

## Client Alert.

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# D.C. Circuit Rebuffs Challenges to EPA's Climate Change Regulations

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In considering the most serious efforts to date to invalidate the federal climate change regulations, the U.S. Court of Appeals for the D.C. Circuit unanimously upheld several of EPA's Clean Air Act greenhouse gas (GHG) emissions rules against a challenge by industry groups and several states. In the case, *Coalition for Responsible Regulation, Inc., et al. v. EPA*, No 09-1322, the Court noted that considerable deference to agency scientific expertise was appropriate, and that EPA had taken steps to ease the potential regulatory burden on the challengers.

At issue were a series of three related EPA actions in response to *Massachusetts v. EPA*, the Supreme Court's landmark 2007 decision requiring EPA to assess GHGs as air pollutants under the Clean Air Act. The first was EPA's Endangerment Finding, which concluded that GHGs may "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." The Court noted that "EPA had before it substantial record evidence that anthropogenic emissions of greenhouse gases 'very likely' caused warming of the climate over the last several decades." This "substantial" scientific evidence was adequate to support the Endangerment Finding, particularly in light of the "precautionary and preventative orientation" of the Clean Air Act.

The second action was EPA's imposition of GHG emissions standards for cars and light trucks (the "Tailpipe Rule"). The Court rejected an argument that EPA improperly failed to account for certain cost impacts, holding that under *Massachusetts v. EPA*, the EPA had no discretion to decline to promulgate vehicle emissions standards once it had determined that GHGs could endanger public health or welfare.

The third challenge involved EPA's application of certain Clean Air Act permitting requirements to large stationary sources of GHGs. The challengers claimed that those requirements applied only to a subset of pollutants, called "criteria pollutants," regulated pursuant to National Ambient Air Quality Standards (NAAQS), which do not include GHGs. The Court disagreed and upheld EPA's longstanding interpretation of the requirements as applicable to emitters of *any* pollutant regulated by the Clean Air Act, which now includes GHGs.

Related to the third issue, the Court dismissed a challenge to EPA's "Timing and Tailoring Rule," which delayed and limited the application of the permitting requirements to major sources with GHG emissions exceeding 75,000 or 100,000 tons per year (depending on the particular provision). The permitting requirements are normally triggered for air pollutant emissions of 100 or 250 tons per year, but in light of the vast number of small-scale GHG sources that would exceed these thresholds, EPA opted to raise the thresholds to avoid an "overwhelming permitting burden." The Court found that the industry and state litigants in the case could not demonstrate that they were harmed by the Rule so as to have standing to challenge it in Court, given that the Rule had the effect of mitigating the burden of the GHG regulatory scheme.

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While the decision is a clear victory for the EPA, ultimately the issues are likely to be decided by the Supreme Court. And with further attempts in Congress to reverse EPA's actions pending, the states remain sharply divided regarding federal attempts to address global warming.

Morrison & Foerster and its Environment and Energy Group have more than four decades of experience in Clean Air Act and climate change issues, both nationally and in California, with its implementation of the Global Warming Solutions Act ("AB 32"). Along with our Cleantech Group, we are closely following these new developments and can provide additional detailed analysis regarding this case upon request.

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