EPA Greenhouse Gas Rules Before the D.C. Circuit

On February 28 and 29, 2012, Judges Sentelle, Rogers, and Tatel of the U.S. Court of Appeals for the D.C. Circuit heard oral arguments in four consolidated cases, *Coalition for Responsible Regulation v. EPA* (Nos. 09-1322, 10-1092, and 10-1073) and *American Chemistry Council v. EPA* (No. 10-1167), challenging four EPA rulemakings on greenhouse gas (GHG) emissions and related historical rules. The challenged GHG rulemakings follow *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the U.S. Supreme Court ordered EPA to determine whether GHGs may reasonably be anticipated to endanger public health or welfare under the Clean Air Act. EPA has since determined that anthropogenic emissions of GHGs significantly contribute to global climate change. This flowchart highlights the major issues before the D.C. Circuit and some of the potential outcomes. The D.C. Circuit is expected to render a decision in summer 2012. Flowchart courtesy of Megan M. Herzog, a Law Fellow at the Environmental Law Institute.

(1) Endangerment Finding: determining that six GHGs collectively are an air pollutant that endangers public health or welfare, and that motor vehicle emissions contribute to this pollution; once EPA has made a finding that vehicle emissions contribute to pollution, it must set GHG emissions standards for new motor vehicles.

Did EPA permissibly deny ten petitions for reconsideration of its finding without engaging in notice-and-comment rulemaking?

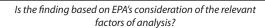
Yes, EPA properly determined that the evidence submitted did not support petitioners' claims. p. 39.

No, EPA improperly relied on documents placed in the docket after the close of the comment period. **Denial remanded**.

Did EPA unlawfully delegate its authority by relying on the Intergovernmental Panel on Climate Change's scientific assessments in its decisionmaking?

Yes, EPA failed to exercise its own judgment. Rule vacated and/or remanded.

No, EPA exercised its own judgment based on the best possible science. pp. 27-28.



Yes, EPA reasonably construed the Act to limit its judgment to scientific issues. p. 26.

No, EPA should have analyzed climate change adaptation and/or the eventual economic impacts of extending the Act to stationary sources of GHGs. Rule vacated and/or remanded.

Did EPA arbitrarily and capriciously define the "air pollutant" at issue as a mixture of six GHGs?

Yes, the record is extensive and petitioners do not dispute its key components. [The court found no Petitioner was injured by inclusion of the two additional pollutants in question and therefore Petitioners lacked standing to bring this claim. p. 35.]

No, EPA relied on flawed climate models and/or failed to properly evaluate scientific uncertainty. Rule vacated and/or remanded.

Under §202 of the Act, is EPA required to define "endangerment" in quantitative terms?

Yes, EPA is required first to establish quantitative decision-making criteria then examine whether the Vehicle Rule could ameliorate endangerment. Rule vacated and/or remanded.

No, EPA reasonably construed the Act, and EPA is afforded deference because it administers the Act. **Rule upheld**. p. 34. (2) Tailpipe/Vehicle Rule: setting GHG emissions standards for new motor vehicles, which the Act requires if vehicle emissions are found to contribute to air pollution; according to EPA, once the Vehicle Rule is in place, the Act's Prevention of Significant Deterioration (PSD) and Title V permitting programs will be "triggered" for stationary sources of GHGs.

Is the rule invalid because the endangerment finding is flawed?

Yes, the Vehicle Rule is dependent on the validity of a flawed endangerment finding. Rule vacated and/or remanded. No, claims against the endangerment finding must be raised separately. p. 43.



Is the rule arbitrary and capricious because it fails to consider the costs of the stationary source program that it will trigger?

Yes, EPA should have indefinitely delayed adopting the rule because it triggers unreasonably burdensome stationary source regulations. Rule vacated and/or remanded.

No, EPA has a nondiscretionary duty to set emissions standards following an endangerment finding, and/or these claims must be raised separately. p. 44.



Is the rule arbitrary and capricious because it will not fruitfully ameliorate climate change?

Yes, EPA must determine that an emissions rule will mitigate the related endangerment, but the Vehicle Rule will have only trivial impacts on climate change. Rule vacated and/or remanded.

No, the rule will result in significant GHG reductions and EPA otherwise lacks the discretion to decline to regulate based on the rule's degree of effectiveness. p. 43.



Should EPA have declined to regulate GHG emissions based on the authority of the National Highway Traffic Safety Administration (NHTSA) to set fuel economy standards?

Yes, EPA could properly have declined to regulate emissions given NHTSA's authority. **Rule vacated and/or remanded**. No, EPA's obligation to protect health and welfare is independent of NHTSA's energy efficiency mandate. Rule upheld. p. 42. (3) Timing Rule: extending the PSD program to facilities emitting GHGs as of the date the first vehicle engines can be certified subject to the Vehicle Rule; per EPA rules promulgated from 1978 to 2002, PSD applies to major sources of any regulated pollutant in areas satisfying National Ambient Air Quality Standards (NAAQS) for any pollutant.

Does the Court have jurisdiction over challenges to EPA's historical rules from 1978 to 2002?

Yes, based on the doctrines of "new grounds," ripeness, and/or reopener. [The court found it did have jurisdiction to review because the claims of at least two petitioners became ripe only with the greenhouse gas rules. p. 50. But because of the lack of standing, as indicated at the right, the analysis ended and the case was dismissed.]

Yes, based only on the doctrine of reopener, but petitioners may only challenge the Tailoring Rule. Case
No. 10-11670 dismissed.

No, the Act requires petitions for review to be filed within sixty days of rule issuance. Case No. 10-11670 dismissed.

(4) Tailoring Rule: phasing in the statutory thresholds at which stationary sources of GHGs will become subject to PSD and Title V permitting requirements, based on EPA's finding that immediately regulating millions of GHG stationary sources would unreasonably burden EPA and state administrators

Do petitioners have standing to challenge the Timing and Tailoring Rules?

Yeson Yeson

Yes, to challenge the underlying premise of the Timing and Tailoring Rules—i.e., EPA's historical interpretation that PSD applies to any pollutant regulated under the Act.

Yes, the application of PSD to GHG emissions injures petitioners, &/or because the state petitioners have standing, all petitioners have standing.

Yes, if the court enforced the Act's statutory thresholds, Congress would intervene to devise GHG-specific standards. No, the remedy sought—literal application of the statute—would fail to alleviate petitioners' injury. p. 81. Case No. 10-1073 dismissed. [Petitions against both the Timing and Tailoring Rules were dismissed for lack of standing.]



Chevron Step I: Is it clear from §§161, 165, and 166 of the Act whether Congress intended GHGs, which are a non-NAAQS pollutant, to be subject to PSD once they have been regulated under the Vehicle Rule (the "trigger")?

Yes, permit requirements are clearly based on emissions of "any air pollutant" regulated by the Act, including non-NAAQS pollutants. Rule(s) upheld.

Yes, under the "NAAQS-only situs" reading of the Act, PSD only applies to a NAAQS-pollutant source in an area in attainment for that pollutant. Rule(s) vacated and/or remanded.

Yes, the structure and purpose of the PSD program, and the unique characteristics of GHGs, signal Congress' intent not to regulate GHGs.

Rule(s) vacated and/or remanded.

No, the Act is ambiguous, but EPA has not had a chance to interpret the ambiguity; EPA thought its rules were compelled by Massachusetts v. EPA or Alabama Power v. Costle. Rule(s) remanded.

No, the Act is ambiguous, but EPA's rules have interpreted the ambiguity.

Chevron Step II: Is EPA's interpretation of the Act, through its rules, based on a permissible statutory construction?

Yes, although there are multiple interpretations, EPA's rational interpretation receives deference as long as EPA properly invoked the doctrine of administrative necessity, one-step-at-a-time, or absurd results as its basis for departing from statutory emissions thresholds.



No, EPA's interpretation of the trigger is unreasonable because it will have absurd results in the case of GHGs, and petitioners suggest alternative interpretations of the Act that would avoid absurd results (e.g., the "NAAQS-only situs" interpretation, or the interpretation that PSD cannot reasonably be applied to GHGs). Rule(s) vacated and/or remanded.

No, Congress set statutory emissions thresholds of 100/250 tons per year for the application of PSD, and EPA is not permitted to alter those standards in the Tailoring Rule. **Rule(s) vacated and/or remanded.**

 ${\it Did EPA properly invoke the doctrines of administrative necessity, one-step-at-a-time, and/or absurd results in the Tailoring Rule?}$

Yes, EPA invoked at least one of the doctrines in accordance with its statutory authority and Congress' intent. Rule(s) upheld.

Yes, EPA's invocation of the one-step-at-a-time doctrine is permissible, but EPA must demonstrate it is on track towards full implementation. Rule(s) upheld, but EPA must draft an implementation schedule.

No, EPA has improperly invoked each of the doctrines. **Rule(s) vacated &/or remanded**.