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## SUPREME COURT RULINGS ARE BREATH OF FRESH AIR

### Connecticut a leading force in greenhouse gas regulation

By **LEE D. HOFFMAN**

In what is 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 month that not only strengthen the Environmental Protection Agency's ability to regulate both new and refurbished sources of air pollution, but also require it to regulate carbon dioxide and other "greenhouse gas emissions" from automobiles.

Taken together, these opinions give Connecticut the green light to continue its role as a leader in greenhouse gas regulation. At the same time, they provide regulators with additional tools to tighten restrictions on power plants that upgrade their facilities.

The first of the two opinions, *Massachusetts v. Environmental Protection Agency*, is likely to have far-reaching effects throughout the country, particularly in Connecticut. In the Massachusetts case, a 5-4 majority ordered the EPA to justify its decision to forgo regulation of carbon dioxide and other greenhouse gas emis-



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sions from automobiles. The Supreme 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 high 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 such emissions do not contribute to climate change.

In its defense, the EPA argued that, because other countries, such as India and China, significantly contribute to green-

house gas emissions, it has no duty to regulate such emissions, particularly since regulating automobile emissions would have a negligible impact on global warming as a whole.

Writing for the majority, Justice John Paul 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."

#### 'Historic Victory'

In addition to having far-ranging impacts on the issues of climate change and EPA's broader ability to regulate greenhouse gases, the case is of significance due to the

local impact the decision will likely have.

Connecticut, as part of the Regional Greenhouse Gas Initiative, has been one of the leading forces in greenhouse gas regulation. Moreover, Connecticut played a significant role in the coalition of 12 states that originally sued the EPA to regulate greenhouse gas emissions.

Leaders in state government seem willing press their recent successes on the greenhouse gas regulation front, and it appears that more regulation may be coming. Connecticut Attorney General Richard Blumenthal hailed the recent decision as a "huge, historic victory," and vowed to continue "to fight for aggressive action to curb global warming—including our lawsuit with other states to force emission reductions by power plants that are the nation's biggest carbon dioxide emitters."

Gina McCarthy, the commissioner of the state Department of Environmental Protection, echoed those sentiments by calling on the EPA to "grant a required waiver to allow Connecticut and nine other states to implement California's motor vehicle greenhouse gas emission standards," which would require automobile manufacturers to reduce greenhouse gas emissions from cars by up to 30 percent. According to McCarthy, the implementation of the Regional Greenhouse Gas Initiative will be a key issue for the DEP. Under the initiative, "one of [the DEP's] top priorities is implementing this historic cap and trade system to limit carbon emissions from power plants."

The exact shape and scope of the regulation contemplated by the DEP and the

Attorney General's office is not clear at present. However, what is clear is that both offices remain committed to regulating greenhouse gas emissions in Connecticut and will seek to have upwind states lower their contributions to Connecticut's greenhouse gas budget as well.

### **Unanimous Ruling**

Unlike the sharp division that marked the Supreme Court's decision in *Massachusetts v. EPA*, the other Clean Air Act case, *Environmental Defense v. Duke Energy Corp.*, found the court speaking with one voice. In the *Duke Energy* case, it unanimously ruled to overturn a lower court decision allowing *Duke Energy* favorable treatment under the New Source Review (NSR) provisions of the Clean Air Act.

Under 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.

The 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. ■