PHILADELPHIA, THURSDAY, JANUARY 18, 2007

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

ALM

ENVIRONMENTAL LAW

High Court's 2007 Agenda Heats Up on Environmental Issues

BY NICOLE R. MOSHANG AND KATHLEEN CAMPBELL
Special to the Legal

Last year saw many important environmental cases in the district and circuit courts and certiorari petitions granted by and pending before the U.S. Supreme Court. This spring will reveal how the Roberts court will deal with environmental regulation while the new Congress and the president decide what role they will play.

GLOBAL WARMING

On Nov. 29, the Supreme Court heard oral arguments in the first global warming case to reach the high court. The case is an appeal of a split panel decision of the U.S. Circuit Court of Appeals for the District of Columbia in *Massachusetts, et al. v. EPA*, which dismissed the claim brought by a coalition of states, cities and numerous environmental and public health groups seeking to require the federal government to consider its petition to regulate carbon dioxide and other greenhouse gas emissions from new automobiles pursuant to Section 202(a)(1) of the Clean Air Act.

The provision at issue, Section 202(a)(1), requires the EPA to set emission standards for "any air pollutant" from new motor vehicles or engines that cause or contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare." The act defines "welfare" to include effects on climate and weather.

Pursuant to this provision, the petitioners filed a rulemaking petition, asking the EPA to promulgate regulations governing greenhouse gas emissions from new vehicles. The EPA denied the rulemaking petition, claiming it did not have statutory authority to regulate such emissions, and that even if it had such authority, it was within its discretion to determine not to regulate such emissions at this time.

NICOLE R. MOSHANG *is a partner in Manko Gold Katcher & Fox's Bala Cynwyd office, where she focuses her practice on environmental litigation.*
KATHLEEN CAMPBELL *is an associate with Manko Gold Katcher & Fox, where she focuses her practice on environmental and toxic tort litigation as well as on regulatory compliance matters, particularly federal and state water pollution issues.*

The petitioners sought review of the EPA's denial before the D.C. Circuit, which has exclusive jurisdiction of final actions by the EPA on matters related to nationally applicable regulations under Section 307(b)(1) of the act. The three-judge panel that heard the case filed three separate opinions deciding the issue on different grounds, the result of which was a concurrence among two of the panel members in the judgment dismissing the case, but not in the grounds for dismissal.

Judge Arthur R. Randolph, who issued the judgment of the court, would have dismissed the case on its merits, while Judge David B. Sentelle would have dismissed the case for a lack of standing, finding that the petitioners had not been "injured" in a particularized manner separate from the harms posed by global warming to the general population. Finding EPA's interpretation of the Clean Air Act impermissible, Judge David S. Tatel filed a dissenting opinion that would have required the EPA to regulate greenhouse gas emissions.

While it remains to be seen if there will be a similar lack of consensus among the Supreme Court justices deciding this case, at the oral arguments before the court it became apparent that at least some justices question, as Sentelle opined, whether the petitioners established that requiring EPA to regulate greenhouse gases from new motor vehicles would redress a particular harm to the petitioners and give the commonwealth of Massachusetts "standing" to raise the merits of the issue.

Moreover, even if the court finds the requisite standing, and addresses the EPA's obligations under Section 202(a)(1) of the act, one should not expect a substantial and sudden shift in the Bush administration's approach towards regulating greenhouse gas emissions, as it is unlikely that the court would require the EPA to take specific action other than to evaluate the need to regulate greenhouse gas emissions from new motor vehicles in light of the court's opinion.

NEW SOURCE REVIEW

Another case arising under the Clean Air Act, *Environmental Defense, et al. v. Duke Energy Corp.*, was argued before the Supreme Court Nov. 1, and a decision is also pending. The *Duke Energy* case involves the EPA's New Source Review (NSR) program, pursuant to which major sources of air contaminants are required to upgrade their control systems when undertaking modifications that cause emission increases. The EPA has defined "modification" broadly to include any physical or operational change to an existing facility,

and few exceptions to this definition exist.

The case arose after Duke Energy made extensive modifications to its coal-fired generating units, which allowed increased production, and therefore increased annual emissions. The United States brought an enforcement action against Duke Energy for failing to comply with the act's Prevention of Significant Deterioration (PSD) requirements, which the United States claimed were implicated by Duke Energy's "major" modifications of its facilities.

Three private environmental groups, including Environmental Defense, intervened as plaintiffs in the enforcement action, *United States v. Duke Energy Corp*., in which Duke Energy successfully argued that since its changes did not result in an increase in the hourly output of emissions, the permitting requirements of PSD were not implicated. In *Duke Energy Corp.,* the 4th Circuit affirmed the district court's decision holding that the act's definition of "modification" renders unlawful the EPA's longstanding regulatory test defining PSD "increases" by reference to actual, annual emissions. Notably, the review of both the district court and 4th Circuit's decisions were initiated by the intervener environmental groups, not the EPA.

Before it can address the substantive issues raised in this case, however, the Supreme Court must first determine whether the 4th Circuit's decision violated Section 307(b) of the act, which provides that national Clean Air Act regulations are subject to challenge only in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and shall not be subject to judicial review in enforcement proceedings. Thus, as may be the case in *Massachusetts*, the Supreme Court could resolve this case without reaching the substantive issues raised in the petition.

THE ENDANGERED SPECIES ACT

With global warming already on its agenda, the Supreme Court added another hot-button environmental issue to its decision docket earlier this month — the protections afforded by the Endangered Species Act. On Jan. 5, the Supreme Court granted certiorari in a pair of consolidated cases that raise the question whether the Endangered Species Act applies to the EPA's decision to delegate permitting authority for the discharge of pollutants under the Clean Water Act to the state of Arizona. In *Defenders of Wildlife v. EPA*, a split panel of the 9th Circuit vacated the EPA's delegation to the state because the EPA failed to consider the impacts that state-issued stormwater permits might have on endangered species.

The case turns on the interaction between two distinct statutory obligations. The Clean Water Act requires the EPA to hand over permitting authority to a state provided that the state has satisfied nine specified criteria, impacts to endangered species not among them. On the other hand, Section 7(a)(2) of the Endangered Species Act provides that each federal agency shall, in consultation with the U.S. Fish and Wildlife Service, ensure that any action authorized, funded or carried out by the agency is not likely to jeopardize federally listed species.

According to the majority, this latter obligation "exists alongside Clean Water Act provisions as the agency's first priority." Thus, even though EPA may have complied with the Clean Water Act, the court concluded that EPA acted arbitrarily and capriciously in failing to evaluate the loss of Endangered Species Act consultation that would result once the permitting program was transferred to the State.

In their petitions to the Supreme Court, EPA and the National Association of Home Builders argued that Section 7(a)(2)'s consultation requirement does not apply to agency conduct mandated by another federal statute. Because the section applies to every federal agency, the court's ruling will have far-reaching implications, particularly if the 9th Circuit's decision is upheld.

Oral argument is expected in April in *National Association of Home Builders v. Defenders of Wildlife* and *EPA v. Defenders of Wildlife*.

PETITIONS TO WATCH

In addition to these three pending appeals, the Supreme Court now has before it three separate petitions seeking review of conflicting appellate rulings concerning the availability of a CERCLA cost recovery action for voluntary cleanups after the court's 2004 landmark decision in *Cooper Industries v. Aviall*.

In *Aviall*, the court ruled that a potentially responsible party that voluntarily cleans up a contaminated site cannot seek to recover the costs it incurs from other potentially responsible parties under Section 113(f)(1) of CERCLA, unless the contribution action is brought during or following a civil action under Section 106 or 107(a) of CERCLA. The court left open, however, the question of whether a potentially responsible party that performs a voluntary cleanup may pursue contribution under Section 107(a), which provides that any covered person shall be liable for cleanup costs incurred by the United States or a state and "any other necessary costs of response incurred by any other person."

In the aftermath of *Aviall*, a number of courts around the country, including unanimous panels in the 2nd and 8th circuits, opened the door for potentially responsible parties to use Section 107(a) as an alternative means of recovering cleanup costs under CERCLA where Section 113 is unavailable. Those cases are *Consolidated Edison Co. v. UGI Utilities Inc*. and *United States v. Atlantic Research Corp*., respectively.

One notable exception, however, has been in the 3rd Circuit, where a divided panel in *E.I. du Pont de Nemours and Co. v. United States* refused to find an implied right of action for potentially responsible parties under Section 107(a).

With the circuits now split, the court is being asked to squarely decide the issue that it acknowledged but declined to resolve two terms ago in *Aviall*. On April 15, UGI Utilities Inc. petitioned the Supreme Court to review the 2nd Circuit decision in *Consolidated Edison*, arguing that the decision is in direct conflict with *Aviall* and a number of pre-*Aviall* rulings at the trial court level, all of which held that Section 107(a) is not available as a vehicle for the assertion of private contribution claims by potentially responsible parties.

The United States followed suit on Oct.24, filing a petition for a writ of certiorari to review the 8th Circuit's decision in *Atlantic Research*. Finally, on Nov. 21, DuPont asked the High Court to review the 3rd Circuit's August ruling denying the company the ability to recover cleanup costs from the federal government, which had formerly owned or operated the con-

taminated sites at issue. In its petition, DuPont argued that the 3rd Circuit's decision is in direct conflict with those from the 2nd and 8th circuits, and would discourage potentially responsible parties from voluntarily undertaking prompt cleanups.

All three petitions have been distributed for conference scheduled for Jan. 19. •