

DC Circuit Upholds EPA Greenhouse Gas Regulatory Program

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On June 26, 2012, the DC Circuit in *Coalition for Responsible Regulation v. EPA*, upheld a suite of EPA rulemakings on greenhouse gases (GHG) under the Clean Air Act (CAA). This ruling should provide regulatory certainty as to current EPA GHG programs and will likely bolster further EPA actions to address GHG emissions from the power sector and other major sources of GHG emissions. Below is a brief description of the relevant regulatory background, the decision and its likely impacts, and other recent related actions by EPA.

Regulatory Background

At issue in the case were four separate rulemakings emanating from the Supreme Court's holding in *Massachusetts v. EPA* that GHGs collectively may be regulated as an air pollutant under the CAA. In view of that holding, EPA made an "Endangerment Finding" that GHGs emitted from car and light trucks were an air pollutant "which may reasonably be anticipated to endanger public health and welfare." Based on the Endangerment Finding, EPA promulgated the "Tailpipe Rule," which set GHG emission standards for cars and light trucks. Once EPA issued that rule, it interpreted the CAA as automatically triggering regulation of stationary sources of GHG emissions as well under the CAA's Prevention of Significant Deterioration (PSD) program. The PSD program requires pre-construction permits for major emitting facilities projects (e.g. power plants, large manufacturers) undertaking construction or modification that have the potential to emit over 100 or 250 tons per year (tpy), depending on type of source, of regulated pollutants in an attainment area. Among other things, it requires regulated sources to establish best available control technology (BACT) standards for their emissions. The PSD permitting process can take well over a year to complete and can be challenged administratively and in court. The CAA Title V program also requires yearly operating permits for regulated sources above the 100 tpy regulated pollutant threshold.

Faced with the nearly impossible task of regulating the hundreds thousands of sources of GHGs under the PSD program and millions of sources under the Title V program at such low thresholds, EPA developed two more rules intended to phase in GHG regulation under the programs. In the "Timing Rule," EPA delayed the triggering of PSD and Title V requirements for major sources of GHGs until January 2, 2011, when it determined that the Tailpipe Rule became effective. Then, in the "Tailoring Rule," EPA departed from the CAA's 100/250 tpy thresholds, and required that only relatively large sources exceeding 75,000 to 100,000 tpy carbon dioxide equivalent (CO₂e), depending on the project, would be subject to the PSD and Title V permitting programs.

Industry groups, particularly from the power sector and large manufacturing, and a number of states challenged this suite of rules. Of greatest concern to them were the Endangerment Finding, because it was the legal underpinning and cause of all subsequent regulation, and the Tailoring Rule, because it clearly departs from statutory text and is the regulation that allows implementation of the PSD program for GHGs. The particular challenge to petitioners was that the Tailoring Rule was not the rule that actually imposed PSD for GHG, but rather relieved state permitting authorities and smaller sources from the burden of GHG permitting. Instead, under EPA's interpretation of the CAA, once the Agency regulated GHGs from mobile sources, PSD automatically applied to GHGs. Hence, those opposed to PSD

stationary source regulation of GHGs had no other way to challenge that interpretation other than challenging the Tailoring Rule and the other regulations underpinning it. Ultimately, more than sixty petitions for review were filed by industry and states in the DC Circuit, which held an unprecedented two-day hearing.

The Court's Ruling

The June 26 ruling dismissed the consolidated petitions in a unanimous *per curiam* order. As to the Endangerment Finding, the Court upheld EPA's determination on the merits, finding it to be consistent with the CAA and adequately supported by the administrative record. The Court gave short shrift to arguments that EPA should have taken other policy issues into account such as industry costs, stating the *Massachusetts* precluded such consideration. It also rather summarily dismissed arguments that EPA did not have sufficient evidence on which to base its finding, including rejecting arguments that EPA lacked sufficient studies of its own, that EPA could not act in the face of scientific uncertainty, and that the science was itself suspect (*i.e.* "Climategate.")

The Court upheld the Tailpipe Rule on the merits, finding that once EPA made the Endangerment Finding, it lacked discretion to defer promulgation of regulations and that its actions were not arbitrary and capricious. Notably, no parties had challenged the substantive standards of this rule. Rather, non-automotive industries focused principally on EPA's lack of consideration of stationary sources when it set the rule. The auto industry, having struck a deal with the Obama Administration on fuel efficiency, did not even challenge the rule.

The EPA then reviewed and rejected a number of arguments challenging EPA's longstanding interpretation of the CAA, holding that EPA could -- and was indeed "statutorily compelled" to -- conclude that once GHGs became regulated under the CAA (*i.e.* under the Tailpipe Rule), PSD and Title V obligations were automatically triggered. In so doing, the Court allowed parties to challenge EPA regulatory interpretations made many years ago which only ripened into issues once EPA regulated GHGs. While this allowed petitioners some leeway to challenge the EPA's interpretation as to whether and when PSD should be triggered for GHGs, the Court quite decisively disposed of the arguments on the merits.

Finally, as to the Timing Rule and Tailoring Rule, the Court dismissed the challenges because it found petitioners lacked the standing to challenge these regulations which actually served to mitigate the automatic application of PSD to all sources above the statutory thresholds as soon as GHGs became regulated under the Tailpipe Rule. The Court held that petitions could not establish injury in fact from these rules much less injury that could be redressed by vacatur of the Rules. Indeed, vacatur of the rules would result in harm to all sources, large and small.

Significance and Impact of the Ruling

This ruling is significant for several reasons. First, it is a unanimous decision, which included two of the judges who ruled in the original DC Circuit case that found EPA was *not* required to regulate GHGs, before that matter was reversed by the Supreme Court in *Massachusetts v. EPA*. Indeed, the DC Circuit was quite mindful of the Supreme Court opinion and cited it repeatedly as the basis and support for its various holdings. The unanimity of review will make it hard for petitioners to seek rehearing by the panel or rehearing *en banc* in the DC Circuit. A petition for certiorari would also appear less likely, since the ruling is carefully placed within the framework set forth by the Supreme Court. This does not mean, however, that no petitioner will seek review.

But perhaps most significantly, the ruling affirms EPA's approach to regulation of GHGs under the CAA, an approach strongly challenged by many in industry and some states. Indeed, the Court was markedly receptive to EPA's arguments. It acknowledged the substantial "ocean of [scientific] evidence" of climate change from GHG emissions and underscored EPA's authority to regulate GHGs as a precautionary matter even in the face of scientific uncertainty. Indeed, it went as far as to state that "Congress made perfectly clear that the PSD program was meant to protect against precisely the types of harms caused by [GHGs.]" These statements set a very high bar for those

who may seek to argue in the future that EPA should not regulate GHGs under other CAA programs. Notably, EPA's Endangerment Finding may now serve as the definitive statement by the agency that GHGs need to be regulated under the CAA. Indeed, EPA cited to the Endangerment Finding as one of the possible bases for the recently proposed and controversial New Source Performance Standards (NSPS) for GHGs from new power plants. The ruling then gives EPA apparent validation to extend its regulatory reach to NSPS and other areas, and also to further refine how it will treat sources under the PSD (e.g. EPA has temporarily exempted CO₂ emissions from biomass from the PSD program and recently decided not to regulate smaller sources, a matter it had deferred in the Tailoring Rule, see below).

Ultimately, the ruling will probably make it likely that the battle over GHG regulation will move to Congress, where the House has already acted to remove EPA's authority to regulate GHGs, only to be stalled in the Senate. The ruling though could also make it more likely that all sides may ultimately attempt a legislative fix that would create a more straightforward way to address GHG emissions than the current CAA.

Related EPA Actions on GHG

On a related note, on July 3, 2012, EPA issued a final rule on the last step of its Tailoring Rule. In that rule, which has yet to be published in the Federal Register, EPA decided it will not further lower the GHG thresholds in the Tailoring Rule, as it had previously considered. After evaluating public comments and assessing the progress of GHG permitting to date, EPA determined that state permitting authorities have not had sufficient time to develop necessary permitting infrastructure or to increase their GHG permitting expertise. EPA and states also had not had the opportunity to develop and implement streamlining approaches to permitting. Hence, EPA determined, *at this time*, it was not appropriate to apply PSD and Title V requirements to additional, smaller sources of GHG emissions. This suggests that EPA may propose further streamlining procedures or even consider lowering thresholds in the future as the permitting programs mature. EPA did in fact finalize one approach to streamlining permits, authorizing the use of site-specific plant-wide applicability limitations (PAL) for GHGs on a CO₂e basis, which would allow a facility to calculate its emissions source-wide rather than at specific emission points. With a PAL for GHGs, a facility could make changes to the plant without triggering PSD permitting requirements as long as emissions do not increase above the limit established by the PAL. Similarly, EPA will authorize a source that is above the GHG thresholds but has emissions of other regulated pollutants at minor source levels to apply for a GHG PAL which would still allow it to maintain its minor source status.

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