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High Court's Recent Term Isn't The Green Light EPA Thinks

By **Sean McLernon**

Law360, Washington (July 01, 2014, 3:56 PM ET) -- The U.S. Environmental Protection Agency has celebrated the 2013-14 Supreme Court term as a rousing endorsement of its regulatory authority, but experts say the Utility Air Regulatory Group case and other decisions are collectively more like a yellow light than a green light, warning the agency to proceed with caution.

As the EPA moves forward with new greenhouse gas regulations and considers other rules to help curb climate change, attorneys speaking at George Mason University's Supreme Court Wrap-Up panel discussion on Tuesday said the high court had shown that it won't give the EPA unlimited deference when it comes to air regulations.

The agency has recently won several big decisions in the D.C. Circuit and the Supreme Court, and last week's high-profile UARG v. EPA decision that nixed its greenhouse gas regulatory scheme was still hailed by the agency as a victory because it provided another option for the EPA to achieve similar results.

But while the EPA ultimately secured the policy result it was looking for, Sidley Austin LLP partner and former EPA general counsel Roger R. Martella Jr. said the court's decision to stop the agency from proceeding with its preferred regulatory approach would have ramifications for future rule-makings.

"While they may be saying they won this case — and there are certainly elements that they did win — the lawyers at EPA are sitting there thinking: 'We have a problem on our hands,'" Martella said.

With seven of the nine justices finding that the EPA could regulate greenhouse gases from large stationary sources that already needed to apply for permits covering emissions of traditional pollutants like particulate matter and sulfur dioxide, the agency praised the decision as consistent with its approach to regulating carbon pollution. But the 5-4 ruling striking down the agency's greenhouse gas regulations under the Prevention of Significant Deterioration and Title V permit programs shows that the EPA has to look at the context in which it is trying to apply its authority, according to Martella.

"In some contexts, regulating greenhouse gases may be perfectly fine," Martella said. "That's what Massachusetts v. EPA said. But that does not give the agency a blank check to just stick greenhouse gases into every provision of the Clean Air Act."

The agency's conclusion that it could plug greenhouse gases into the PSD and Title V programs was inconsistent with the structure and design of the Clean Air Act, Justice Antonin Scalia wrote for the

majority in the UARG decision. Justice Scalia went on to scold the EPA for attempting to bring about "an enormous and transformative" expansion of power without clear congressional authorization.

The EPA can't afford to ignore Scalia's rebuke as it issues new regulations. Martella said that if he were still working at the EPA, he would be most concerned about how the UARG decision applies to upcoming rules.

The justices could view with similar skepticism proposed new source performance standards for new and existing power plants because of their broad impact across the economy. Justice Scalia told the EPA that the court expected Congress to speak clearly if it "wishes to assign to an agency decisions of vast economic and political significance."

"You have to be thinking really seriously about how you reconcile these broad approaches with this decision," Martella said.

Hollingsworth LLP partner Richard O. Faulk, who represents small business entities that were spared the regulatory burden of applying for greenhouse gas emissions permits by the UARG decision, said the ruling sent a clear message to the EPA.

"They can't simply have broad discretion to do whatever they want to do with the Clean Air Act," said Faulk, who also serves as senior director of energy and the environment at the Law and Economic Center of George Mason University School of Law. "They have to do reasonable interpretations."

It's rare that the Supreme Court has said that the EPA has acted outrageously and unreasonably, as it did in the UARG case, according to Faulk.

"It's very, very difficult to say, at least for small businesses and probably across the board, that that sort of language isn't a victory for the industrial interests that they were trying to regulate," Faulk said.

All in all, it's still fair to say that this was still a good Supreme Court term for the EPA, according to Crowell & Moring LLP partner Kirsten Nathanson, especially considering the agency's victory in the EPA v. EME Homer case that resurrected the EPA's regulation of air pollution crossing state borders.

But the agency is nevertheless limited by the plain words of the Clean Air Act, Nathanson said. Arguments focused on the statutory language matter more than arguments over overall statutory structure and overall congressional intent, she said. That holds true even in a case like EME Homer City, in which the court ruled in the EPA's favor.

"Basically if you want to make an argument that the agency has violated broader principles, cooperative federalism, overall statutory purpose, Congress's overall goals, you aren't going to get anywhere with this court if there is plain language somewhere in the statute that is cutting against your argument," Nathanson said. "If you have silence, if you have ambiguity, if you have plain language somewhere that you can pull with you, you have a stronger foundation for the judicial review."

Industry groups and others challenging EPA rules may have a better chance to build upon that foundation now that the Supreme Court has taken EPA to task over greenhouse gas regulations, according to Martella.

"When the Supreme Court does speak to those issues, if you're a court of appeals judge, you can't help

but pay attention to that and take that direction very seriously," Martella said.

--Editing by Elizabeth Bowen and Philip Shea.
