



CLIMATE
UPDATE

Recent Supreme Court Decisions on Greenhouse Gas Emissions and Energy Facilities

The Supreme Court recently issued two decisions that could have significant impacts on the global warming/greenhouse gas debate, as well as on the energy and automobile industries.

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CASE #1: MASSACHUSETTS v. ENVIRONMENTAL PROTECTION AGENCY (EPA)

In *Massachusetts v. Environmental Protection Agency (EPA)*, the Supreme Court, in a five-four vote, concluded that, contrary to the EPA's position, the Clean Air Act did give the EPA the authority to regulate carbon dioxide emissions.

The case arose in the context of establishing tall pipe emission standards for automobiles: the EPA had concluded that since carbon dioxide (even at levels that they may rise to in the near future) does not pose a direct health risk, it is not a "pollutant" subject to EPA regulation. Furthermore, the EPA concluded that even if it did have authority to regulate, it would decline to do

so for a number of reasons: the science of global warming was not definitively established; regulating tail pipe carbon dioxide emissions would at best be only an extremely minor incremental benefit to the global warming problem; and the only known method to reduce carbon dioxide emissions from automobiles is to increase fuel economy (i.e., reduce the amount of gasoline consumed), which is a subject that Congress is examining in its review of fuel economy standards.

The Supreme Court concluded that in fact carbon dioxide did meet the statute's definition of "pollutant" and was therefore subject to the EPA's jurisdiction. The Court also rejected the various reasons the EPA gave for declining to regulate these emissions.

CLIENT ALERT

The Court is not necessarily requiring that the EPA regulate carbon dioxide emissions from automobiles. However, the likely effect of this decision will be that the EPA will have to reexamine whether it is appropriate to regulate such emissions (the Court having already found that the previously proffered reasons for declining to regulate are "arbitrary" and an "abuse of discretion," and are therefore impermissible).

Even if the EPA turns around and decides to regulate carbon emissions, it is unlikely that the EPA would be able to implement any such regulations before this administration leaves office.

Therefore, rather than leaving it to the EPA's discretion to attempt to cobble together regulation of carbon emissions under the 40-year-old Clean Air Act, Congress is likely to attempt to develop comprehensive legislation. If unsuccessful, it will be left to the next administration to deal with this issue.

However, one direct regulatory change seems to have occurred already as a result of this decision. Under the Clean Air Act, California is allowed to adopt automobile emission standards that are more stringent than federal standards (which other states can then adopt). California had been attempting to regulate carbon dioxide emissions through this provision, but still needed the EPA's approval. However, the day after the Supreme Court's decision, the EPA announced that it would no longer oppose California's attempts.

Following closely behind the Supreme Court decision, on April 10 the EPA announced the establishment of the nation's first renewable fuel standard program, which the EPA Administrator says is a first step in supporting President Bush's call to reduce gasoline use in the U.S. by 20 percent within 10 years. According to the Administration, the program requires that the equivalent of at least 7.5 billion gallons of renewable fuel be blended into motor vehicle fuel sold in the U.S. by 2012. The program is estimated to cut petroleum use by up to 3.9 billion gallons and cut annual greenhouse gas emissions by up to 13.1 million metric tons by 2012 -- the equivalent of preventing the emissions of 2.3 million cars.

Congress may well overtake any effects that would have been attributed to *Massachusetts v EPA*. The case simply holds that the EPA has jurisdiction over carbon emissions from automobiles. The only short term result is that the case has been remanded to the lower court, where the EPA must either come up with better reasons for declining to regulate or begin the process of determining how best to regulate automobile emissions.

Given the current political climate, the anticipation of carbon legislation from Congress (which they hope to pass this year) and the usual drawn-out time frame for development and adoption of any such regulations, it is more likely that comprehensive legislation eclipsing the Supreme

Court's decision will be enacted by Congress sooner than the EPA will develop and implement any regulations.

The decision in *Massachusetts v. EPA* could also affect other cases that are before the federal courts, in particular, relating to emissions from power plants. In addition, the Clean Air Act regulates much more than automobile emissions, and carbon dioxide emissions will now have to be considered in every area regulated under the Act.

CASE #2: ENVIRONMENTAL DEFENSE v. DUKE ENERGY

The second decision, *Environmental Defense v. Duke Energy*, was originally a Clinton-era EPA enforcement action that was dropped by the Bush Administration and later picked up by Environmental Defense.

It questions whether Duke Energy's improvements to its coal burning facilities, which made them both more efficient and able to operate more hours, constituted "modifications" that would trigger additional pollution control requirements.

Duke argued that their work was simply "routine maintenance," while the environmental groups argued that the work was a "modification" that would trigger New Source Review, which could lead to requirements for additional equipment to reduce nitrogen oxides and sulfur dioxide emissions (precursors of smog and acid rain).

Duke also argued that "modification" standards should only be applicable if the hourly emission rate was increased, not if emissions increased solely because the changes allowed the facility to operate more hours each day. In a unanimous decision, the Supreme Court held that the EPA could conclude that changes to the facility resulting in increased annual emissions could be a "modification" subject to increased regulation.

This case has been remanded back to the lower court and there are many more issues and stages of litigation that must be resolved before Duke will have to retrofit its facilities with scrubbers. Duke is already under new statutory obligations to retrofit facilities by 2013 to reduce emissions, and it is unclear if this case will have any direct impact. However, at a minimum, it is likely to have impacts on other facilities and companies that may have resisted incorporating additional pollution control equipment.

CONCLUSION

Whether either of these cases result in the far reaching impacts that have been predicted remains to be seen. Given the changing "climate" in Congress and the election cycle, new legislation and state-level action could potentially overtake these decisions.

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