Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

EPA's Authority Up In The Air This High Court Term

By **Keith Goldberg**

Law360, New York (September 27, 2013, 7:12 PM ET) -- The cases on the U.S. Supreme Court's plate this term that carry the biggest implications for the energy and environmental sectors are all about the power and reach of one government regulator: the U.S. Environmental Protection Agency.

The high court has already agreed to consider the EPA's cross-state air pollution rule, which was invalidated by the D.C. Circuit. It's also considering petitions challenging the EPA's attempts to regulate greenhouse gas emissions under the Clean Air Act.

Here are the energy and environment-related cases attorneys say they'll be watching during this Supreme Court term.

EPA et al. v. EME Homer City Generation LP et al.

The Supreme Court in June said it would hear the government's appeal of a D.C. Circuit decision striking down the EPA's cross-state air pollution rule, also known as CSAPR, which forces states to reduce emissions from power plants that travel across borders.

In vacating the rule in August 2012, the D.C. Circuit said the EPA had run afoul of the Clean Air Act by forcing states to reduce more pollution than necessary and denying them the opportunity to set up their own plans.

"Whenever the federal government decides to seek cert, that’s a big filtering mechanism for the court," said Pratik Shah, who served as an assistant to the U.S. solicitor general before joining Akin Gump Strauss Hauer & Feld LLP last month as co-head of the firm's Supreme Court practice. "Also, there are states on both sides of this issue, which ... increases its importance to the court."

One question at stake is whether the Clean Air Act allows the EPA to base reductions on cost rather than amount. The power plant challenging the rule argues that this approach requires upwind states to cut more pollution than needed to meet air quality standards.

The Supreme Court will also address whether states are excused from adopting implementation plans until after the EPA has quantified each state's interstate obligations.

A reinstatement of the rule would have have a significant impact on power plants, utilities and other entities that operate in an upwind state, not to mention throwing a wrench into the air pollution plans of those states, experts say.

"It was going to have the effect, it it were left in place, of hampering the states and the sources within those states that are dependent upon coal," Locke Lord LLP partner Gerry Pels said.

However, Covington & Burling LLP senior of counsel Don Elliott, a former EPA general counsel and an adjunct professor of environmental law at Yale Law School, argues that the impact of the high court's ruling could be more limited.

CSAPR was supposed to replace the George W. Bush administration's Clean Air Interstate Rule Program. By vacating CSAPR in its entirety, the D.C. Circuit kept the older rule in place until the EPA comes up with a "valid replacement." Luckily, utilities in most states have already implemented these rules, Elliott says.

"The biggest distinction between the Obama CSAPR rule and the Bush CAIR rule is that the Obama administration included Texas, where the Bush administration didn't," Elliott said. "It makes a big difference to the coal-fired power plants in Texas, but most of the other utilities in other states have already built compliance with the CAIR rule into their planning."

Lead challenger EME Homer City Generation LP and the other respondents are represented by Peter D. Keisler of Sidley Austin LLP, F. William Brownell of Hunton & Williams LLP and P. Stephen Gidiere III of Balch & Bingham LLP, among others.

The cases are U.S. Environmental Protection Agency et al. v. EME Homer City Generation LP et al., case number 12-1182, and American Lung Association et al. v. EME Homer City Generation LP et al., case number 12-1183, in the U.S. Supreme Court.

Challenges to EPA's Greenhouse Gas Authority

The Supreme Court is mulling a stack of challenges to the EPA's authority to regulate greenhouse gas emissions under the Clean Air Act — challenges that, so far, the D.C. Circuit has upheld.

The controversy centers on the Supreme Court's landmark 2007 decision in Massachusetts v. EPA, which held that greenhouse gases are air pollutants under the Clean Air Act. This led the EPA to find two years later that greenhouse gas emissions threaten human health and welfare.

Several states and industry groups contested the EPA's conclusion, but the D.C. Circuit ruled last year that agency's interpretation of the Clean Air Act was unambiguously correct.

Now states and industry groups have petitioned the Supreme Court to weigh in on the issue. Challengers also want the court to look at the agency's expansion of two permitting programs to include greenhouse gases from certain new and modified stationary sources, which the D.C. Circuit also upheld.

"This is one of the more significant environmental cases of the last 25 years, because I think if GHGs are going to be regulated in the manner suggested by EPA, it will no doubt impact the national economy and several regional economies based on the nature of emissions of the industries," Pels said. "I think in essence, the EPA's approach will regulate any type of burning of fossil fuels, which means they're going to be affecting and regulating consumption of energy throughout the whole economy."

The petitions target specific rules enacted by the EPA, including one that regulates greenhouse gas emissions from motor vehicle tailpipes. Also in the petitioners' crosshairs is the so-called tailoring rule, which lays out a timeline for major stationary sources to apply for permits based on the scale of their greenhouse gas emissions.

"Certainly under the tailoring rule, the more significant entities to be affected are going to be utilities," Shah said. "There's significant ramifications for the regulated industry."

Some petitions have challenged the EPA's authority to regulate greenhouse gases. The state of Texas, for example, is urging the Supreme Court to reconsider or overturn its Massachusetts decision.

While observers have questioned whether the high court has the appetite to revisit the Massachusetts case, Pels believes the justices will agree to review at least some of the issues raised in the various petitions.

"I believe that the issues posed are of national significance, and the court's going to look for some way to address it," Pels said.

Luminant Generation Co. LLC et al. v. EPA

Luminant is appealing a Fifth Circuit decision that federal law does not allow for emissions limit exceptions for power plants during planned startup, shutdown and maintenance periods, or SSM periods. The case stems from the EPA's rejection of an SSM exception to emissions limits under a state implementation plan crafted by Texas.

Luminant's high court petition argues that giving the EPA broad discretion to veto state implementation plans "risks rendering states mere functionaries, eliminating the sovereignty concurrent with that of the federal government." Meanwhile, the EPA argues that the exception contained in Texas' plan would interfere with Clean Air Act requirements.

"We have a high-stakes battle between EPA and the states over their SIPs that goes to who has the right to obligate what your local sources have to do," said Squire Sanders partner Allen Kacenjar Jr.

Utilities and power plants will be watching to see whether the Supreme Court takes the case — and so will the 36 states that would have their SSM exemptions stripped under a rule proposed by the EPA that would eliminate the practice.

A denial of Luminant's petition would place the EPA on firmer footing, leaving those states scrambling to figure out how to comply, according to Kacenjar. But if the high court accepts the petition, the states could gain more latitude, he said.

"What we're fundamentally struggling with here is: How much flexibility does a state have to create its own rules?" Kacenjar said.

The case's tentacles extend beyond the EPA, experts say. In backing the agency, the Fifth Circuit relied on the Supreme Court's landmark ruling in Chevron USA Inc. v. Natural Resources Defense Council Inc., which outlines when to grant deference to an agency's interpretation of a law that it administers. If the Supreme Court agrees to hear the case, experts say it could signal that the justices are willing to re-examine Chevron's scope.

"People's antennas always go up when they see a petition where Chevron is an issue; it's the critical case in administrative law as to the role of government agencies," said Gabrielle Sigel, who co-chairs Jenner & Block LLP's climate and clean technology law practice. "It certainly would be closely watched if cert were granted."

Luminant is represented by Harry M. Reasoner, Jeremy C. Marwell and Eric A. White of Vinson & Elkins LLP; P. Stephen Gidiere III and Thomas L. Casey III of Balch & Bingham LLP, Stacey H. Dore and Daniel J. Kelly of Energy Future Holdings Corp. and Stephanie Zapata Moore of Luminant Generation Co. LLC.

The case is Luminant Generation Co. LLC et al. v. U.S. Environmental Protection Agency, case number 12-1484, in the U.S. Supreme Court.

EPA v. Friends of the Everglades et al.

A case that has ramifications for municipalities and water systems around the country has reached the Supreme Court based on a question of jurisdiction. The dispute centers on a 2008 EPA rule that exempts certain water transfers from Clean Water Act permit requirements.

Environmental groups and U.S. states challenged the rule after it was introduced, and their cases ended up consolidated in the Eleventh Circuit. But the Eleventh Circuit found in October that it lacked jurisdiction to hear the case, since the EPA water transfer rule "neither issues nor denies a permit" and it can review only permitting decisions.

Although the ruling dismissed the challenge to the EPA's rule, the agency still petitioned the high court in June to weigh in on the jurisdictional matter.

The EPA argues that the appeals court's refusal to review the rule conflicts with other circuit rulings and could gum up its regulatory process by allowing district courts to review a rule that governs permitting decisions — which it says can be reviewed only by filing a petition with a circuit court.

"This particular rule affects all sorts of municipalities and water districts, since transferring water from one body to another is a common activity for those entities," said Shah, who co-authored the government's petition while at the solicitor general's office. "If invalidated, that would also increase the permitting burden on EPA, which under the rule does not currently require ... permits for water transfers."

A separate petition filed by the U.S. Sugar Corp. argues that the Eleventh Circuit's finding would have far-reaching harmful effects by increasing the cost of regulatory compliance for industry, burdening the court system, inviting forum-shopping by plaintiffs and "turn[ing] a common-sense judicial review scheme upside-down."

U.S. Sugar is represented by Timothy Bishop, Chad Clamage and Michael Kimberly of Mayer Brown LLP and Rick Burgess of Gunster Yoakley & Stewart PA.

The environmental groups are represented by Earthjustice.

The case is EPA v. Friends of the Everglades et al., case number 13-10, in the U.S. Supreme Court.

--Additional reporting by Jeremy Heallen, Sean McLernon and Gavin Broady. Editing by Kat Laskowski and Katherine Rautenberg.