTUS decision will more likely affect Section 111(d), with the potential to allow regulatory "flexibility" in setting standards for coal dominated existing power plants. EPA's increased flexibility would include deciding whether to require carbon capture and sequester (CCS) methods in emissions control, which would impose stringent regulations on coal burning plants.

Gerrard also articulated the "beyond the fence issue," which weighs the value of placing some regulatory burden on energy recipients, including technologies and consumers.

The EPA must propose their new regulatory measures by June 1, 2014. SCOTUS must issue their opinion on *Utility Air Regulatory Group v. EPA* before the end of session later that month.

-SRM
