Bloomberg BNA

# Toxics Law Reporter™

VOL. 28, NO. 22 JUNE 6, 2013

*Agency Authority*

## *Arlington v. FCC* Unlikely to Have Big Impact On Courts Reviewing EPA Action, Experts Say

The U.S. Supreme Court's May 20 decision in *Arlington, Texas v. FCC* that federal agencies are entitled to deference regarding the scope of their own authority may have little effect on the way reviewing courts deal with actions by the Environmental Protection Agency, environmental attorneys tell BNA.

The Supreme Court in *City of Arlington v. FCC*, U.S., No. 11-1545, 5/20/13, held that in cases in which Congress has left ambiguous a regulatory agency's jurisdiction, ''the court must defer to the administering agency's construction of the statute so long as it is permissible'' under the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), known as *Chevron* deference.

''Any time you come to issues of deference, EPA is going to be front and center because it puts out so many regulations,'' Alec Zacaroli an environmental lawyer with Kilpatrick Townsend & Stockton LLP in Washington, D.C., told BNA June 3.

**Statutes 'Just Too Clear.'** But federal environmental statutes are usually pretty clear in granting EPA interpretation authority. ''In the great majority of cases involving judicial review of EPA's actions, I think this new opinion will not come into play in a big way,'' Richard G. Stoll of Foley Lardner LLP in Washington, D.C., told BNA in a May 31 email.

''EPA's jurisdiction to regulate all sorts of activities under the Clean Air Act, the Resource Conservation and Recovery Act, etc., is just too clear—painfully clear as many would say,'' Stoll said.

''EPA in fact has so many unmet obligations to issue so many regulations under unworkable statutory deadlines—deadlines that public interest groups then easily convert to judicial orders with unworkable deadlines—that EPA really doesn't have that much time or resources (or need) to try to think of new ways to expand its incredibly broad jurisdiction,'' he said.

**'A Few Extraordinary Issues.'** The case probably will not do much to change the way reviewing courts deal with EPA's actions ''except for a few extraordinary—but of course highly important—issues,'' Stoll said.

One of those extraordinary issues, Stoll said, is the Clean Water Act's scope of jurisdiction over ''waters of the United States.''

''As the Supreme Court has continued to confuse us with its opinions on that issue, maybe now—if EPA ever comes up with a definitive interpretation—the courts (including the Supreme Court) will be more inclined to defer to EPA's position,'' he said.

**'*Massachusetts v. EPA* Comes to Mind.'** For one Clean Air Act practitioner, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (22 TXLR 329, 4/5/07) came to mind. ''That case wouldn't have been decided differently because it was first prong of *Chevron*, and ultimately the court found the statute to be clear,'' Zacaroli said.

But if the Supreme Court had not first determined that the Clean Air Act's language was clear, ''if you had taken the position that jurisdictional arguments are not subject to deference, that would have been an interesting case,'' Zacaroli said.

The central issue in *Massachusetts v. EPA* was whether air pollution includes carbon dioxide. ''Had [the court] decided that was not clear on its face, and then you consider whether the agency's interpretation should be afforded deference, then it's clearly a jurisdictional issue. If the act doesn't cover greenhouse gases as air pollution then the EPA can't regulate them,'' Zacaroli said.

''You have one administration saying no, greenhouse gases are not air pollution, and now you've got another administration coming in that will probably reverse that,'' Zacaroli said. ''It shows you the arbitrary nature of administrative rulemaking depending on the policies and politics of whoever is in charge.''

**Solution Without a Problem.** ''At a certain level it clarifies things, to the extent that people had any question about it. But I never realized this was an issue,'' Seth Jaffe, an environmental and administrative attorney at Foley Hoag LLP in Boston, told BNA May 31.

''There really is nothing in the history of *Chevron* deference cases that would have led one to doubt that it applies to jurisdictional questions,'' Jaffe said. ''Scalia [wrote in *Arlington* that] sometimes trial judges get confused essentially, and this decision will make it less likely that they would get confused.''

Jaffe said EPA is less likely to be affected than other agencies, because there is ''something different about EPA at a political level. EPA is so in the cross hairs and

 ISSN 0887-7394

it's got so many big decisions . . . and so many ambiguous statutes to interpret.''

EPA already has the discretion that would be granted by *Arlington*, Jaffe said. ''Maybe you could of described it as wishful thinking on their part, but I'm sure that the folks at EPA thought that they had discretion under *Chevron* to interpret ambiguous provisions of the Clean Air Act, the Clean Water Act, and superfund and all of that. They would have been truly shocked if it had come out the other way.''

''If you start to carve out exceptions, what kind of rule do you have?'' Jaffe asked. ''They have deference unless it's about jurisdiction? They have deference even about jurisdiction unless it's about state law or state authority? That's pretty complicated and difficult, especially considering any power not given to the federal government remains with the states—you could argue any question of federal authority is a federalism question.''

''Maybe it will have an impact. It shouldn't,'' Jaffe said. ''That's my short take.''

BY PERRY COOPER

*The opinion is at http://pub.bna.com/lw/111545US.pdf.*



  TXLR ISSN 0887-7394