

## Supreme Court Grants Limited Review of Greenhouse Gas Emissions Regulations

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On October 15, 2013, the **United States Supreme Court** granted [certiorari](#) to review six of the nine submitted petitions stemming from an appellate court ruling upholding **Environmental Protection Agency** (“EPA”) greenhouse gas (“GHG”) controls at utilities, factories and other facilities around the country. Specifically, the challenged appellate ruling from the Court of Appeals for the District of Columbia Circuit unanimously upheld EPA’s GHG emission endangerment findings, rebuffed challenges to the EPA’s tailpipe rule for automobile emissions and its applicability to stationary sources, and determined the EPA was “unambiguously correct” in using existing federal law to address global warming. However, the Supreme Court’s review will be more limited than some petitioners sought and will not jeopardize the Obama administration’s larger climate-change agenda.

The nine petitions were brought by dozens of trade groups, companies, public policy organizations and states.<sup>[1]</sup> The petitions requested the Court take up various aspects of the EPA’s GHG reduction program for automobiles and stationary sources.<sup>[2]</sup> Industry groups have warned that EPA regulations would cost billions of dollars and hundreds of thousands of jobs, stalling the already-sluggish economic recovery. Under this line of thinking, some petitions argued that the EPA’s broad reading of the Clean Air Act (“CAA”) to allow the agency to enact and enforce a range of regulations of carbon dioxide usurped the power to determine policy reserved exclusively to Congress. Other petitions requested the court re-examine the landmark decision in [Massachusetts v. EPA](#) (2007) 549 U.S. 497, which resulted in limits on GHG emissions from both new vehicles and stationary sources like power plants.

The Obama administration urged the Court to reject the review entirely, saying the lower court ruling was a straightforward application of the Clean Air Act (“CAA”), consistent with the deference that judges generally afford to federal administrative rulings. Environmental advocates and a New York-led group of 17 states joined the administration in opposing Court review of the nine petitions.

The Court’s review under the writ will be a limited review of the EPA’s authority under the CAA to regulate emissions.<sup>[3]</sup> The justices specifically declined to review three petitions that comprised: (i) a broad challenge to the EPA’s capacity to reduce GHG emissions from factories and other stationary facilities; (ii) a challenge to the EPA’s conclusion that carbon emissions endanger public and welfare; and (iii) a request to overturn *Massachusetts v. EPA*. The refusal to review these petitions eliminated a more in-depth review of the EPA’s overall authority to regulate GHG emissions under the CAA.

The upcoming review, however, carries the potential to slow down President Obama’s landmark green agenda. The EPA has long interpreted the Prevention of Significant Deterioration (“PSD”) Program provision of the CAA, a preconstruction review and permitting program that requires permitting for any new “major” sources of “any air pollutant” regulated under the CAA. As a result, when the EPA promulgated regulations for GHG emissions from automobiles in 2010, it determined that PSD-permitting requirements were automatically triggered. PSD permits subject sources to both site specific and technology-based requirements.

The review will focus on the central question of “whether [the] EPA permissibly determined that its regulation of [GHG] emissions from new motor vehicles triggered permitting requirements under the [CAA] for stationary

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sources that emit greenhouse gases.” (Certiorari Order, pgs. 2-3.) Put alternatively, the Court will review the EPA’s assumption that PSD permitting is automatically required once a pollutant is regulated under any section of the CAA. This review may determine whether the EPA should treat stationary facilities differently than automobiles, and whether the EPA overstepped its authority by applying the 2010 fuel efficiency standards to other sources.

The Court will hear arguments in February 2014. Recently, proponents of the six accepted petitions urged the Court to allow them to present a wide range of potentially conflicting arguments during the briefing stage of the case. This request comes in response to the Court Clerk’s request that the number of briefs be kept “to a minimum and avoid repetitive arguments.” The petitioners disagree with the Court’s request because many of the parties have significantly different opinions on the issues presented by the petitions granted review under the writ. For example, utilities contend that GHG should never be a part of the PSD program. Other petitioners take a more moderate view, arguing that GHG requirements should be a part of the PSD program for facilities that qualify for the permits due to the emission of other hazardous pollutants during their activities. These discrepancies in the petitioners’ arguments mirror the issue faced at the appellate court level last year when the lawyers on both sides had to determine the logistics for who would argue the regulations at issue before the court, given the various opinions.

The Court, which will render a decision by the end of June 2014, could grant the manufacturing industry and utilities a broad victory against the EPA, a narrow victory or no victory, thereby leaving open a wide range of potential outcomes and consequences. For example, the Court could eliminate PSD requirements for large GHG emitters and affect EPA’s ability to finalize power plant rules for the remainder of the Obama administration.

Industry representatives and environmentalists alike opine that by refusing to hear challenges to the EPA’s prior endangerment finding, the Court has upheld the fundamental tenets of the EPA’s GHG regulations. Despite any potential setbacks to the currently applied GHG emissions reduction program to large industrial facilities, specialists agree that the Obama administration’s larger climate-change agenda is not in jeopardy, as the EPA will continue to proceed with its rules to curtail emissions from new cars and light trucks and other existing sources. Nathan Richardson, resident scholar and economist at Resources for the Future, stated: “The most important [GHG] regulations under the [CAA], standards for existing sources, will be similarly unaffected by any outcome of this case.”

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[1] Virginia, Alaska, Texas and others, were party to these petitions, as were the U.S. Chamber of Commerce, American Petroleum Institute, American Chemistry Council, National Association of Home Builders, the Utility Air Regulatory Group, Energy-Intensive Manufacturers, the Southeastern Legal Foundation, Pacific Legal Foundation, the Coalition for Responsible Regulation and other organizations.

[2] Stationary sources include power plants, refineries, petrochemical plants and heavy industry facilities.

[3] The cases the court will hear are *Utility Air Regulatory Group v. EPA*, 12-1146; *American Chemistry Council v. EPA*, 12-1248; *Energy-Intensive Manufacturers v. EPA*, 12-1254; *Southeastern Legal Foundation v. EPA*, 12-1268; *Texas v. EPA*, 12-1269; and *Chamber of Commerce v. EPA*, 12-1272. The cases rejected are *Virginia v. EPA*, 12-1152; *Pacific Legal Foundation v. EPA*, 12-1153; and *Coalition for Responsible Regulation v. EPA*, 12-1253.

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