Supreme Court hears oral arguments on EPA regulation of GHG's

On February 24, the Supreme Court of the United States (SCOTUS) heard oral arguments from seven groups of petitioners on the subject of the Environmental Protection Agency's (EPA) authority to regulate greenhouse gases (GHG's) from stationary sources under the Clean Air Act (CAA). The debate on *Utility Air Regulatory Group v. EPA* included petitions from private groups and state governments focusing on congressional intention in the creation of the CAA and varying interpretations of the law's language regarding "air pollutants."

Peter Keisler, representing private petitioners, argued that language in U.S. Codes 7471 and 7475(e) under the Prevention of Significant Deterioration of Air Quality (PSD) statute in the CAA, which regulates sources' annual emissions, indicates that air pollutants are defined in a regional context. Keisler stated that because GHG emissions have no measurable area-specific impacts, they should be subject to state and local rather than federal regulation.

All of Utility Air Group (UAG) petitioners contended that EPA's multiple definitions of "air pollutant" in Title V and U.S. Code 7491 of CAA depend on context and also differ from the *Massachusetts v. EPA* definition as "all things airborne." The lack of clarity in language therefore provides no legal regulatory basis for regulating GHG's from major emitting facilities.

Justice Sonia Sotomayor conversely cited the plaintiffs' failure to agree on a cohesive definition of "air pollutant" to support their case, which is the precise reason why courts defer to agency definitions.

According to UAG, EPA had no justification to redefine "major emitting facilities" from the original U.S. Code 7479 under *Massachusetts v. EPA*, which determined EPA had authority to regulate GHG emissions from non-stationary sources, such as automobiles. UAG also argued that regulation of GHG's from motor vehicles under U.S. Code 7521 did not permit EPA to expand or "trigger" GHG regulation of stationary sources. EPA's Tailoring Rule did just that, by regulating emissions facilities that produced 100,000 tons of GHG's per year or more in order to exclude PSD requirements for minor emitting institutions such as schools, apartment complexes, etc. An EPA case-by-case determination of such institutions is a long process that contravenes congressional intention, which wrote thresholds to exempt such entities, they said.

According to Keisler, because best available control technologies (BACT) are not capable of bringing GHG emissions below 250 tons/year level, and the largest of power plants emit tens of millions of tons of CO_2 per year, GHG regulation is unfeasible. He considers EPA interpretations, which are meant to give "maximum discretion" to the agency, as paving the way for unprecedented power to alter regulations indefinitely.

EPA's representative, Donald Verilli Jr., argued that U.S. Codes 7409, 7602, and 7475 provide the agency the ability to regulate any pollutant based on EPA discretion as determined in *American Electric v. Connecticut*. Verilli declared that EPA has regulated ozone-depleting substances since 1998 under PSD, which like GHG's, have no local effects.

Justice Elena Kagan articulated there is no "plausible alternative interpretation" of the phrase "any pollutant" consistent with legislative purpose. Although new pollutants have been discovered, congressional intention of reducing pollutants in general has not changed, and therefore it is EPA's obligation to regulate GHG's.

Regardless of the decision, SCOTUS will likely set a substantial precedent for the scope of federal regulation in its opinion to be published by the end of the 2014 term.