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Litigation of EPA Greenhouse Gas Regulation Continues as Courts Examine Implementation

Following the D.C. Circuit's June 2012 validation of EPA's greenhouse gas regulatory authority in *Coalition for Responsible Regulation, et al. v. EPA, et al.*, much of the attention has shifted to challenges to EPA's application of this authority, particularly with regard to permitting stationary sources such as power plants. This Issue Brief summarizes the current litigation landscape for EPA's regulation of greenhouse gas emissions from the electric sector.

Background

Multiple lawsuits challenging several related EPA actions to regulate greenhouse gases, including the endangerment finding, vehicles rule, and Tailoring Rule were consolidated into one case, *Coalition for Responsible Regulation, et al. v. EPA, et al.* The U.S. Supreme Court confirmed EPA's authority to regulate greenhouse gas emissions under the Clean Air Act in the 2007 decision, *Massachusetts v. EPA*. On June 26, 2012, the D.C. Circuit upheld EPA's Endangerment Finding and the Tailpipe Rule and dismissed the petitions that challenged the Timing and Tailoring Rules, thereby validating EPA's authority to regulate greenhouse gases under the Clean Air Act. Overall, the D.C. Circuit'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*. On May 7, 2013, the D.C. Circuit held oral arguments in two cases challenging EPA's State Implementation Plan (SIP) Call, which allowed smoothed the implementation of the stationary source greenhouse gas permitting in states with SIPs that did not allow for the regulation of additional pollutants (e.g., greenhouse gases). This outcome of these cases could shape implementation of greenhouse gas regulations for stationary sources.

Regulations at Issue

Litigation currently addresses a number of greenhouse gas regulations affecting stationary sources, particularly the electric sector. The following summarizes those regulations.

- Endangerment Finding. On December 7, 2009, EPA finalized the endangerment finding, which finds that greenhouse gas emissions cause or contribute to air pollution that endangers public health and welfare. Thus, EPA found that "atmospheric concentrations of greenhouse gases endanger public health and welfare within the meaning of Section 202(a) of the Clean Air Act".
- Motor Vehicles Rule. Following the endangerment finding, EPA and the Department of Transportation's National Highway Safety Administration (NHTSA) issued regulations to reduce greenhouse gas emissions from and improve fuel economy of new cars and trucks. This final rule triggered regulation of stationary sources under the Clean Air Act.
- Timing Rule. Under the Clean Air Act, the Prevention of Significant Deterioration (PSD) program requires new or modified major sources that emit one or more pollutants "subject to regulation"

under the Act to install the best available control technology (BACT) for such pollutants. In 2008, then-Administrator Stephen Johnson released a memorandum that intended to answer when a pollutant was "subject to regulation", positing that a regulation had to result in "actual control of emissions of that pollutant". In other words, monitoring or reporting emissions (e.g., carbon dioxide [CO_2]) would not trigger the PSD program. The Obama Administration finalized a rulemaking to further clarify that, in regard to the long lead-time of the motor vehicles rule, greenhouse gases were subject to regulation for the purposes of triggering PSD on January 2, 2011 (the first day on which 2012 model year cars, with greenhouse gas limits, could be sold).

- Tailoring Rule. On May 13, 2010, EPA released the final Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule). Broadly, this rule establishes the threshold for greenhouse gases for PSD and Title V, temporarily narrowing the definition of major source with regard to greenhouse gas emissions under the PSD and Title V operating permit regulation programs.[1] Notably, this rule does not begin regulation of greenhouse gases under PSD and Title V; the other rulemakings discussed above established that EPA understands this to occur when greenhouse gases become a regulated pollutant under the Clean Air Act on January 2, 2011. Rather, the Tailoring Rule explains how this regulation will initially occur. Without the Tailoring Rule, PSD and Title V would automatically include greenhouse gases at the current 100 to 250 tons per year (tpy) threshold (with a significance threshold for modifications of zero). This rule substantially raises the applicability threshold in the initial years of the program, beginning at 75,000 to 100,000 tpy, measured on a carbon dioxide-equivalent (CO_2e) basis.
- SIP Call. On December 1, 2010, EPA issued a SIP Call, which identified 13 states unable to implement greenhouse gas permitting by January 2011 and gave EPA the authority to impose a Federal Implementation Plan (FIP) to ensure sources can continue to obtain PSD permits in these states.
- Greenhouse Gas New Source Performance Standard (NSPS). On March 27, 2012, EPA proposed a greenhouse gas performance standard for new electric generating units (EGUs). The standard would require new fossil fuel-fired units to meet an output-based standard of 1,000 pounds of CO_2 per megawatt-hour, based on the performance of a new natural gas combined cycle facility. However, EPA missed the April 2013 deadline to finalize the greenhouse gas NSPS for new sources and has not indicated a timetable for proposal of a rule for existing sources.

Current Litigation

EPA's Greenhouse Gas Regulatory Authority

Coalition for Responsible Regulation, et al. v. EPA, et al.

On June 26, 2012, the D.C. Circuit upheld EPA's Endangerment Finding for greenhouse gases and the Tailpipe Rule and dismissed the petitions that challenged the Timing and Tailoring Rules. 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

[1] Under the Clean Air Act, PSD thresholds are 100 and 250 tpy, depending on source category. While these thresholds are appropriate for criteria pollutants, EPA estimated that applying these thresholds would increase the number of facilities annually subject to PSD from less than 300 per year to over 41,000 per year, and that the number of facilities annually subject to Title V permitting would increase from 14,000 to approximately 6.1 million. Accordingly, EPA determined that applying these thresholds would lead to "absurd results" and create significant "administrative burdens".

> 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.

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*. On December 20, 2012, the D.C. Circuit denied rehearing. Multiple petitioners have sought Supreme Court review; there is no deadline by which the Supreme Court must respond. However, a decision by the Supreme Court to review one or more of these cases could affect the entire greenhouse gas regulatory framework, including established rules as well as those still in development, such as the greenhouse gas NSPS for power plants. Of note, because the D.C. Circuit did not rule on the Tailoring or Timing Rules, if the Supreme Court were to grant standing to industry challenges, the D.C. Circuit would then have to review those rules on their merits for the first time.

Greenhouse Gas SIP Call

*State of Texas, et al. v. EP*A, et al., and *Utility Air Regulatory Group (UARG), et al. v. EPA, et al.*

Multiple states and several industry groups challenged EPA's 2010 Greenhouse Gas SIP Call, resulting in parallel cases in the Fifth and Tenth Circuits, respectively. Both were eventually transferred to the D.C. Circuit. On May 7, 2013, the D.C. Circuit heard oral arguments in both cases. A decision for the plaintiffs in either case could upend the still-developing greenhouse gas PSD programs in the affected states, although it would likely not have the nationwide impact that a reversal in *Coalition* would.

Greenhouse Gas NSPS

Las Brisas Energy Center, LLC, Petitioner v. Environmental Protection Agency and Lisa Perez Jackson

On December 13, 2012, the D.C. Circuit dismissed industry challenges to the proposed greenhouse gas NSPS, finding that the "challenged proposed rule is not final agency action subject to judicial review."

In response to EPA's failure to finalize the rule within one year, on April 15, 2013, several environmental organizations filed a Notice of Intent to Sue. Similarly, in May 2013, UARG sent a letter to EPA, claiming that the failure to finalize the proposal within one year terminated the proposal, requiring a re-proposal if the rule is to be promulgated.

Key Takeaways

The Supreme Court and D.C. Circuit have established precedent recognizing and upholding EPA's authority and obligation to regulate greenhouse gases. However, the D.C. Circuit's upcoming decision regarding EPA's implementation of its authority through the SIP Call will have implications for whether and how EPA is able to require compliance with its authority. While we expect every greenhouse gas regulation to be challenged in court, a clear victory for EPA in the SIP Call cases would send a signal that the courts are willing to grant EPA appropriate deference in developing greenhouse gas regulations. A ruling against EPA, by comparison, could be seen by some industry stakeholders as an indication that courts are willing to step in and constrain EPA's implementation of its greenhouse gas authority.

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