

Supreme Court Agrees to Hear GHG Cases

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On Tuesday, October 15, the Supreme Court of the United States granted certiorari in six cases that sought review of the D.C. Circuit Court's 2012 decision upholding EPA's greenhouse gas (GHG) rules. The Supreme Court granted certiorari on the question of whether EPA permissibly determined that its regulation of GHGs from new motor vehicles triggered stationary source GHG permitting requirements.

The Supreme Court's decision in the GHG consolidated cases will likely be the most significant environmental decision the Court has issued since its 2007 decision in *Massachusetts v. EPA*. In that case, the Court held that EPA had the authority to regulate GHGs from new motor vehicles under Section 202 of the Clean Air Act if it made an endangerment finding regarding such emissions. EPA subsequently issued an Endangerment Finding and promulgated GHG emission standards for light-duty vehicles (Tailpipe Rule). Once the Tailpipe Rule was promulgated, EPA took the position that GHGs were covered under the Clean Air Act's Title V and Prevention of Significant Deterioration (PSD) programs because GHGs were "air pollutants" that were regulated under the CAA. To prevent the absurd results that would follow if the existing major stationary source permitting thresholds of 100 and 250 tons per year were applied to GHGs that are emitted in far greater amounts from ubiquitous sources, EPA promulgated the Tailoring Rule, which increased the stationary source permitting thresholds for GHGs to 75,000 or 100,000 tons per year. The centerpiece of the President's Climate Action Plan, the carbon pollution standards for new and existing power plants, also relies on the position that EPA's regulation of GHGs from new motor vehicles triggered its authority to regulate GHGs from stationary sources.

If the Supreme Court were to strike down EPA's regulation of GHGs under the stationary source permitting programs, the legality of its regulation of GHG emissions from power plants under Section 111 of the Clean Air Act would be called into question as well. However, it is more likely that the Supreme Court will issue a narrow clarifying decision. In *AEP v. Connecticut* (2011), the Supreme Court addressed the issue of whether a federal common law claim could be brought to curtail GHG emissions, and held that such claims were displaced by EPA actions authorized by the Clean Air Act, specifically, EPA's proposed GHG limits for new power plants. A decision holding that stationary source GHG requirements are not authorized under the Clean Air Act would seemingly contradict the Court's decision in *AEP v. Connecticut*.

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