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Oral Argument Hints That Supreme Court May Trim Back U.S. Industrial Source Greenhouse Gas Regulations

Written by: James Coleman

Report commented on: Oral argument in *Utility Air Regulatory Group v. Environmental Protection Agency (EPA)*

On Monday the U.S. Supreme Court heard oral argument in *Utility Air Regulatory Group v. Environmental Protection Agency (EPA)*, in which petitioners challenged the EPA's "Prevention of Significant Deterioration" (PSD) regulations for stationary industrial sources of greenhouse gases. These regulations, finalized in 2010, require sources that emit over 100,000 tons of greenhouse gases to obtain a PSD permit and adopt the "best available control technology" for every pollutant that they emit, including greenhouse gases. These regulations have been closely watched in Canada, especially given Prime Minister Harper's suggestion that he would like Canada to move in tandem with U.S. greenhouse gas regulation.

The oral argument provided few surprises: it was as complex as expected in this case of arcane statutory interpretation. As described below, the argument did hint, however, that the Supreme Court might adopt a compromise position, holding that 1) industrial sources cannot be required to obtain a PSD permit purely on the basis of their greenhouse gas emissions, but 2) can be required to adopt best available control technology for their greenhouse gas emissions if they need a PSD permit anyway due to their emissions of other pollutants. This ruling would likely have little impact on EPA's broader agenda on greenhouse gas emissions.

The argument follows from the U.S. Supreme Court's landmark decision in *Massachusetts v. EPA*, 127 SCt 1438, a 2007 case in which the Supreme Court held that greenhouse gases were a pollutant under the general terminology of the U.S. Clean Air Act. Relying on this decision, EPA has adopted greenhouse gas standards for new cars and trucks. It has also proposed greenhouse gas standards for new coal and natural gas power plants. And it is due to propose standards for existing coal and gas plants at some point this summer. This case, however, concerns a separate set of standards, adopted under the Clean Air Act's catch-all for industrial sources, the Prevention of Significant Deterioration (PSD) requirement that requires state and local permitting agencies to ensure that new major sources adopt the "Best Available Control Technology." Petitioners made clear in oral argument that they are not challenging EPA's rules for cars, or its proposed rules for individual source categories such as power plants. Instead, they challenge only EPA's PSD catch-all.

EPA's argument is simple: the Clean Air Act requires PSD regulation for sources of "any air pollutant" and *Massachusetts v. EPA* said that a greenhouse gas is a pollutant. Furthermore, the Clean Air Act language for PSD is the same as the language EPA used for the car rules and the power plant rules that the petitioners are not disputing.

But there's a catch. The Clean Air Act requires a PSD permit from any new source that emits over 250 tons of "any air pollutant." That threshold makes sense for pollutants like lead and sulfur dioxide, but far too many sources emit that level of greenhouse gases, so EPA raised the level to 100,000 tons to avoid regulating hundreds of thousands of sources, which EPA acknowledges would be absurd.

Petitioners argue that, rather that re-write the statutory thresholds, EPA should not have included greenhouse gases in its PSD program. They say "any air pollutant" can mean different things in different parts of the act. It may be hard to imagine that Congress used the same word to mean different things in different places, but it's even harder to imagine that Congress used the word "250" to mean "100,000."

That left three arguments at play in Monday's arguments:

1) The government defended its entire regulation: sources that emit over 100,000 tons of greenhouse gases need a PSD permit, and a PSD permit requires the "best available control technology" for greenhouse gases.

2) Industry argued the opposite: emitting greenhouse gases cannot trigger a need for a PSD permit, and even if an industrial source needs a PSD permit because it emits other pollutants, it should not have to adopt "best available control technology" for greenhouse gases. That is, greenhouse gases are not included in the PSD program at all.

3) The Justices spent most of their time pressing both sides why they should not adopt some version of a compromise suggested by one petitioner and a dissenting circuit court judge: emitting greenhouse gases cannot trigger a PSD permit, but if a source needs a permit, it must adopt the best available control technology for greenhouse gases.

This compromise would not rely on altering the 250-ton threshold set by the statute. Justice Kennedy, the swing-vote, noted that the government had not cited any case that would allow that type of statutory re-write. At the same time, the compromise would force the biggest industrial facilities, which need a PSD permit anyway, to adopt best available control technology for greenhouse gases. Professor Jody Freeman, President Obama's Counselor for Energy and Climate Change, recently suggested that perhaps EPA should have adopted this approach from the beginning to avoid the risk of Supreme Court reversal.

Both petitioners and the government tried to suggest that this fallback was inadequate. This was difficult for the petitioners, given that one of the petitioners had proposed that fallback. And Justice Kennedy, the presumed swing-vote, emphasized that he was looking for an argument that followed "both the result and the reasoning" of *Massachusetts v. EPA*, which stressed the possible benefits of greenhouse gas regulation.

But the government also had a difficult time explaining why it could not accept the proposed compromise. Nearly all sources that emit 100,000 tons of greenhouse gases emit over 250 tons of some other pollutant, so they would require a PSD permit in any case. (And, under the compromise, this would mean they must adopt best available control technology for greenhouse gases.) The only sources that would be excluded, under the compromise, would be the few sources that emit threshold levels of greenhouse gases, but not any other pollutant. EPA estimated that its regulation would cover 86% of greenhouse gases emitted by facilities over the statutory threshold, whereas the compromise would cover 83%. Justices Ginsburg, Roberts, Breyer, and Sotomayor all mentioned this distinction, suggesting that there was very little difference between the government's position and the proposed compromise.

On the other hand, Chief Justice Roberts, another potential swing-vote, noted that this compromise might require two definitions of "pollutant" within the statutory section on PSD: one definition for the kind of pollutant that triggers the need for a permit, and another definition for the kind of pollutant that must be controlled with the best available technology. Even if it is okay to have one definition for cars and another for PSD, it is somewhat troubling to have inconsistent definitions within the PSD program itself.

The government added a final wrinkle to the compromise suggestions. Justice Sotomayor, who seemed friendly to the government, asked the government if it must lose, how it would like to lose. (See pages 67-72 of the oral argument transcript.) In answer, Solicitor General Donald Verrilli suggested that "pollutant" should still include all greenhouse gases except carbon dioxide, which is the most common greenhouse gas, and the reason that EPA changed the threshold. This is a particularly complex suggestion, and has already earned a critique from Resources For the Future's Nathan Richardson.

In sum, oral argument suggests that there is some appetite for a compromise among the Supreme Court's swing votes, and even among some of the government's supporters. But, as usual, there are too many factors at play for a firm prediction.

Two disclaimers:

1) Before entering my academic career in 2011, I represented some of the petitioners in their challenge to EPA's regulations.

2) I have omitted some details of the regulations and the petitioners' arguments to avoid belaboring an already complex argument.

A version of this post originally appeared on James Coleman's blog Energy Law Prof.