

## Pesticides

### NRDC Requests EPA Review Glyphosate, Address Effects on Monarch Butterflies

The Natural Resources Defense Council petitioned the Environmental Protection Agency Feb. 24 to conduct an immediate review of the widely used herbicide glyphosate and take action to mitigate any unreasonable adverse effects on the North American monarch butterfly.

The NRDC requested that the agency initiate an "interim administrative review" of glyphosate within 30 days and complete the review within six months. The petition also requests that once the EPA completes its review, the agency take action to restrict uses of glyphosate and take other mitigation measures to protect monarch butterflies.

The EPA is currently conducting a review of glyphosate under its registration review program, which is designed to review every registered pesticide active ingredient at least once every 15 years to ensure the pesticide continues to meet the standard for registration under federal law. The NRDC said in the petition that an "urgent review" of glyphosate, which is marketed by Monsanto under the brand name Roundup®, is needed due to ongoing harm to U.S. monarch butterfly populations.

The EPA did not respond to a Feb. 24 request for comment on the petition.

**Declines in Monarch Populations.** The NRDC said the increased use of glyphosate on corn and other crops in the Midwest has led to a reduction in agricultural milkweed, a weed that is the food source for monarch larvae. The suppression of milkweed has contributed to a "sharp decline" in monarch butterfly populations, according to the NRDC.

The petition states that in 1997, before the widespread adoption of crops modified for resistance to glyphosate and the associated increase in glyphosate use, approximately 1 billion monarch butterflies migrated from the U.S. and Canada to Mexico for the winter. That number has dropped to an estimated 35 million butterflies this winter, according to the petition.

The NRDC said the disappearance of milkweed along migratory paths require adult females to travel farther to find plants on which to lay their eggs. Those females expend more energy during the search for an appropriate location, resulting in depleted body fat, the laying of fewer eggs and an increased risk of dying before reproduction, according to the petition.

Sylvia Fallon, a senior scientist with the NRDC, said in a Feb. 24 blog post that while temperature, drought and other factors affect monarch populations, researchers "broadly agree" that the increased use of glyphosate is a major contributor to population declines.

**Mitigation Measures Requested.** The petition requests that the EPA take steps to restrict the use of glyphosate in order to eliminate "unreasonable adverse effects" to monarch butterfly populations. The Federal Insecticide, Fungicide and Rodenticide Act only allows the EPA to register a pesticide for sale and distribution in the U.S. if the agency determines the pesticide can be used without resulting in unreasonable adverse effects on human health or the environment.

The requested mitigation measures mentioned in the petition are:

- restricted use of glyphosate and other herbicides along roads, power lines and other rights-of-way;
- required herbicide-free buffer zones around agricultural areas located along monarch butterfly migratory corridors; and
- required establishment of milkweed habitat zones where herbicide use is prohibited.

The NRDC also called on the EPA to assess the risks to monarchs associated with cosmetic and ornamental glyphosate use and to guard against dramatic increases in herbicide use resulting from the approval of new herbicide-resistant crops in order to protect monarch butterflies from further harm.

**Monsanto Supportive of Coexistence.** Monsanto Corp., in a Feb. 24 blog post, said the company is "eager" to work with conservationists, weed scientists, farmers and other groups to increase milkweed populations and rebuild the monarch butterfly habitat.

"There's no reason agriculture can't coexist with natural wonders like monarch butterflies and their annual migration," Monsanto said.

Monsanto noted that scientists have identified numerous factors contributing to monarch butterfly population declines, including the destruction of butterfly habitats in Mexico, extreme climate changes and other weather events.

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NRDC's Feb. 24 petition on glyphosate is available at [http://docs.nrdc.org/wildlife/files/wil\\_14022101a.pdf](http://docs.nrdc.org/wildlife/files/wil_14022101a.pdf).

## Climate Change

### Statutory Interpretation Central to Arguments In U.S. Supreme Court Greenhouse Gas Case

Counsel for industry and state petitioners seeking to overturn Environmental Protection Agency permitting requirements for stationary sources that emit greenhouse gases faced heavy questioning before the U.S. Supreme Court Feb. 24 as to the meaning of the phrase "any air pollutant" for purposes of Clean Air Act regulation (*Util. Air Regulatory Grp. v. EPA*, U.S., No. 12-1146, oral arguments heard 2/24/14).

EPA has interpreted the phrase to mean any regulated pollutant under the act in finding that the regulation of greenhouse gases for vehicles necessarily triggered stationary source permitting requirements.

Noting various interpretations advanced on the issue by petitioners, Justice Elena Kagan asked Peter Keisler, counsel for industry petitioners, to explain the interpretation of the phrase for which he was arguing. Kagan noted three interpretations from petitioners and that Circuit Judge Brett Kavanaugh gave one other interpretation in the underlying case before the U.S. District Court for the District of Columbia Circuit.



In response, Keisler sought to set forth the industry petitioners' main arguments and stated that while other provisions of the Clean Air Act give the EPA authority to regulate greenhouse gases from stationary sources, the prevention of significant deterioration provision does not because "the PSD program is exclusively focused on emissions that have area-specific air quality impacts, and not on globally undifferentiated phenomena."

Following up on Keisler's statements, Justice Ruth Bader Ginsburg asked about the endangerment finding, which refers to greenhouse gases having severe effects at the local level. Keisler responded that the industry petitioners' point is that it is not the kind of measurable area-specific impact.

Agreeing with Keisler, Justice Antonin Scalia said it is "certainly not measurable."

**'Conundrum' Over Statutory Violation.** Kagan said the "conundrum" that this case raises is that everyone is violating a statutory term. Kagan commented that the EPA says it can't regulate greenhouse gases at the statute's set threshold amounts and that industry petitioners would be violating the "any air pollutant" phrase as "no one" would naturally read the phrase to mean any air pollutant if they have localized effects, but not otherwise.

Counsel for the state petitioners, Jonathan F. Mitchell, Solicitor General of Texas, also faced questioning from Kagan as to the correct interpretation of the phrase "any air pollutant." Mitchell, however, disagreed with the proposition that the EPA's interpretation of the phrase is set and said instead that the EPA has used other interpretations.

**Agency Deference Questioned.** In response to questioning from Justice Sonia Sotomayor as to what the court should do, Mitchell said he was asking the court to hold that greenhouse gases included in the interpretation of air pollutant does not fit with unambiguous provisions of the PSD and Title V programs.

With respect to EPA's determination that only the largest stationary sources would initially be subject to greenhouse gas permitting, Justice Stephen G. Breyer questioned Mitchell about why the case didn't present a permissible example of an agency reading an exception into the statute.

Breyer laid out the choices for the act's permitting requirements. One interpretation would be any regulated air pollutant but not greenhouse gases. Another would be any air pollutant, including greenhouse gases, with EPA having the authority to exempt small emitters. He asked which does "less violence" to the statute.

Mitchell chose the first interpretation, saying the term "air pollutant" is flexible and can be interpreted to avoid "absurdity."

Saying the issue in the case was at the "apex" of deference, and that there's nothing that gets more deference than the agency's interpretation of such a complicated statute, Kagan asked why this wasn't a classic case for deference.

Mitchell responded by drawing an analogy to the situation in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), a case in which the state petitioner's brief said the court refused to give deference to an FDA interpretation regarding jurisdiction over tobacco products because the results would not have been compatible with rational regulation.

**EPA's Position Questioned.** Addressing Solicitor General Donald B. Verrilli Jr.'s arguments in support of the EPA, Justice Antonin Scalia asked why it would be unreasonable to give EPA authority to regulate mobile sources and not stationary sources given the licensing for stationary sources and the other problems it produces, saying that doesn't seem irrational at all to him.

In responding, Verrilli turned to the language of the Clean Air Act and the interrelation of the provisions at issue in the case.

Chief Justice John G. Roberts Jr. asked what best available control technology looked like with respect to greenhouse gases, following up that the issue deals with regulation of energy usage as opposed to particulate emissions such as the national air ambient quality standard provisions.

Verrilli responded that it's an "evolving" process with 140 or so permits that have been issued.

Roberts and Breyer asked what is gained by the EPA prevailing on its argument. They said if the EPA can regulate greenhouse gases with respect to sources that are already subject to permitting, that would get to 83 percent of greenhouse gas emissions. EPA prevailing on its argument that regulation of greenhouse gases for mobile sources triggered regulatory requirements for stationary sources would mean only an additional 3 percent, or 86 percent of such emissions, according to Roberts.

Scalia said he didn't have the expansive notion of reading an exception into the statute as Breyer and said an alternative choice to the EPA's approach was adopting a permissible interpretation of the statute that doesn't lead to the "absurdity."

Roberts questioned whether allowing the EPA to change the thresholds for permitting in the present case could result in the EPA's assertion of authority to change thresholds with respect to other pollutants regulated in the future.

Justices Anthony Alito Jr. and Breyer also seemed concerned with whether the EPA intended to regulate greenhouse gas emissions at the statutory thresholds at some time in the future, which would expand the number of entities subject to regulation, rather than keeping with the exemption for small emitters the agency has currently established for greenhouse gases permitting.

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The transcript of the oral arguments is available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-1146\\_nk5h.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1146_nk5h.pdf).

## Climate Change

### Supreme Court Considers Compromise On EPA's Greenhouse Gas Permitting

U.S. Supreme Court justices seemed to give serious consideration Feb. 24 to arguments for limiting the scope the Environmental Protection Agency's prevention of significant deterioration program, eliminating greenhouse gases as a permitting trigger (Util.