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Attys React To Supreme Court Ruling On EPA Emissions Rules

Law360, New York (June 23, 2014, 7:18 PM ET) -- The U.S. Supreme Court on Monday limited the U.S. Environmental Protection Agency's ability to regulate greenhouse gas emissions from stationary sources under the Clean Air Act. Here, attorneys discuss the significance of the decision.

Kathy Beckett, Steptoe & Johnson PLLC
"Of significance is the fact that in the [Utility Air Regulatory Group] v. EPA opinion, the concurrences and dissents all speak to whether the EPA — the agency tasked with implementing the CAA — has been and will continue to design a program that looks further and further away from its enabling statute, the Clean Air Act. Examples of such statements in the opinion of the court written by Justice Scalia, and the other two opinions of Justice Breyer and Justice Alito include: Justice Scalia's 'We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery'; Justice Breyer's 'I also agree with the court's point that "a generic reference to air pollutants" in the Clean Air Act need not "encompass every substance falling within the Act-wide definition that we construed in Massachusetts'; and Justice Alito's '[Best Available Control Technology] analysis, like the rest of the Clean Air Act, was developed for use in regulating the emission of conventional pollutants and is simply not suited for use with respect to greenhouse gases.' This ruling and the accompanying concurrences and dissents all articulate significant frustration with the law as written and the agency that is aggressively working to implement a square peg, the greenhouse gas regulatory program, that does not fit into the round hole, the Clean Air Act. This ruling is not about winners and losers. It is about a broken public policy, that Congress is incapable to addressing."

Timothy Bishop, Mayer Brown LLP
"The majority cut off a very dangerous expansion of EPA power by holding that the EPA cannot ignore Congress's clear instructions in order to do something the EPA thinks is a 'good idea.' It would have been truly extraordinary to allow the EPA to 'tailor' pollutant emission levels up from the 100 or 250 tons Congress expressly set as the trigger for Prevention of Significant Deterioration regulation to 100,000 tons for GHG simply by regulatory fiat. And it is extraordinarily troubling — 'outrageous,' the majority said — that the EPA believed it had that power. Hopefully, the court's strong criticism will deter the EPA from similarly extravagant claims to increase its own power in the future. The EPA and the regulated community can now move on to determining the question of how best available control technology can sensibly apply to GHG emissions from plants otherwise subject to the PSD program."

Eric Boyd, Thompson Coburn LLP
"Today's decision removes some of the significant constraints on the construction of new and modified major sources without increasing GHG emissions. Few sources have been required to go through PSD for GHG emissions alone, and most of the GHG [BACT determinations to date involve energy efficiency measures. So-called 'anyway' sources must still comply with BACT for GHGs. The EPA will continue to

regulate sources of GHGs under other provisions of the Act — like the [New Source Performance Standards] program under Section 111. The court, however, split on ideological lines about whether language in the Act was or was not ambiguous, so how it will impact application of the Chevron standard in future cases is less clear."

Bernice I. (Bicky) Corman, Venable LLP
"As a legal matter, the ruling has some significance: the court's conclusion that EPA's regulation of GHGs remains lawful in some, but not all cases, indicates that EPA's discretion in applying two Clean Air Act regulatory tools to GHGs is not unbounded. The ruling has less significance, though, as a practical matter, as it leaves EPA still able to use the two mechanisms to limit GHGs from sources obtaining permits 'anyway' because of their non-GHG emissions — which, per the Solicitor General means 83 percent, rather than 86 percent, of U.S. stationary source GHG emissions."

Scott Deatherage, Gardere Wynne Sewell LLP
"In Texas, the greenhouse gas permitting program is currently in transition from the EPA to the State. The court's decision may require amendment of the regulations promulgated by the Texas Commission on Environmental Quality that were reviewed and approved by the EPA as part of this transition process. This may delay the implementation of the program, and leave it with the EPA for longer than originally planned. If facilities are required to wait on permits issued by the EPA under the court's ruling, then the process may be delayed further than would have been anticipated. For facilities applying for new permits, the application would still be bifurcated between an EPA and TCEQ permit. How the TCEQ will respond to this opinion and the timing of that decision remains to be seen. How the opinion will be managed by the EPA will play a key role here as well. If facilities must obtain or amend a permit for conventional pollutants under the PSD or Title V programs, and they are over the threshold set by the EPA for greenhouse gases, the 'anyway' facilities, then they will need to address greenhouse gas emissions in their permit. If the EPA decides or the D.C. Circuit requires the EPA to re-evaluate the de minimis level of greenhouse gas emissions, then the permitting process may be put on hold."

J. Wylie Donald, McCarter & English LLP
"If we look at the Tailoring Rule as the EPA's reasonable means to spread the pain of adjusting to GHG regulation beyond traditional power plants, then UARG unsews that approach. Under current law, GHG controls must be imposed on the entities that are already regulated by the Clean Air Act under the PSD provisions. But if the Tailoring Rule is recognized as simply a proposed approach, the EPA has achieved what it wanted: finality as to how and what the Clean Air Act can regulate with respect to GHG emissions. UARG ensures the pain will still be spread in the form of increased electricity costs."

Richard O. Faulk, Hollingsworth LLP
"This victory is especially important to American small business — as the court's opinion explicitly recognized. Ultimately those businesses faced potential regulation and expensive permitting — but now they are plainly outside EPA's reach because their emissions typically fail to exceed EPA's statutory authority under the Clean Air Act. Count today as a victory for common sense and plain language — and a profound loss for regulators who erroneously believed that the Clean Air Act was endlessly elastic."

Craig Gannett, Davis Wright Tremaine LLP
"EPA's draft 111(d) rules are in significantly more jeopardy today than they were yesterday. The majority is definitely hostile toward EPA rulemakings that would 'bring about an enormous and transformative expansion in EPA's authority without clear congressional authorization.' It is very likely that Justice Scalia would include the draft 111(d) regulations in this category. Absent some sort of expedited review, the finalized 111(d) rules won't make it to the Supreme Court until at least 2017. Lots

can change between now and then."

Morgan Gilhuly, Barg Coffin Lewis & Trapp LLP
"This decision is a clear short-term win for EPA — giving it the authority to regulate GHG emissions from every facility already regulated under the Clean Air Act — but it underlines, again, the need for a comprehensive legislative solution to the problem of climate change. The court took away EPA's authority to ever regulate GHG emissions from non-'anyway' sources, which emit 17 percent of the GHGs from stationary sources in the U.S. That restriction does not significantly limit EPA's efforts today, but the U.S. can never comprehensively address climate change without addressing every sector of the economy."

Drew Goddard, Bass Berry & Sims PLC
"The case involved EPA regulations that require very large sources of greenhouse gases to install best available technology to reduce those emissions. The court held that the EPA's regulations went beyond what the Clean Air Act authorized. The effect on these specific regulations is not great — the court upheld the regulations for all but about 3 percent of the emissions the EPA sought to regulate. The greater significance is that the majority opinion was extremely critical of the EPA's attempt to regulate beyond what the Clean Air Act allows, and may indicate that in future cases the court will be unwilling to defer to the EPA's expansive view of its authority to regulate greenhouse gases."

Mike Krancer, Blank Rome LLP
"Today's decision is a huge win for the core of the President's Climate Action Plan and the EPA's implementation of it through the final rule for new power plants and the proposed rule for existing ones. Though today's case does not directly involve those rules, the result, rationales, and line up of the Justices convincingly show that the pair of power plant rules rest on solid legal ground. The bottom line is that seven Justices have forcefully upheld the legality of control and regulation of GHGs under the Clean Air Act for power plants."

John Lazzaretti, Squire Patton Boggs LLP
"The court has stated that the EPA can proceed with regulating greenhouse gases under its existing PSD preconstruction permitting program, but has simultaneously warned the EPA that it can go too far if its tries to modify its existing programs to accommodate greenhouse gas regulations in ways never intended by Congress. The court's opinion makes clear, for example, that while the EPA can interpret ambiguous sections of the Clean Air Act to allow it to add greenhouse gasses to the PSD program, it cannot ignore the fact that the PSD program has important limitations on its scope and purpose, and the EPA's regulation of greenhouse gases under PSD will have to conform to these limits."

Robert Meyers, Crowell & Moring LLP
"This case is significant in several respects. First, it clarifies that Massachusetts v. EPA was not a 'command' for the EPA to regulate greenhouse gas emissions under all possible provisions of the Clean Air Act, but rather, that the EPA is to consider whether regulation of such emissions makes sense given the wide variety and varying purposes of Clean Air Act programs. The decision also makes it clear that the EPA cannot rewrite or 'tailor' the Act just to fit its climate policies. Instead, the EPA must consider the overall statutory scheme of the Act, especially with regard to smaller sources, when it attempts to press forward with new regulations."

Todd Palmer, Michael Best & Friedrich LLP
"The court's decision creates uncertainty concerning what, if any, de minimis threshold should be used for determining whether an 'anyway' source triggers [Best Available Control Technology] requirements

for any GHG emission increases associated with a PSD project. The court held that the EPA has thus far failed to establish a GHG de minimis threshold for GHGs. Until the EPA does so, it can be argued that any increase in GHG emissions will trigger GHG BACT obligations for the emission units physically modified by a PSD project. This has the potential to affect a large number of PSD permit applicants."

Kevin Poloncarz, Paul Hastings LLP
"The real significance is for the smaller sources that will no longer require PSD permits. While making up only a small percentage of stationary source emissions — 3 percent, compared to the 83 percent attributable to 'anyway sources' — in California, a number of gas-fired electric generating projects are currently being planned that would not require PSD permits, but for their emissions of GHGs. Although the efficient design of those plants would almost assuredly meet BACT, the court's decision could eliminate a favored avenue for opponents of all fossil-fired generation to delay construction through the often lengthy appeals process afforded for PSD permits."

Brian Potts, Foley & Lardner LLP
"Overall, it's a win for the environmental groups. The court left greenhouse gas permitting requirements in place for roughly 83 percent of stationary-source greenhouse gas emissions. However, there is some language that should worry the EPA about the legality of its proposed Clean Power Plan. The court says it expects 'Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."' The EPA's proposed Clean Power Plan is clearly of vast economic and political significance and is based on a 40-year-old statute — the Clean Air Act — so the court may be sending the EPA a message."

Rick Rothman, Bingham McCutcheon LLP
"The impact and import of today's Supreme Court ruling may ultimately depend on how far the EPA or the courts are willing to extend the concepts articulated by the decision with respect to interpreting the same term under the CAA — i.e. 'air pollutant' — in different ways depending on the context. In the short term, the largest impacts likely will be that many facilities will not be subject to PSD or Title V permitting based only on GHG emissions, and that other facilities will not be able to get out from under EPA's decision to apply BACT for GHGs."

James Rubin, Dentons
"The ruling might be a victory for both sides. The court upheld the EPA's authority to treat greenhouse gases like any other regulated pollutant and require the most significant emitting sources to include reduction measures in preconstruction permits. It also gave the EPA discretion to determine the best available control technology for reducing GHG emissions. At the same time, smaller sources no longer face permit requirements simply for GHG emissions. More tellingly, the court's strong criticism of the EPA's re-writing statutory language to support a preferred outcome may foretell a difficult future for the EPA's existing power plant rule, which was not at issue."

Christopher D. Smith, Thompson & Knight LLP
"I suspect that the EPA will be happy with this result, as it largely preserves the agency's ability to regulate greenhouse gas emissions. According to the EPA, 'anyway' sources account for approximately 83 percent of American stationary source greenhouse-gas emissions. The other, non-'anyway' sources that the EPA had proposed to regulate under the Tailoring Rule accounted for only 3 percent of stationary source greenhouse-gas emissions. The decision achieves generally the same result as that sought by the invalidated Tailoring Rule, namely, narrowing the scope of greenhouse-gas regulation to include only the largest stationary sources."

Patrick Traylor, Hogan Lovells LLP
"EPA's weakest GHG permitting argument has always been changing the statutory threshold of a 'major emitting facility' from 100 to 100,000 tons per year. The court today rejected the EPA's argument that it had to destroy the structure of the Clean Air Act in order to save it. The majority employed a classic Chevron analysis — chiding EPA for doing violence to plain statutory language, while sustaining reasonable EPA interpretations of ambiguous terms. In the end, the court prohibited the EPA from regulating GHG emissions from Dunkin Donuts, and confirmed the EPA's authority to regulate GHGs from the largest industrial sources."

Charles Warren, Kramer Levin Naftalis & Frankel LLP
"The ruling does not severely limit the EPA because the Supreme Court left the EPA leeway to regulate greenhouse gases in most cases under the PSD and Title V programs."

Jon Welner, Jeffer Mangels Butler & Mitchell LLP
"Not very significant. The decision should be mostly of interest to legal scholars. It changes the technical legal basis of EPA's program to regulate greenhouse gases from stationary sources, but has little practical impact. Most importantly, it affirms the Supreme Court's basic holding in Massachusetts v. EPA that the EPA has authority to regulate greenhouse gases."

Andrew Wheeler, Faegre Baker Daniels
"In his dissent, Justice Breyer states today's decision 'drains the Act of its flexibility and chips away at the Massachusetts decision.' While the court noted that this decision does not impact the authority for the NSPS program, there are inferences in this case that the court will be very leery of the agency broadly expanding its greenhouse gas authority. This will complicate the NSPS implementation since EPA is asserting itself into power supply issues traditionally held by FERC and the state PUCs and attempts by the agency to apply flexibility not found in the Act."

Tim Wilkins, Bracewell & Giuliani LLP
"On its face, today's Supreme Court ruling retains BACT standards for greenhouse gas emissions at facilities required to obtain authorization 'anyway' because of their traditionally-regulated emissions while eliminating such requirements at so-called GHG-only sources — 3 percent of those covered by the EPA's tailoring rule. But lost in the headlines about the ruling's direct impact are important holdings that flatly reject EPA's decision to 'tailor' — or, frankly, simply rewrite — certain inconvenient aspects of Congress's plain language and undercut the commentariat's view that the court's April decision in EME Homer City heralded a new era of sweeping deference to EPA."

--Editing by Emily Kokoll.
