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Summary of the D.C. Circuit's Greenhouse Gas Rulings

On June 26, 2012, the U.S. Court of Appeals for the District of Columbia Circuit (D. C. Circuit or court) upheld EPA's Endangerment Finding for greenhouse gases and the Tailpipe Rule and dismissed the petitions that challenged the Timing and Tailoring Rules. *Coalition for Responsible Regulation, Inc. et al. v. EPA*, No. 09-1322; *Coalition for Responsible Regulation, Inc. et al. v. EPA*, No. 10-1073; *Coalition for Responsible Regulation, Inc. et al. v. EPA*, No. 10-1092; *American Chemistry Council v. EPA et al.*, No. 10-1167 (D.C. Cir. June 26, 2012).

Specifically, the court unanimously held that:

> But for the reasons set forth below, we conclude: 1) the Endangerment Finding and Tailpipe Rule are neither arbitrary nor capricious; 2) EPA's interpretation of the governing CAA provisions is unambiguously correct; and 3) no petitioner has standing to challenge the Timing and Tailoring Rules. We thus dismiss for lack of jurisdiction all petitions for review of the Timing and Tailoring Rules, and deny the remainder of the petitions. (Page 16)

Overall, the court's opinion makes clear that EPA not only had authority to issue the regulations, but it had a legal duty to do so under the plain terms of the Clean Air Act and the Supreme Court's 2007 decision in *Massachusetts v. EPA*.

Background

Following the Supreme Court decision in *Massachusetts v. EPA*, EPA promulgated a series of greenhouse gas-related rules. First, EPA issued an Endangerment Finding, in which it determined that greenhouse gases may "reasonably be anticipated to endanger the public health or welfare." Second, it issued the Tailpipe Rule, which set emission standards for cars and light trucks. Third, EPA determined that the Clean Air Act requires major stationary sources of greenhouse gases to obtain construction and operating permits. However, as a result of the administrative burden on permitting authorities, EPA issued the Timing and Tailoring Rules to initially limit the application of the permitting obligation to large stationary sources starting January 2, 2011. Industry and State Petitioners challenged each of these rules.

Endangerment Finding

In response to the challenges to EPA's Endangerment Finding, the court concludes that the endangerment finding was "neither arbitrary nor capricious." "[T]he Endangerment Finding is consistent with *Massachusetts v. EPA* and the text and structure of the CAA, and is adequately supported by the administrative record." (Page 22) The court also notes that the additional determination petitioners request (e.g., performing a cost-benefit analysis, gauging the effectiveness of whatever emission standards EPA enacts, and predicting society's adaptive response to climate change) "do not inform the 'scientific judgment' that 202(a)(1) requires of EPA." (Page 24) Rather, the court holds that "[t]he statute speaks in terms of endangerment, not in terms of policy, and EPA has complied with the statute." (Page 25)

Petitioners also argued that EPA should have at least considered the "absurd" consequences that would follow from an endangerment finding, such as the hundreds of thousands of small stationary sources that would be newly-subject to Prevention of Significant Deterioration (PSD) and Title V permitting.

However, the court explains that the plain language of the Act "does not leave room for EPA to consider as part of the endangerment inquiry the stationary-source regulation triggered by an endangerment finding, even if the degree of regulation triggered might at a later stage be characterized as 'absurd'". (Page 26)

With regard to the scientific underpinning of the endangerment finding, the court holds that the Petitioners' claims lack merit. Petitioners had argued that EPA improperly 'delegated' its judgment to the IPCC, USGCRP, and NRC by relying on the assessments of climate-change science, but the court characterizes their reasoning as "little more than a semantic trick". (Page 27) The court explains that "EPA simply did here what it and other decision-makers often must do to make a science-based judgment: it sought out and reviewed existing scientific evidence to determine whether a particular finding was warranted...EPA is not required to re-prove the existence of the atom every time it approaches a scientific question." (Page 27)

In reviewing EPA's record underlying the Endangerment Finding, the court states:

> The record also supports EPA's conclusion that climate change endangers human welfare by creating risk to food production and agriculture, forestry, energy, infrastructure, ecosystems, and wildlife. Substantial evidence further supported EPA's conclusion that the warming resulting from the greenhouse gas emissions could be expected to create risks to water resources and in general to coastal areas as a result of expected increase in sea level...Finally, EPA determined from substantial evidence that motor-vehicle emissions of greenhouse gases contribute to climate change and thus to the endangerment of public health and welfare. (Page 30)

The court also notes that the existence of some uncertainty does not prevent EPA from acting given that the Clean Air Act is precautionary in nature and designed to protect public health. Citing *Ethyl Corp. v. EPA*, the court states that "EPA need not prove 'rigorous step-by-step proof of cause and effect' to support an endangerment finding...As we have stated before, 'awaiting certainty will often allow for only reactive, not preventative, regulation." (Page 31)

Additionally, the Industry Petitioners had argued that EPA's inclusion of PFCs and SF6 as part of the greenhouse gases listed in the endangerment finding was arbitrary and capricious because motor vehicles do not emit those two gases. However, the court holds the Petitioners lacked standing to make such an argument and thus the court lacked jurisdiction to review the issue.

Finally, in response to arguments surrounding EPA's denial of petitions for reconsideration of the Endangerment Finding, which cited the emails and internal documents from the University of East Anglia Climate Research Unit (so-called "climategate"), the court agrees with EPA's determination that none of the errors provided substantial support to overturn the Endangerment Finding.

Tailpipe Rule

With respect to the Tailpipe Rule, the court similarly holds that the rule was "neither arbitrary nor capricious". The Petitioners did not challenge the substantive standards of the Tailpipe Rule; rather, they argued that EPA failed to consider the cost of stationary-source permitting requirements triggered by the rule. However, the court concludes that, having "made the Endangerment Finding..., EPA lacked discretion to defer promulgation of the Tailpipe Rule on the basis of its trigger of stationary-source permitting requirements under the PSD program and Title V." (Page 40)

Consistent with the Supreme Court decision in *Massachusetts v EPA*, the court also determines that the plain text of CAA section 202(a)(1) precluded EPA from deferring to the National Highway Traffic Safety Administration's (NHTSA) authority to regulate fuel economy as the Petitioners had suggested.

Scope of PSD Permitting Triggers

In terms of stationary sources, the Petitioners challenged EPA's interpretation of the scope of the permitting requirements for construction and modification of major emitting facilities under CAA Sections 165(a) and 169(1) (PSD permitting triggers). Although EPA argued that the challenge was untimely because its interpretation of the PSD permitting triggers was set forth in its 1978, 1980, and 2002 rules and was thus no longer subject to comment, the court finds the challenges were ripe given the promulgation of the Tailpipe Rule.

However, when examining the merits of the Petitioner's arguments, the court holds that "EPA's interpretation of the governing CAA provisions is unambiguously correct." First, the court notes that "'any regulated air pollutant' is, in this context, the only plausible reading of 'any air pollutant.'" (Page 56) And, as the Supreme Court held, 'air pollutant' includes greenhouse gases. The court also explains that the PSD program requires covered sources to install control technology for 'each pollutant' regulated under the CAA and to establish that they will not cause or contribute to air pollutant in excess of any emission standard under the CAA. Thus, the court concludes that the PSD program is intended to control pollutants regulated under any section of the Act and that "Congress made perfectly clear that the PSD program was meant to protect against precisely the types of harms caused by greenhouse gases." (Page 58)

Stationary Sources: Timing and Tailoring Rules

Having determined that the Act requires PSD and Title V permits for major emitters of greenhouse gases, the court then examines the Petitioners' challenges to the Tailoring Rule and Timing Rules. Ultimately, the court determines that the Petitioners lacked standing to challenge these rules.

To establish standing, a petitioner must have suffered an injury that: 1) is concrete and particularized and actual or imminent, not conjectural or hypothetical; 2) was caused by the conduct complained of; and 3) is likely, as opposed to merely speculative, to be redressed by a favorable decision.

The court holds that "[s]imply put, Petitioners have failed to establish that the Timing and Tailoring Rules caused them "injury in fact" much less injury that could be redressed by the Rules' vacatur." (Page 77) The court explains that the Petitioners were regulated and the State Petitioners were required to issue permits not because of EPA's actions but by the "automatic operation of the statute." In fact, the court notes that the Timing and Tailoring Rules actually mitigate the injuries claimed by the Petitioners.

In response to this reasoning, the State Petitioners had argued that if the court were to vacate the Rules, Congress would be forced to enact "corrective legislation to relieve the overwhelming permitting burdens on permitting authorities and sources, thus mitigating their purported injuries." (Page 78) However, the court finds that this theory fails. Citing Schoolhouse Rock, *I'm Just a Bill*,[1] the court states that it has "serious doubts as to whether, for standing purposes, it is ever 'likely' that Congress will enact legislation at all." "As a generation of schoolchildren knows, 'by that time, it's very unlikely that [a bill will] become a law. It's not easy to become a law."(Page 79)

Of note, Industry Petitioners had also raised arguments related to the rules by EPA ordering states to revise their PSD SIPs to accommodate greenhouse gas regulations. The court, however, finds that it did

[1] http://video.google.com/videoplay?docid=7266360872513258185#

not have jurisdiction over those issues and challenges to these rules are currently pending in separate cases.

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