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ENVIRONMENTAL LAW

High Court to Rule on Interpretive Guidance of Federal Regulations

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Special to the Legal

Upon first glance, the list of cases in which the U.S. Supreme Court will be hearing oral argument during the next year does not appear to offer anything of interest to environmental practitioners. The court's prior term, which began in October 2013, offered a pair of blockbuster Clean Air Act cases involving the U.S. Environmental Protection Agency's authority to regulate interstate air pollution and greenhouse gas emissions. The term before that, the justices took up questions involving the interpretation of important terms used in the Clean Water Act. At first glance, it seems like the court is not currently offering much to excite the environmental bar.

Take a closer look, though. At the beginning of December, the justices are set to hear argument in a pair of consolidated cases—*Perez v. Mortgage Bankers Association*, No. 13-1041, and *Nickols v. Mortgage Bankers Association*, No. 13-1052—that could have a profound effect on how the EPA interprets and enforces its regulations. These cases involve, oddly enough, a dispute over how mortgage brokers are classified for the purposes of federal wage protections. The Supreme Court has granted review on a single question: whether a federal agency



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must go through notice and comment proceedings when it significantly revises a definitive interpretation of one of its regulations.

THE LAW TODAY: PARALYZED VETERANS AND ITS PROGENY

Since 1997, the U.S. Court of Appeals for the D.C. Circuit and several of its sister circuits have required federal agencies to follow notice and comment rulemaking proceedings whenever they make a “significant revision” to a “definitive interpretation” of a regulation. The D.C. Circuit announced this rule in a case captioned *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). The rationale of *Paralyzed Veterans* and its progeny is simple: The revision of a definitive interpretation of a regulation is

functionally equivalent to a revision of the underlying regulation, an action that an agency cannot take under the Administrative Procedure Act without public notice and the solicitation of comments. The *Paralyzed Veterans* rule therefore places a limit on how flexible the EPA may be with respect to interpreting its rules; its interpretations that have become “definitive” may only be revised in a whole new rulemaking proceeding.

A BIG CASE WITH HUMBLE ORIGINS

Reading only the D.C. Circuit's opinion below in the *Perez* and *Nickols* cases, one would not anticipate that these cases would be vehicles for the Supreme Court to address broad questions about agencies' authorities to change how they interpret their regulations. The underlying dispute arose under the Fair Labor Standards Act, which sets general requirements for employers to pay overtime to employees working over 40 hours in a week. The Department of Labor (DOL) has published regulations defining certain classes of employees that are exempt from the overtime pay requirements. In 2006, the department issued an opinion letter interpreting these regulations to cover mortgage brokers, such that their employers were not obligated to pay them overtime. Just four years later, the department reversed course and issued an interpretation stating that employers had an obligation

to pay mortgage brokers overtime.

The Mortgage Bankers Association challenged the labor department's change of heart in federal court, and the issue addressed by the D.C. Circuit was a narrow one. Specifically, the D.C. Circuit only addressed how the regulated community's reliance on an agency interpretation factors into the *Paralyzed Veterans* analysis. The court held that reliance is one of several factors that determines whether an agency interpretation is "definitive," such that its revision requires notice and comment rulemaking. Despite the D.C. Circuit disclaiming any intention of revisiting whether the *Paralyzed Veterans* doctrine reflects a proper interpretation of the Administrative Procedure Act, that issue is precisely the one on which the Supreme Court is scheduled to hear argument Dec. 1.

IMPLICATIONS FOR AGENCY GUIDANCE

The Supreme Court's ruling in *Nickols* and *Perez* has implications for how flexibly the EPA can work with the regulated community, as well as the degree of uncertainty regulated entities may face as they try to navigate the EPA's interpretations of its regulations. On the one hand, leaving the *Paralyzed Veterans* doctrine in place provides a more stable regulatory environment because it makes changing regulatory interpretations more difficult for the EPA. The agency will be less likely to alter an interpretation if doing so requires a resource-intensive rulemaking process. On the other, permitting the EPA to alter or amend its interpretations of its regulations would grant the agency a greater degree of flexibility in addressing new problems or

working with the regulated community to address unique compliance issues.

The EPA's interpretative guidance for recycling plastics from automobile shredder residue (ASR) regulated under the Toxic Substances Control Act (TSCA) illustrates this tension. Although TSCA generally prohibits the use and distribution of PCBs (polychlorinated biphenyls), the EPA's regulations define a set of "excluded PCB products" that are not subject to this prohibition. The EPA has issued guidance interpreting the exclusion to permit entities recycling ASR to presume that ASR is an excluded PCB product, provided that the entity processes this material in accordance with the Voluntary Procedures for Recycling Plastics From Shredder Residue, a set of guidelines developed by the Institute of Scrap Recycling Industries.

The Supreme Court's ruling in Nickols and Perez has implications for how flexibly the EPA can work with the regulated community.

If the Supreme Court leaves the *Paralyzed Veterans* rule in place, recyclers have some assurance that adherence to the Voluntary Procedures will remain a presumptive measure for ensuring that ASR is an excluded PCB product. An attempt by the EPA to significantly alter the interpretation in its prior guidance, such as by revoking the presumption, could require the EPA to promulgate an entirely new rule.

The time and resources necessary to go through such a procedure would make the EPA think twice about changing course. Furthermore, even if the EPA were to revise the interpretation through a rulemaking, the recyclers would have an opportunity to weigh in on the EPA's proposed change to its interpretation during the comment period.

Although the *Paralyzed Veterans* doctrine offers the industry a degree of certainty, a Supreme Court decision casting the rule aside would, in certain circumstances, grant the EPA greater flexibility to respond to changing needs and unique circumstances. If, for example, recyclers were to advocate for the EPA to expand the types of handling procedures that would allow them to presume ASR is an exempt PCB product, *Paralyzed Veterans* could tie the EPA's hands. But a decision sweeping away the doctrine would grant the EPA a greater range of flexibility; the agency could revise its interpretive guidance relating to ASR without the procedural hurdles and costs created by the rulemaking process. In certain circumstances, the demise of *Paralyzed Veterans* would permit the EPA to be more flexible and responsive.

When the court hears arguments in *Perez* and *Nickols*, remember that the case is about much more than mortgage brokers' compensation. The rules that govern how agencies, including the EPA, amend the interpretations of their regulations will hang in the balance. Environmental lawyers should stay tuned. •

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