

## Supreme Court Hears Oral Arguments in GHG Stationary Source Permitting Case

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On February 24, the United States Supreme Court heard oral arguments in *Utility Air Regulatory Group v. EPA*, a group of consolidated cases regarding the EPA's interpretation that its GHG vehicle emission limits under section 202 of the Clean Air Act triggered stationary source GHG permitting requirements. The first question from the Court came from Justice Sotomayor, who asked the lawyer arguing on behalf of the industry petitioners, Peter Keisler, to identify his interpretation of the phrase "any air pollutant" since several different interpretations had been advanced by various industry petitioners. Mr. Keisler said the industry's "principal argument" is that GHGs do not trigger the PSD program and should not require BACT determinations, because they do not have "area-specific air quality impacts."

Justice Kagan appeared to reject this argument, stating: "Nobody would think that the most natural, most reasonable readings of those phrases are any pollutant if they have localized effects, but not otherwise." Justice Kagan went on to ask why EPA's response to the problem of GHG emissions was not the more reasonable approach, given that EPA was faced with a choice of either exempting "a broad class of pollutant" or fudging the numbers. Of note, Mr. Keisler acknowledged that the case is not about whether EPA can regulate GHGs from stationary sources, noting the Court previously held in *AEP v. Connecticut* that EPA can do so under section 111 of the Clean Air Act. Mr. Keisler went on to illustrate the differences between the PSD and the NSPS program that make the PSD program unsuitable to regulating GHGs, implying that the NSPS program does not present the same challenges.

Solicitor General Donald Verrilli, arguing on behalf of the EPA, also faced tough questions from the Court. Justice Roberts pointed out that only an additional 3% of GHG emissions would be regulated under the government's preferred interpretation versus an alternative interpretation, advanced by industry, that would allow EPA to regulate GHGs from sources already subject to PSD permitting for non-GHG pollutants. And, Justice Scalia pressed the Solicitor General to agree that EPA is compelled to adopt an interpretation of the Clean Air Act that does not produce absurd results rather than adopting an interpretation that does produce absurd results and then modifying the terms of the statute to eliminate the absurdity.

When asked what interpretation the government would prefer if the Court did not accept its position, the Solicitor General indicated that removing CO<sub>2</sub> emissions from the PSD permit trigger would solve the problem that required EPA to change the statutory permitting thresholds for GHGs. However, the Solicitor General stressed that EPA does not accept the industry's position, because doing so would risk excluding other non-NAAQS pollutants from PSD.

Based on the questioning from the Court, the more liberal justices such as Justices Ginsburg, Kagan, and Sotomayor appear likely to allow EPA to continue to regulate GHGs under the PSD permitting program given the Supreme Court's prior decision in *Massachusetts v. EPA*. The more conservative justices, particularly Justice Scalia, are likely to favor the industry petitioners' argument that the PSD program was not intended to address GHGs. A decision in the case is expected by June, and we will provide an update once a decision is reached.

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