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D.C. Circuit Upholds EPA Regulation of Greenhouse Gas Emissions from New Motor Vehicles and Major Stationary Sources

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The U.S. Court of Appeals for the District of Columbia Circuit has unanimously upheld four U.S. Environmental Protection Agency ("EPA") actions aimed at regulating greenhouse gas ("GHG") emissions. In *Coalition for Responsible Regulation, Inc. v. EPA*,[1] several states and industry groups challenged the EPA rulemakings which, either directly or indirectly, have the effect of regulating GHG emissions from vehicles and certain stationary sources under the Clean Air Act ("CAA").[2] As an immediate consequence of the decision, these rulemakings will stand as promulgated to force new cars and light trucks, as well as certain major stationary emitters of GHGs, to curb GHG emissions. Beyond these near-term impacts, the decision will eventually allow EPA to phase in permitting requirements for construction, modification, and operation of all stationary "major emitting facilities" that meet threshold GHG emissions. This will result in regulation of facilities never before covered by the CAA. More fundamentally, the decision further opens the door to allow EPA to regulate GHGs as "air pollutants" under the CAA, despite this seemingly square-peg-in-a-round-hole approach.

Background

The impetus of the *Coalition for Responsible Regulation* decision dates back to EPA's 2003 denial of a petition asking it to regulate GHG emissions from new motor vehicles, and the U.S. Supreme Court decision in 2007 that reversed the denial. In *Massachusetts v. EPA*,[3] a divided Supreme Court recognized that "greenhouse gases fit well within the [CAA]'s capacious definition of 'air pollutant,' " and held that, under § 202(a) of the CAA,[4] "EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."[5] Moreover, EPA *must* regulate "any air pollutant from any class or classes of new motor vehicles," but only if EPA first issues an "endangerment finding" which determines that such pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."[6] In holding that EPA "offered no reasoned explanation for its refusal to decide whether [GHGs] cause or contribute to climate change," the *Massachusetts* Court refused to decide whether EPA should issue an "endangerment finding" for

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[1] No. 09-1322 (D.C. Cir. June 26, 2012).
[2] 42 U.S.C. §§ 7401-7671q.
[3] 549 U.S. 497 (2007).
[4] 42 U.S.C. § 7521(a).
[5] *Massachusetts*, 549 U.S. at 532.
[6] 42 U.S.C. § 7521(a)(1). The *Massachusetts* Court did not explore the tautological problem with these definitions. "Air pollutant" includes any "air pollution agent." The term "air pollution" is not defined by the CAA.

GHGs, or whether policy considerations may guide EPA for such a finding.[7] The Court said, "We hold only that EPA must ground its reasons for action or inaction in the statute."[8]

EPA's Four Actions at Issue in Coalition for Responsible Regulation

In December 2009, EPA issued the first of its disputed actions—an "Endangerment Finding" which, in effect, forced it to regulate GHGs from new motor vehicles under the statutory mandate in CAA § 202(a)(1).[9] After its Endangerment Finding, EPA promulgated three more rules which either directly or indirectly have the effect of regulating GHG emissions. EPA first issued the so-called "Tailpipe Rule," directly setting GHG emission standards for new cars and light trucks pursuant to its Endangerment Finding.[10] Based on EPA's interpretation of the term "any air pollutant" under the CAA, EPA determined that the Tailpipe Rule also indirectly triggered regulation of GHGs with respect to construction or modification of stationary sources under the Prevention of Significant Deterioration ("PSD") program and operation of stationary sources under Title V. Specifically, EPA interprets "any air pollutant" under the PSD program and Title V to include "any air pollutant regulated under the CAA." With the promulgation of the Tailpipe Rule, GHGs became "regulated" to fit within EPA's interpretation which, by operation of law, triggered the PSD and Title V permitting programs.

Clarifying this interpretation, EPA concluded in another rulemaking (the "Timing Rule") that once the Tailpipe Rule took effect (regulating GHGs as "air pollutants") on January 2, 2011, permitting was required for certain stationary sources which meet the applicable PSD and Title V emissions thresholds.[11] To minimize the immediate impact of the expanded PSD and Title V applicability, EPA lastly issued the "Tailoring Rule."[12] The Tailoring Rule establishes a new threshold to require only the largest stationary-source emitters of "carbon dioxide equivalent" ("CO_{2e}") to obtain PSD and Title V permits. Specifically, under the first step of EPA's phase-in process, the Tailoring Rule only applies to stationary sources already covered under the PSD or Title V programs. The second step requires sources with the potential to emit 75,000 or 100,000 tons per year of CO_{2e}, depending on the project, to comply with the programs in terms of GHG emissions. Under the Tailoring Rule, EPA committed to phase in other major GHG-emitting facilities at a later time, due to the significant

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[7] *Massachusetts*, 549 U.S. at 534-35.

[8] *Id.* at 535. There is a tension between the Court holding that GHGs are air pollutants and holding "only" that EPA's lack of a reasoned explanation for its decision required a remand. *Massachusetts* deserves a more detailed analysis, from an administrative law and appellate perspective, than the authors can provide here.

[9] *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

[10] *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010).

[11] *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

[12] *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010).

permitting costs on small sources and the agency burdens of processing the additional permitting requirements.

In *Coalition for Responsible Regulation*, the D.C. Circuit consolidated several states' and industry groups' petitions to review EPA's Endangerment Finding, Tailpipe Rule, Timing Rule, and Tailoring Rule.

The Endangerment Finding[13]

The court initially explained that, in order to support the Endangerment Finding, EPA "compiled a substantial scientific record, which is before us in the present review." Thus, the court proceeded to address questions that the Supreme Court left unanswered in *Massachusetts*—whether, given the record, EPA may issue a finding under CAA § 202(a) that GHGs "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," and whether policy considerations may guide EPA in issuing such a finding.

The petitioners first argued that, under § 202(a), EPA must consider policy concerns and regulatory consequences, not only scientific evidence of potential harm. Relying on the plain language of § 202(a) and the *Massachusetts* decision, however, the court explained that only scientific considerations are required for the two prongs of an endangerment finding: "[1] whether particular 'air pollution'—here, greenhouse gases—'may reasonably be anticipated to endanger public health or welfare,' and [2] whether motor-vehicle emissions 'cause, or contribute to' that endangerment." As part of this argument, the petitioners asserted that the indirect, ultimate consequence of the Endangerment Finding—the triggering of PSD and Title V permitting for stationary sources—was an absurd result. This absurdity, alleged the petitioners, merits EPA's consideration of policy and regulatory consequences. The court, however, did not waver in limiting EPA's endangerment review to science-based considerations given the plain language of § 202(a).

The petitioners also mounted several challenges to the underlying scientific evidence used for the Endangerment Finding, which relied upon three, peer-reviewed "major assessments." The petitioners argued that EPA, in essence, improperly "delegated" its decision to the three entities responsible for the assessments. But the court explained that EPA made its own evaluations and relied on this existing science, as "the best source material" (in EPA's opinion), to make its own final determination. It did not matter that EPA relied on syntheses of specific studies. In the court's words, "EPA is not required to re-prove the existence of the atom every time it approaches a scientific question."

In response to other allegations that the science did not sufficiently support EPA's Endangerment Finding, the court explained that it is extremely deferential to an agency's technical expertise in evaluating scientific evidence. Courts presume a science-based agency action is valid if there is any "rational basis" for the action. In light of this standard, the court deferred to the "substantial" support for the Endangerment Finding that included evidence that human activity (i.e., "anthropogenic" activity) is contributing to GHGs which, in turn, warms the climate. Specifically, the court noted that EPA's determination that GHG emissions "very likely" caused recent climate warming was bolstered by evidence of natural and manmade changes to the climate, historical evidence of past climate change, and computer-based modeling of anthropogenic emissions. The court further explained that EPA had "substantial" evidence to demonstrate causation with respect to endangerment. That is, the Endangerment Finding concluded that human-induced climate change—including from motor-vehicle GHG emissions—threatens public health and welfare.

[13] *Coalition for Responsible Regulation*, No. 09-1322, at 21-39.

Despite the petitioners' arguments about the significant uncertainty in the record, the court indicated that the CAA's purpose is preventative—not remedial—and thus tolerates a certain degree of uncertainty to address mere *potential* future harm. As the court explained, § 202(a) "requires a precautionary, forward-looking scientific judgment about the risks of a particular air pollutant." Therefore, "some residual uncertainty," as stated in the *Massachusetts* decision, does not defeat the Endangerment Finding. The court further held that EPA need not define or quantify the concentration of atmospheric GHGs or the rate of climate change that will cause the endangerment. The court reasoned that there is inherent uncertainty in creating a specific numeric value for endangerment. The plain language of the statute does not ask EPA to quantify the endangerment. The petitioners mounted a host of other arguments with respect to the scientific evidence, all of which the court rejected to uphold EPA's Endangerment Finding.

The Tailpipe Rule[14]

The petitioners next challenged the Tailpipe Rule's "automatic" triggering of PSD and Title V regulation of stationary sources. They claimed that EPA used an improper interpretation of § 202(a)(1) and that EPA arbitrarily and capriciously failed to consider the cost impacts of the interpretation on stationary sources when issuing the Tailpipe Rule. Based on § 202(a)(1) and the *Massachusetts* decision, the court rejected the petitioners' focus on the alleged absurd result of increased costs for stationary sources. Section 202(a)(1) leaves EPA with no discretion to refrain from issuing motor-vehicle standards once an Endangerment Finding is made. Therefore, the court explained, EPA had no choice but to promulgate a tailpipe rule of some sort. EPA could not defer the Tailpipe Rule merely because it would indirectly trigger regulation of stationary sources as well.

The petitioners also argued that EPA failed to support the Tailpipe Rule with the Endangerment Finding, and with evidence that the Tailpipe Rule would mitigate or reduce any endangerment. To this, the court responded that a particular level of mitigation is not required. The court felt that the Endangerment Finding demonstrated that motor-vehicle emissions are a "significant contributor" to GHG emissions and that the Tailpipe Rule would result in "meaningful mitigation" of those emissions.[15] The court summarily rejected other challenges,[16] ultimately upholding EPA's promulgation of the Tailpipe Rule.

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[14] *Id.* at 39-45.

[15] The court gave one example of what it considered mitigation: "EPA estimated that the Rule would result in a reduction of about 960 million metric tons of CO_{2e} emissions over the lifetime of the model year 2012–2016 vehicles affected by the new standards." The *Massachusetts* Court previously opined that incremental regulation may mitigate the impacts of climate change. *Massachusetts*, 549 U.S. at 523-25. In neither decision was there an explanation of how much reduction of GHG emissions would be necessary to slow the pace of climate change. Absent such a showing, there is a problem of redressability that goes to the standing of the petitioners in *Massachusetts*.

[16] The court rejected the petitioners' argument that CAA § 202(a)(2) requires consideration of compliance costs for stationary sources, on the basis that the section applies only to costs incurred by the *motor-vehicle industry* to achieve compliance with new standards. Likewise, for reasons already stated, the court rejected arguments relating to flaws in the underlying Endangerment Finding, as well as alleged procedural defects.

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EPA's Interpretation of "Any Air Pollutant"[17]

In order to avoid the Tailpipe Rule's triggering of regulation of stationary sources, the petitioners challenged EPA's "longstanding interpretation" of the scope of the PSD permitting program. The petitioners did not, however, meaningfully challenge EPA's interpretation with respect to Title V. The interpretation of "any air pollutant" is important because the phrase is part of the definition of "major emitting facility,"[18] which, in turn, triggers permitting under CAA § 165(a).[19]

As the court explained, the PSD program generally applies to six "criteria pollutants," none of which are the GHGs collectively defined as an "air pollutant" in EPA's Endangerment Finding. Generally, the PSD program requires permits for construction or modification of "major emitting facilities" that are in "attainment" areas for the six criteria pollutants (i.e., areas which meet ambient air quality standards for the six criteria pollutants) or areas deemed "unclassifiable."[20] Under the CAA, "major emitting facilities" are those which emit or have the potential to emit either 100 tons per year or 250 tons per year (depending on the type of source) of "any air pollutant."[21] As the court indicated, obtaining a PSD permit requires the applicant to "install the 'best available control technology [BACT] for each pollutant subject to regulation under [the CAA]'—regardless of whether that pollutant is a [criteria] pollutant."[22] Therefore, the phrase "each pollutant subject to regulation" is also important. The court explained that, since 1978, EPA has interpreted the phrase "any air pollutant" to mean "any air pollutant regulated under the CAA." Because of this existing interpretation, once the Tailpipe Rule initially "regulated" GHGs, the PSD program "automatically" applied to facilities emitting 100 or 250 tons per year of GHGs in attainment or unclassifiable areas.

In addressing the parties' arguments, the court first determined that at least two petitioners, which were never regulated under the PSD program until the Tailpipe Rule triggered it, timely challenged EPA's interpretation.[23] The court proceeded to the merits of the statutory-interpretation challenge. For issues of statutory interpretation, courts proceed under the *Chevron* two-step analysis. If Congressional intent is clear, the court "must give effect to the unambiguously expressed intent of Congress." If, however, the statute is silent or ambiguous regarding the specific issue, the court will consider "whether the agency's answer is based on a permissible construction of the statute."

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[17] *Coalition for Responsible Regulation*, No. 09-1322, at 45-73.

[18] 42 U.S.C. § 7479(1).

[19] *Id.* § 7475(a).

[20] *See id.* §§ 7471, 7475(a).

[21] *Id.* § 7479(1).

[22] *See id.* § 7475(a)(4).

[23] EPA had countered that the challenge was untimely because its interpretation was established in rules promulgated in 1978, 1980, and 2002. Generally, a petition for review must be filed "within 60 days from the date of notice" of the rulemaking. An exception exists when the petition is based solely on "new grounds" that arise at a later time (i.e., a subsequent event which allows the claim to ripen). In that case, a petition may be filed within 60 days of the new grounds. The court explained that two petitioners, which were not previously regulated under the PSD program, established such "new grounds" because they were now subject to PSD regulation as a result of the recent Tailpipe Rule. Thus, the Tailpipe Rule ripened the two petitioners' claims, which they could have only speculatively asserted back in 1978, 1980, or 2002. Accordingly, the court held that the petitions to review were timely.

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Relying on the *Massachusetts* decision and language throughout the CAA, the court held that the term "air pollutant"—under the first step of the *Chevron* analysis—"unambiguously encompasses" GHGs. Likewise, the court held that the term "any" means just that, and concluded that the phrase "any air pollutant" encompasses all "regulated" air pollutants, now including GHGs. The court garnered further support for the conclusion that any "regulated" pollutant is the proper inquiry by referencing PSD provisions and the overall purpose of the CAA to protect public health and welfare. In essence, the court reasoned that the PSD program and CAA generally are intended to protect the public from harm, including effects on weather and climate, through the regulation of all pollutants—not just criteria pollutants. Accordingly, the court held that " 'any air pollutant' in the definition of 'major emitting facility' unambiguously means 'any air pollutant regulated under the CAA.' "

The industry petitioners asserted three alternative interpretations of the relevant terms with respect to PSD permitting. The court rejected the first alternative, which essentially sought to carve out a GHG-specific exception to the term "air pollutant" under the PSD program because GHGs are a global, rather than local, problem. For this, the court relied on the *Massachusetts* decision and the plain language of the CAA which focus on "any" or "each" air pollutant. As the industry petitioners' second alternative, they proposed to interpret the PSD program as applying only to "major emitting facilities" which (1) emit a criteria pollutant and (2) are located in an attainment or unclassifiable area for that specific criteria pollutant. In effect, under this interpretation, a major emitter of GHGs that does not emit any criteria pollutants would not be subject to PSD permitting requirements. At bottom, however, the interpretation would have required the court to hold that "any air pollutant" includes only criteria pollutants, which it was unwilling to do given the lack of ambiguity in that phrase. The court conceded that the phrase "any air pollutant" is narrower in certain contexts, but rejected the alternative. The court also summarily rejected the industry petitioners' third alternative, which sought to invoke the process for designation of new criteria pollutants, because EPA did not classify GHGs as criteria pollutants.

The Timing and Tailoring Rules[24]

The Timing Rule delayed the applicability of the PSD and Title V program until the Tailpipe Rule became effective. The Tailoring Rule then narrowed the applicability of those programs to only the highest GHG-emitting stationary sources. Recognizing these underlying purposes of the rules, the court dismissed the petitioners' arguments, based on a lack of Article III standing. The court held that it lacked jurisdiction because the petitioners failed to show an "injury in fact," or that any alleged injury could be redressed by *vacatur* of the rules. Because it had already upheld the Tailpipe Rule and EPA's interpretation of "any air pollutant," the court simply concluded that the alleged injury—the "automatic" triggering of the PSD and Title V programs—was not the result of any subsequent rulemaking. In the court's words:

Industry Petitioners were regulated and State Petitioners required to issue permits not because of anything EPA did in the Timing and Tailoring Rules, but by automatic operation of the statute. Given this, neither the Timing nor Tailoring Rules caused the injury Petitioners allege: having to comply with PSD and Title V for greenhouse gases.

Further, the court reasoned that the Timing and Tailoring Rules functioned to lessen the burden on petitioners, thereby eliminating any possibility that vacating the rules would redress any alleged injury. Thus, the court held that the petitioners lacked standing to challenge the rules.[25]

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[24] *Coalition for Responsible Regulation*, No. 09-1322, at 73-81.

Conclusions

In *Coalition for Responsible Regulation, Inc. v. EPA*, the D.C. Circuit picked up where the Supreme Court left off in *Massachusetts*, agreeing with EPA that GHGs are "air pollutants" that may be regulated under the CAA. Although it is evident that the CAA may not be the best fit for GHG regulation, the decision sends GHGs further down CAA's regulatory path. The decision also highlights courts' willingness to defer to what they perceive as EPA's technical expertise in making science-based decisions that ultimately allow the agency to regulate GHGs under particular CAA regulatory programs. It now appears likely that GHGs may eventually be regulated as "air pollutants" throughout the CAA.

In sum, *Coalition for Responsible Regulation* upholds four agency rulemakings that—pending any potential appeal to the U.S. Supreme Court—will immediately impact the motor-vehicle industry and any stationary sources that emit GHGs within the scope of the Tailoring Rule. Stationary sources already subject to the PSD program, and other new or modified stationary sources with the potential to emit 75,000 or 100,000 tons per year of CO_{2e} (depending on the project), will need to comply with PSD permitting and BACT requirements for GHGs. In addition, EPA intends to eventually phase in other "major emitting facilities." But it remains unclear what EPA's next GHG thresholds will be under the next steps of the phase-in. Under a literal interpretation of the CAA threshold, EPA has estimated the impact if it were applied immediately. Specifically, the PSD permitting and BACT requirements would expand from 280 sources per year to approximately 82,000 new sources, most of which would be small businesses and residential sources, with permitting costs estimated at an average of $60,000 per source.[26] As a result, potentially impacted sources must remain apprised of any future EPA actions. In addition, they may wish to participate as *amici curiae* in any potential petition for *certiorari* to the U.S. Supreme Court in the *Coalition for Responsible Regulation* case.

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[25] The court concluded its opinion by refusing to exercise jurisdiction over challenges to other EPA rules that ordered states to revise their State Implementation Plans to regulate GHGs under the PSD program. Such challenges are currently pending before the D.C. Circuit in two separate cases.
[26] 75 Fed. Reg. at 31,556.