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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

EPA High Court Wins Leave Openings For Industry Challenges

By **Juan Carlos Rodriguez**

Law360, New York (September 18, 2014, 7:43 PM ET) -- The U.S. Supreme Court's decisions last term upholding much of the U.S. Environmental Protection Agency's cross-state air pollution and greenhouse gas regulations offer companies legal footholds they can use to challenge the agency's authority, according to attorneys looking ahead to the next term.

At a George Mason University School of Law Supreme Court term preview on Thursday, Sidley Austin LLP partner Roger Martella Jr. said that while the EPA touted last term's decisions as victories, the high court left plenty of ground unguarded. The EPA might like to consider the matters closed, but the battles aren't stopping anytime soon, he said.

In Utility Air Regulatory Group v. EPA, the Supreme Court slightly scaled back the EPA's authority to regulate greenhouse gases from stationary sources, ruling the agency had violated the Clean Air Act when it expanded two permitting programs to include carbon dioxide emissions. The majority still left the door open for federal regulation of greenhouse gases, however, as long as it's done through the Best Available Control Technology program, known as BACT.

While acknowledging the EPA's success in that regard, Martella said the industries and states that opposed the plan found helpful the opinion's language laying out how far the agency can go in requiring facilities to meet BACT standards for carbon dioxide, which eliminated some uncertainty in that area.

He also pointed out that the majority expressed concern that the EPA had not established a baseline threshold below which it would not regulate greenhouse gases as part of BACT.

"There are a number of significant consequences that came out of this, despite the EPA's representation that this was a full win for the agency," Martella said.

He noted that dozens of facilities that either thought they had to obtain permits or were in the process of obtaining them were immediately impacted by the decision. In July, the EPA said they no longer needed to do so, in light of the ruling.

"That has already impacted a number of significant facilities under planning, under construction in the United States, that are leading to a manufacturing and energy renaissance," Martella said.

Another outcome is something that's not happening but otherwise would have, he said. The EPA had intended to regulate other sources of greenhouse gas emissions, such as smaller sources beyond big

industrial facilities, but now it won't be proceeding with that rulemaking, which had been planned for early next year.

And the broadest ramification, Martella said, is the strong language the majority opinion used in striking down the so-called tailoring rule, which he said would be relevant in many rulemakings in environmental and other contexts. The tailoring rule temporarily exempts many of the smaller stationary sources the agency had recently claimed came under carbon emissions regulation.

Citing its 2000 ruling in U.S. Food and Drug Administration v. Brown & Williamson Tobacco Corp., the court said the EPA could not look to a specific provision of a statute, like the Clean Air Act, to set the foundation for a broad-based regulation of the economy.

“The court also said that EPA cannot regulate sources that Congress did not intend to be regulated under the Clean Air Act — things like shopping centers, commercial office buildings and things like that,” Martella said. “This is going to be the truly lasting impact of the decision.”

And in EPA v. EME Homer City Generation LP, state and industry petitioners have argued that even though the Supreme Court found the D.C. Circuit had been wrong to vacate the rule, there should be more litigation before it’s remanded to the EPA.

“The industry and state petitioners are arguing ... there should be a second round of litigation, a second round of briefing, to consider these as applied challenges as instructed by the D.C. Circuit. And in the meantime, the stay should stay in effect,” Martella said.

Kirsten L. Nathanson, a partner at Crowell & Moring LLP, said there isn’t much environment-specific on the slate so far this term, but there is a nonenvironment case that would have an impact across federal agencies including the EPA, the Army Corps of Engineers and others.

In Perez v. Mortgage Bankers Association and Nickols v. Mortgage Bankers Association, the Department of Labor has urged the high court to reverse a D.C. Circuit ruling that nixed the agency’s 2010 reclassification of mortgage loan officers as eligible for overtime pay. It argues that the appeals court’s approach undermined the flexibility Congress wanted agencies to have.

“The key issue in the case involves an agency’s ability to change its mind — and to change its mind on the interpretation of its own regulations, and to do so without having to go through notice and comment,” Nathanson said.

Richard O. Faulk, the senior director of the Energy & Environment, Law and Economics Center at George Mason School of Law and a partner at Hollingsworth LLP, said one issue to look for in the future are public nuisance claims aimed at companies that are already permitted through a program under the Clean Air Act.

One case over the issue that hasn’t been picked up yet by the Supreme Court is Grain Processing Corp. v. Laurie Freeman, he said. In June, the Iowa Supreme Court revived a class action alleging a corn-based products manufacturer is negligently releasing harmful chemicals onto residents’ homes and properties, finding that the residents’ state-law claims are not preempted by the CAA.

“So even though this company was permitted by federal law to operate exactly as it was operating ... [the plaintiffs] could still maintain a state law public nuisance action to essentially, by injunction,

regulate the emissions from the facility and require replacement of equipment," Faulk said.

--Editing by Kat Laskowski and Philip Shea.
