

CLEAN AIR ACT ALERT

This Alert is published by our Environmental Law Section. Please feel free to contact any of our authors for more information.

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U.S. Supreme Court Issues Opinions on Enhanced New Source Review Regulation and Climate Change

In what is being seen as a rebuke of the Bush administration's energy and air pollution policies, the U.S. Supreme Court issued a pair of opinions earlier this week that not only strengthen the Environmental Protection Agency's ability to regulate both new and refurbished sources of air pollution, but also require the EPA to regulate carbon dioxide and other "greenhouse gases." Taken together, these opinions give states the green light to continue their push for greenhouse gas regulation, while at the same time tightening restrictions on sources that upgrade their facilities.

In the first case, *Environmental Defense v. Duke Energy Corp.*, the Court ruled unanimously to overturn a lower court decision allowing Duke Energy favorable treatment under the New Source Review (NSR) provisions of the Clean Air Act. NSR is triggered whenever a source of air pollution makes physical changes or changes in its method of operation that might result in new or increased emissions. If it's anticipated that such changes might have an effect on emissions, the source must obtain a permit prior to construction or risk being in violation. Under the Clinton administration, power plants were targeted for NSR enforcement in certain instances where the power plants performed maintenance activities that allowed them to run longer and potentially generate additional pollutants.

The chief issue in the *Duke Energy* case was whether to measure emissions on an annual or hourly basis to determine if there had been an increase in total emissions that would trigger a permit requirement. Duke Energy argued for an hourly standard, since the improvements it had made to its facilities allowed for fewer emissions to be generated per hour. Because those same improvements allowed the facilities to be online a greater percentage of the time, however, the EPA countered that on an annual basis the facilities generated more pollutants and therefore required permitting.

A unanimous Supreme Court agreed with the EPA's annual measuring methodology, noting that actual emissions of pollution are better measured in terms of actual operations over time, rather than on an hour-to-hour basis. Although the ruling is a victory for the EPA, several observers note that the ruling upholds stricter, Clinton-era interpretations of the NSR program, rather than the more relaxed, permittee-friendly approach favored by the Bush administration.

By way of contrast, the Court was far more divided on the issue of the EPA's ability to regulate greenhouse gas emissions. In *Massachusetts v. Environmental Protection Agency*, the Court ordered the EPA to justify its decision to forgo regulation of carbon dioxide and other greenhouse gas

emissions from automobiles. The Court ruled broadly that the EPA has the authority to regulate both carbon dioxide and other greenhouse gases, laying the groundwork for stricter carbon dioxide controls for automobiles and other sources of carbon dioxide.

In reaching its decision, the Court held that the Clean Air Act gives the EPA the authority to regulate greenhouse gas emissions as pollutants, and that the EPA could decline to regulate such emissions only if it determined that the emissions do not contribute to climate change. In its defense, the EPA argued that because other countries, such as India and China, are seen as heavily contributing to greenhouse gas emissions, the EPA has no duty to regulate such emissions, given that regulating automobile emissions would have a negligible impact on global warming as a whole. Writing for the majority, Justice Stevens rejected that argument and held that “a reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”

The case was brought before the Court by a coalition of twelve states, including the State of Connecticut and other New England states. Given the success that these states have had at the Supreme Court, it would seem that the door will be open to further regulation under the Regional Greenhouse Gas Initiative, or other legislation and regulations.

Look for further updates on this topic as events warrant.

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