

Power Plant Cases in the Supreme Court

Article By:

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The Supreme Court's 2013 term just began but it is already shaping up to be an important one for power plant owners and operators. Three points stand out: First, on October 7, the Court denied *cert.* in ***Luminant Generation Co. LLC v. EPA***, a case in which several power companies were challenging the Environmental Protection Agency's (EPA) current approach to regulating air emissions during startup, shutdown and malfunction (SSM) events. The Court's action leaves in place a Fifth Circuit decision which upheld EPA's approach, at least as applied to the Clean Air Act state implementation plan (SIP) for the State of Texas. More importantly, the Court's action is likely to bolster EPA's confidence as it pursues its ongoing rulemaking concerning the SSM provisions in 39 other SIPs, a rulemaking in which EPA has proposed eliminating affirmative defenses for excess emissions that occur during "planned" SSM events. More information about EPA's ongoing SSM rulemaking can be found here: <http://www.epa.gov/airquality/urbanair/sipstatus/emissions.html>.

Second, the Court is actively considering whether to hear an industry challenge to EPA's regulation of greenhouse gases under the Clean Air Act's (CAA) prevention of significant deterioration (PSD) program. The Court currently has before it eight *cert.* petitions seeking review of the D.C. Circuit's August 2012 decision in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). That decision rejected industry challenges to EPA's four "core" greenhouse gas (GHG) regulations – the *Endangerment Finding*, in which EPA concluded that carbon dioxide emissions from motor vehicles contribute to air pollution reasonably anticipated to endanger public health and welfare; the *Tailpipe Rule*, in which EPA set motor vehicle GHG emission limits; the *Timing Rule*, in which EPA announced that GHGs are "subject to regulation" under the CAA as of January 2, 2011; and the *Tailoring Rule*, in which EPA announced that with respect to GHG emissions it was raising the statutory threshold for PSD applicability. A central point of dispute in the *Coalition* matter is whether EPA's conclusion that it is required to regulate motor vehicle GHG emissions means that EPA must also regulate stationary source GHG emissions. We should know shortly whether the Supreme Court will address that dispute.

Finally, the Court is scheduled to hear oral argument on December 8 concerning EPA's Cross State Air Pollution Rule, [a rule which the D.C. Circuit invalidated last summer](#). The Supreme Court's eventual decision in that case, [EPA v. EME Homer City Generation, L.P.](#), No. 12-1182, is likely to be extremely significant for power plant owners regardless of which side prevails. A ruling in EPA's favor will reinstate stringent emission limits on upwind power plants, but a ruling against EPA may simply lead to more stringent emission limits being imposed in downwind states. In all events, the case concerns a complex and difficult problem – interstate air pollution – and the Supreme Court's

decision is likely to clarify EPA's authority to address that problem.

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