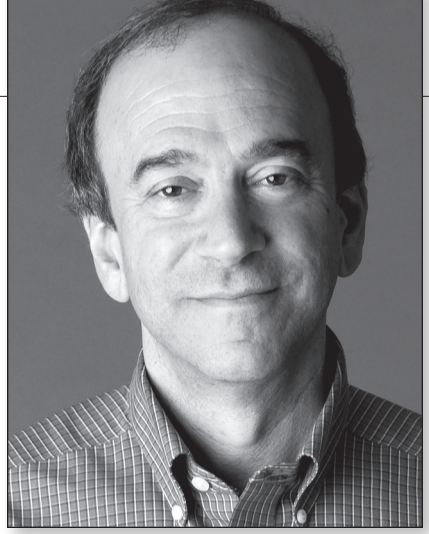

By Richard Lazarus

PSD Regs for GHGs Just a Sideshow

What makes the Supreme Court supreme is its authority to be the final word on matters of law, not politics. But, sometimes, the Court's rulings have more potential political portent than strictly legal significance. And one pending environmental lawsuit, *Utility Air Regulatory Group v. EPA,* may well be just such a case.

UARG concerns the validity of EPA's application of the Clean Air Act's Prevention of Significant Deterioration program to new major stationary source emissions of greenhouse gases. When the Court granted multiple industry and state petitions in *UARG* last October to consider the validity of the agency's PSD rulemaking, many environmental lawyers fairly assumed the case had all the trappings of a blockbuster.

A closer review of the formal order granting review, however, quickly revealed the case was no sizzler. In granting review on a narrow PSD issue, the Court had denied review of the biggest issues. In particular, the Court let stand EPA's determination that greenhouse gas emissions cause or contribute to an endangerment of public health and welfare. And it refused to consider the validity of EPA's new motor vehicle standards, which is the Obama administration's signature achievement to address climate change.

The case narrowed even further during briefing and oral argument. Although several of the petitioners and their supporting amici curiae had argued in their opening briefs that *Massachusetts v. EPA* should be overruled and that GHGs should not be covered at all by the Clean Air Act, petitioners had changed their tune by oral argument time. They were instead arguing that PSD need not cover GHG emissions because there were other parts of the act, in particular Section 111, better suited to regulating emissions from stationary sources. Indeed, petitioners' lead counsel spent considerable time at oral argument singing the virtues of Section 111 in application to GHGs.

On its merits, the shift in argument most likely represents petitioners' best chance for persuading the Court to reject EPA's broadest construction of the scope of the PSD program. But in doing so, attorneys also deprived the *UARG* case of much, if any, possible practical significance. After all, not even the most stalwart proponents of GHG regulation ever thought that PSD was the best or most appropriate way to address stationary sources.

Section 111 is clearly the better and more appropriate statutory basis, because EPA can do so on a categorical (rather than individual facility) basis, and can, of course, regulate existing sources too under Section 111(d). In light of petitioners' apparent concession of the scope of Section 111, Justice Stephen Breyer understandably asked both parties during argument: What possible difference, then, does the PSD program make?

The Court let stand EPA's determination that greenhouse gases endanger health, welfare

As a matter of law, likely very little. But as a matter of politics, potentially something. Should the Court rule against EPA on the PSD issue, one can rest assured that those opposed to EPA's use of the current Clean Air Act to address climate change will quickly try to use that ruling to bolster the political story line that the Court has repudiated the president's plan to "go it alone," without new legislation from Congress.

Of course, that would be mostly nonsense. The president's go-it-alone strategy is based on EPA's Section 111 authority, and not its PSD authority, and, in light of *UARG* petitioners' embrace of Section 111 before the Court, even an adverse PSD ruling is likely only to bolster EPA's ongoing efforts to promulgate sweeping regulations under Section 111. But that kind of nuance can quickly be lost in political discourse, which rarely concerns itself with legal accuracy.

The *UARG* oral argument was also noteworthy in another respect. In the midst of the argument, Justice Breyer wondered aloud what "Mr. Billings" would have thought if faced with the issue that now challenged EPA in trying to apply the language he drafted to greenhouse gases. For those of us in legal academia and the bar who revel in environmental law's history, it was a glorious moment.

The justice was referring to Leon Billings, who served as Senator Edmund Muskie's chief staffer during the drafting of the path-breaking environmental laws of the 1970s, including the Clean Air Act. Those then-new statutes addressed the toughest issues: the role of costs, benefits, risk assessment, scientific uncertainty, and technological availability in determining statutory objectives and the pollution control standards designed to achieve them.

And, in sharp contrast to lawmakers today, Billings and others (especially his Republican counterpart, Tom Jorling) forged the political compromises necessary to achieve congressional passage without giving up on the lofty ambitions of those laws, or otherwise undercutting their reach. For that reason, the Supreme Court shout-out to "Mr. Billings" was a wonderful moment.

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