

## Observers: Power sector would benefit little from climate case victory

*By Jonathan Crawford  
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The fossil fuel-fired electric power industry may see few if any benefits if the U.S. Supreme Court strikes down a U.S. EPA stationary source greenhouse gas permitting program because the agency can regulate heat-trapping gases from new power plants using other means, according to some legal observers.

The EPA's preconstruction permitting and review program that requires new or modified stationary sources of greenhouse gases to install the best available control technology has come under fire from industry groups. The industry is arguing before the Supreme Court that the EPA misinterpreted the Clean Air Act in subjecting those types of gases to statutory requirements meant to apply to other pollutants.

Even if the Supreme Court rejects the greenhouse gas permitting program, the EPA can still regulate new fossil fuel-fired power plants under its new source performance standards, a rulemaking that many observers contend is not in jeopardy in the case because it falls under an entirely separate part of the statute.

"Regardless of where the Supreme Court comes out [in the case], the EPA still has the authority to move forward with performance standards under a separate part of the [Clean Air] Act," said Jonas Monast, director of the Climate and Energy Program at Duke University's Nicholas Institute for Environmental Policy Solutions.

Monast said that if the preconstruction permitting rules in the EPA's prevention of significant deterioration, or PSD, program are remanded — which he said is a "big if" — the agency can simply continue to proceed with developing the performance standards for power plants.

"It is important to understand that the EPA is taking two distinct approaches to regulating greenhouse gases from stationary sources," he added.

Oil and gas sector stands to benefit considerably more from win in climate case

In contrast to the fossil fuel-fired electric power industry, oil and gas refiners and producers, which strongly oppose the greenhouse gas regulations, would stand to benefit considerably more, said Paul Gutermann, partner at Akin Gump Strauss Hauer & Feld LLP.

"The oil and gas industry has an opportunity of strongly supporting the challenges to these regulations, and buying at least some time before greenhouse gas regulations hit that industry," he said.

While the EPA's greenhouse gas permitting program creates a single permitting regime that applies to any source that emits more than 100,000 tons or 75,000 tons per year, including refineries, the agency's new source performance standard applies exclusively to new power plants.

Monast said the court's rejection of the permitting program could give the oil and gas sector some breathing room from federal greenhouse gas rules for some time to come because the rulemaking process for setting performance standards is complex and lengthy. That has been the case with the new source performance standard for new power plants, which the EPA has had to reissue.

Industry has 'puncher's chance' to prevail on endangerment argument

Nevertheless, Gutermann said the industry has a "puncher's chance" of prevailing in its challenge to the greenhouse gas permitting program for stationary sources. One such compelling argument, he said, is that the EPA was required to make an endangerment finding for stationary sources, as it had done with mobile sources, prior to issuing its rulemaking.

"There is theoretically enough of a difference that the court could rule that a separate endangerment finding is required, or possibly that the EPA hasn't looked at precisely that issue, which is whether the basis for the endangerment finding they did for mobile sources was sufficiently general, or covered issues that also applied to stationary sources," he said.

Gutermann added that the endangerment finding, in which the EPA determined that greenhouse gases from mobile sources contribute to air pollution that may endanger public health or welfare, is a "statutory prerequisite for there to be PSD applicability." He said the EPA may have to conduct another study given that its endangerment finding focused only on the risk assessment and the health studies related to the types of emissions from cars as opposed to those from power plants.

At a minimum, Gutermann maintained, the EPA may have to re-examine the endangerment finding. But the court may find that the EPA also has to repromulgate the tailoring rule and everything else. Gutermann said that would potentially have the effect of at least halting the permitting program.

Advocates for the rule say the EPA's finding that greenhouse gas rules for new automobiles automatically triggered preconstruction review and permitting rules simply follow a plain reading of the language of the Clean Air Act. Under the EPA's interpretation, the PSD program goes into force once a pollutant, such as greenhouse gases, is regulated under any section of the Clean Air Act, including for motor vehicles.