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D.C. Circuit Upholds EPA Greenhouse Gas Regulations

Peter J. Fontaine • 856.910.5043 • *pfontaine@cozen.com*
Joshua L. Belcher • 202.912.4826 • *jbelcher@cozen.com*

On June 26, 2012, the U.S. Court of Appeals for the D.C. Circuit upheld a suite of U.S. Environmental Protection Agency (EPA) actions related to the regulation of greenhouse gas (GHG) emissions under the federal Clean Air Act (CAA).[1] In particular, the court upheld the EPA's "Endangerment Finding" and "Tailpipe Rule," and dismissed petitions for review of the "Timing Rule" and "Tailoring Rule." With the D.C. Circuit's decision, all challenged aspects of the EPA's GHG regulations will remain in effect, dealing a heavy blow to opponents of the agency's policy on climate change.

Regulatory Background

The consolidated appeals before the D.C. Circuit had been brought by large group of industrial actors and states who were dissatisfied with the agency's GHG-related rulemakings under the CAA subsequent to the U.S. Supreme Court's landmark decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which established GHGs as "pollutants" under the CAA and required the EPA to determine whether emissions of GHGs from new motor vehicles threaten public health and welfare. In 2009, two years after *Massachusetts v. EPA*, the agency released its "Endangerment Finding," determining that GHGs *do* cause global climate change, that climate change endangers the public health and welfare, and that mobile source emissions of GHGs contribute to the concentration of GHGs in the atmosphere.[2] This finding ultimately required the agency to regulate motor-vehicle emissions, culminating in May 2010 with the "Tailpipe Rule," which established GHG emissions standards for passenger cars and light-duty trucks.[3] At the same time, the EPA announced in a reconsideration of agency interpretive policy that GHGs would become "subject to regulation" under the CAA's preconstruction New Source Review (NSR) and Title V permit programs when a regulatory or statutory requirement to control GHG emissions "takes effect."[4] As a result of this "Timing Rule," the triggering date for regulation of GHG emissions from stationary sources occurred on January 2, 2011, the effective date of the Tailpipe Rule. To check the extraordinary expansion in the number of sources that would become regulated under the CAA's preconstruction NSR and the Title V permit programs, the EPA issued its "Tailoring Rule," increasing the CAA's statutory emissions threshold for GHGs from 100 or 250 tons per year to 75,000 or 100,000 tons per year on a mass basis.[5]

The D.C. Circuit's Decision

The regulations' opponents argued the EPA had both misinterpreted the CAA and acted in an arbitrary and capricious manner. The D.C. Circuit first upheld the Endangerment Finding on the merits, deferring to the EPA's judgment and refusing to re-weigh the "substantial" scientific evidence on which the agency relied. As the court opined, "EPA is not required to re-prove the existence of the atom

1 The court's decision, *Coalition for Responsible Reg. v. EPA*, No. 09-1332 (D.C. Cir.) can be found here.

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

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

4 *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs* ("Timing Rule"), 75 Fed. Reg. 17,004 (Apr. 2, 2010).

5 *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* ("Tailoring Rule"), 75 Fed. Reg. 31,514, 31,553-54 (June 3, 2010).

every time it approaches a scientific question." The court also ruled that the language of the CAA, as confirmed by the earlier decision in *Massachusetts v. EPA*, did not allow the EPA to consider policy issues in making its Endangerment Finding. The court similarly rejected the claims against the Tailpipe Rule. According to the D.C. Circuit, the CAA clearly established a "non-discretionary" duty for the EPA to issue motor-vehicle emission standards once it found that GHGs contributed to air pollution. The *Massachusetts v. EPA* decision reinforced that duty, and the court ruled the Tailpipe Rule was not improper.

Finally, the D.C. Circuit upheld the EPA's long-standing interpretation of certain CAA permitting triggers that would require sources to obtain a permit if they emit major amounts of GHGs and are located in an area that is in attainment or unclassifiable for any pollutant for which National Ambient Air Quality Standards (NAAQS) had been established. However, the court simply dismissed related claims against the Timing and Tailoring Rules for lack of jurisdiction. Without addressing the merits of the underlying challenges, the court stated that no party could demonstrate actual injury that would result from these rules, and noted that the Timing and Tailoring Rules actually stand to mitigate the injuries alleged. The court also noted that to vacate the rules as requested would not provide the challengers with any relief, but would in fact expand the burden to a much broader spectrum of entities. As a result, the D.C. Circuit held that the petitioners failed to meet the fundamental test for establishing standing.

What's Next?

By validating its GHG-related regulations, particularly the merits decision on the Endangerment Finding, the D.C. Circuit has given the EPA clearance to continue regulating carbon dioxide and other GHGs at the national level. The ruling also undercuts industry challenges to several other related EPA rulemakings, setting back those efforts considerably. While challengers may ask for the decision to be reheard by a full panel of the D.C. Circuit or seek certiorari to the U.S. Supreme Court, neither tack would result in action in the near term and would do nothing to relieve industry of their present regulatory burdens. As for a political solution, there is no realistic chance for a successful legislative fix in the current election year. While much depends on the outcome in November, it nevertheless remains to be seen whether legislation would be any more likely in 2013. As a practical matter, industries impacted by the EPA's GHG regulations will be best served in the long run by reexamining now their operations for any potential compliance gaps and engaging EPA and state regulators early and often on future GHG-related rulemakings.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

Peter J. Fontaine at pfontaine@cozen.com or 856.910.5043
Joshua L. Belcher at jbelcher@cozen.com or 202.912.4826