



By Richard Lazarus

As Congress Stalls, the Courts Step In

Three different sets of petitions for a writ of certiorari pending before the Supreme Court, all arising under the Clean Air Act, attest to the implications for the courts of Congress's abdicating its environmental lawmaking responsibilities.

Congress passed the Clean Air Act in 1965, the Air Quality Act in 1967, the Clean Air Act Amendments of 1970, the Clean Air Act Amendments of 1977, and the Clean Air Act Amendments of 1990. The 13-year interval between the 1977 and 1990 amendments was at the time considered far too long given the need for the pollution control statutes to keep pace with science, technology, and administrative experience. It has now, however, been 23 years since the last significant amendment of the CAA. The need for refinement in response to new developments is no less than before, yet there is little reason to suppose that Congress will soon be able to muster the votes necessary for amending the statute.

The three sets of petitions pending before the Court very much reflect the problem with such statutory stagnation. The first, *Native Village of Kivalina v. Exxon Mobil*, filed on February 25, seeks damages from the largest U.S. sources of greenhouse gases based on the federal common law of nuisance. The petition faces an uphill battle, notwithstanding the

truly compelling underlying facts: the imminent destruction from climate change of the island where petitioners live off Alaska and the absence of timely relief under the existing CAA. Petitioners' principal hurdle is that two years ago in *American Electric Power Co. v. Connecticut* the Court unanimously rejected a similar claim for injunctive relief on the ground that the statute displaces the federal common law. Petitioners argue that the Court's reasoning in *American Electric Power* — that the CAA already provides a means to abate emissions — provides a sharp basis for distinction, because the act offers no damages remedy, which is the exclusive relief being sought in this new case.

The second set of petitions, *EPA v. EME Homer City Generation*, filed on March 29, is a stronger candidate for review because the solicitor general is one of the petitioners, and the Supreme Court grants most SG petitions. At issue in these cases is the legality of EPA's Cross-State Air Pollution Rule, which is the agency's latest effort to implement the CAA's provision designed to prevent upwind states from interfering with downwind states' ability to achieve National Ambient Air Quality Standards. As described in a previous column (November/December), EPA has been flummoxed for several years because the D.C. Circuit has interpreted the existing statutory language in a strikingly inflexible manner that appears to preclude what almost everyone agrees is the most sensible regulatory approach, interstate emissions trading. Yet, because Congress has simultaneously proven incapable of addressing the issue anew, EPA's only resort is High Court review.

Finally, last but not least, are the petitions seeking review of the D.C. Circuit's ruling last June in *Coalition for Responsible Regulation v. EPA*. In

that case, the agency essentially swept the table. The appellate court upheld EPA's determination that greenhouse gas emissions from new motor vehicles endanger public health and welfare, ruled that the tailpipe rule regulating emissions was neither arbitrary nor capricious, agreed with EPA that, in light of the tailpipe rule, the CAA's Prevention of Significant Deterioration Program required major stationary sources of greenhouse gases to obtain construction and operating permits, and dismissed for lack of standing challenges to EPA's so-called Tailoring Rule, which seeks to limit the number of those stationary sources now subject to that permit requirement. The panel was unanimous and included a wide spectrum of judges (Judith Rogers, David Sentelle, and David Tatel).

EPA has reason to take these petitions quite seriously. The CAA's application to climate change is easy in many respects but confounding in others. Judge Janice Rogers Brown loudly dissented from denial of rehearing en banc with an express invitation to the Supreme Court to revisit the "interpretive shortcoming" in its 2007 ruling in *Massachusetts v. EPA*. Judge Brett Kavanaugh's dissent was far less sweeping, but extended to

Three sets of petitions could portend a significant term for the Clean Air Act

EPA's longstanding view on the wide scope of its PSD program and likewise seemed directed to prompt further review. All four members of the Court who dissented in *Massachusetts v. EPA* are still on the Court and it requires only four votes to grant cert.

Should the High Court grant some or all of those petitions, the October 2013 term could well be one of the Court's most significant ever for the Clean Air Act.

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