

DC Circuit Clears Path for GHG Rules, But Politics Remain

By Michael B. Gerrard

What may have been the most important environmental decision of 2012 dismissed numerous challenges to the rules issued by the U.S. Environmental Protection Agency (EPA) to control emissions of greenhouse gases (GHGs). While further legal battles are looming, the most serious remaining threats to EPA's program are in the political sphere.

This article describes the ruling in *Coalition for Responsible Regulation v. EPA* [[http://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/\\$file/09-1322-1380690.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/$file/09-1322-1380690.pdf)], forecasts EPA's next moves, and describes the battles still ahead for EPA.

The Ruling

As most *Trends* readers are aware, the Supreme Court's landmark 2007 decision in *Massachusetts v. EPA* [<http://www.law.cornell.edu/supct/html/05-1120.ZS.html>]. held that the Clean Air Act authorizes EPA to regulate GHGs from motor vehicles. EPA did not exercise this authority while George W. Bush remained in office. Things changed rapidly as soon as Barack Obama became President in January 2009. Like most proponents of GHG regulation, he believed that the Clean Air Act was not ideally suited to addressing this global problem, and he supported legislation specifically addressing GHGs. The resulting Waxman-Markey bill, an economy-wide cap-and-trade program, narrowly passed the House in June 2009 but failed in the Senate. Thus the Obama administration was required to use its existing legal tools.

Proceeding under the Clean Air Act, after extensive hearings and opportunities for public comment EPA issued the "Endangerment Finding" -- a formal determination that GHGs pose a threat to public health and welfare. This finding was the prerequisite to all further action on GHGs under the statute.

The finding triggered the need to regulate GHGs from motor vehicles. Thus EPA and the National Highway Traffic Safety Administration (NHTSA) issued the "tailpipe rule" -- GHG and fuel economy standards for light duty vehicles for the model years 2012-2016.

This in turn triggered the need to regulate GHGs from stationary sources such as power plants and factories. Here a serious legal problem arose. The Clean Air Act specifies low numerical thresholds that make sense for conventional pollutants, but if applied to GHGs they could sweep in more than a million sources. EPA had no interest in requiring that many permits, so it raised the thresholds under what it called the "tailoring rule" so that only on the order of 10,000 sources would be covered.

EPA also issued the "timing rule," which specified that these permitting requirements for stationary sources would take effect on January 2, 2011.

These four rules led to an onslaught of litigation. Trade associations, coalitions, individual companies, and certain states filed more than 100 lawsuits. They were all joined together for purposes of argument before the U.S. Court of Appeals for the District of Columbia Circuit.

The court held a very unusual two days of argument on February 28-29, 2012. In the many post mortems that followed, every question and comment of the three members of the panel -- Chief Judge David Sentelle (an appointee of President Reagan) and Judges David Tatel and Judith Rogers (appointees of President Clinton) -- was scrutinized and analyzed.

The ruling came down on June 26. It was unanimous, and it was a resounding victory for EPA.

First, the court found that EPA had ample basis for the Endangerment Finding; EPA had independently and thoroughly scrutinized the available scientific studies, and there was more than enough in the record to uphold EPA's judgment. It declared that EPA "is not required to re-prove the existence of the atom every time it approaches a scientific question." The court also said the plain words of the statute required EPA to rest its finding solely on whether the pollutants caused an endangerment, without regard to the nature of the controls that might be imposed or their economic consequences.

Turning to the tailpipe rule, the court found that the Clean Air Act clearly provided that, once motor vehicle emissions were found to pose a danger, they must be regulated. It did not matter that this would trigger stationary source rules.

Finally, the court turned to the tailoring rule and the timing rule. Much ink had been devoted in the law reviews to the question of whether the tailoring rule, in particular, was an impermissible deviation from the statute, or whether it was allowable under such doctrines as "absurd results," "administrative necessity," and "one step at a time." The court did not get to any of that. Instead, it said that none of the plaintiffs had standing to challenge the rule. The effect of the tailoring rule was to regulate fewer sources, not more, and therefore no company was hurt by it.

EPA's Next Steps

Shortly before the court ruled, EPA proposed a New Source Performance Standard (NSPS) for GHG emissions from new fossil fuel-fired power plants. The rule would set emission standards that can easily be met by a modern natural gas-fired power plant, but not by a coal-

fired plant unless it has carbon capture and sequestration -- a technology that is not yet in commercial application anywhere in the world. With the court ruling, EPA is free to put this rule into final form when it is ready.

This proposed NSPS will not apply to existing power plants. EPA has not indicated when it will propose GHG controls that apply to them. However, a number of other recent EPA standards on non-GHG pollutants are bad news for existing coal-fired plants, such as a rule that restricts emissions of mercury and other hazardous air pollutants.

The NSPSs are a nationwide floor for the performance of new facilities. The prevention of significant deterioration and new source review programs are separate permitting programs, generally administered by the states. EPA has been issuing non-binding guidance documents on the technology standards that the states apply in those programs, and more of these documents can be expected covering additional source categories.

Also pending are a number of other EPA standards, not directly involving GHGs but covering GHG-intensive industries or activities, that will not be issued until after the November 2012 election. Among these are rules on the disposal of coal ash; the national ambient air quality standards for fine particulates and ozone; air pollution standards for Portland cement plants; cooling water standards for power plants; and guidance on permitting hydraulic fracturing operations that use diesel fuel. As noted above, the motor vehicle emission standards that the court upheld apply to light duty vehicles for the 2012-2016 model years. EPA and NHTSA have proposed standards for the model years 2017-2025. They have also established the first GHG standards for medium and heavy-duty vehicles, such as buses and large trucks, covering model years 2014-2018.

Upcoming Legal Challenges

One important aspect of the D.C. Circuit ruling is its resounding reaffirmation of the Endangerment Finding in the face of a ferocious onslaught from industry and anti-regulation states. This continues an unbroken streak for climate science in the U.S. courts. Not a single judge has expressed skepticism about anthropogenic climate change in a written opinion or dissent. There has only been one actual trial on the issue; a federal district judge found that Vermont's adoption of GHG standards for motor vehicles was supported by the scientific evidence about climate change. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie* [www.leagle.com/xmlResult.aspx?xmlDoc=2007803508FSupp2d295_1776.xml&docbase=CsLwAr3-2007-Curr], 508 F. Supp. 2d 295 (D.Vt. 2007).

The scientific evidence about how human activities are changing the climate continues to accumulate and strengthen. Notably, no models or comprehensive theories have emerged that can explain recent changes in temperatures and other weather patterns without including the key influence of GHGs. Some of the anti-regulation groups are persisting in their claims that there is too little evidence to warrant action, but these claims have had zero traction in the courts, where actual evidence must be presented and subjected to scrutiny. (The situation in the political arena, of course, is completely different.)

The legal assault against GHG regulation continues. Some of the *Coalition for Responsible Regulation* plaintiffs have petitioned the D.C. Circuit for en banc review, and if this does not succeed, there will almost certainly be a certiorari petition to the Supreme Court. Lawsuits have already been filed challenging EPA's proposed GHG NSPS for fossil fuel power plants (even though it is not yet final). Texas and other states that refused to cooperate with EPA's new GHG permitting programs are challenging EPA's takeover of these programs.

Attempts may be made to find a party with standing to challenge the tailoring rule. Every regulatory action EPA takes concerning GHGs can be expected to generate a lawsuit.

Political Challenges

Politicians, not judges, are far the greater threat to GHG regulation. The November 2012 election represents a sharp fork in the road. If President Obama and Vice President Biden are reelected, EPA will no doubt continue on its path to use the Clean Air Act and other existing statutes to regulate GHGs. If and only if they are reelected, the House of Representatives returns to Democratic control, and the Senate remains Democratic, we may see a resumption of efforts at a new climate change law.

If Mitt Romney and Paul Ryan win the election, events will be far different. As a presidential candidate (unlike as governor), Mr. Romney has opposed GHG regulation. Congressman Ryan has consistently voted for bills that would strip EPA of its authority to regulate GHGs, and his score on the League of Conservation Voters' 2011 National Environmental Scorecard is three out of a possible 100. If and only if they win, the House remains Republican, and the Senate shifts to Republican control, is there a real prospect of repeal of the provisions of the Clean Air Act that underlie EPA's actions.

Even in the absence of Congressional action, a Romney-Ryan administration would profoundly alter the course of GHG regulation. Rescinding the Endangerment Finding would be vulnerable to judicial attack without a good explanation of how the science no longer supports it. However, few if any of EPA's proposed regulations would become final, and those already in place, if not withdrawn, would almost certainly be unenforced. The environmental community and pro-regulation states would bring multiple lawsuits, but litigation over missed deadlines and unmet statutory mandates can stretch out for years. The pattern of a sluggish EPA and a slow

judicial response has been seen before in such presidential transitions as Carter to Reagan, and Clinton to Bush II. As the most pertinent example, George W. Bush and Dick Cheney took office in 2001; the Supreme Court ruled EPA had authority all along to regulate GHGs in 2007; and EPA did not actually act until Mr. Obama became President in 2009. In other words, a White House opposed to GHG regulation was able to delay it for two full terms. Thus the American people are facing extremely important choices.

Michael B. Gerrard is Andrew Sabin Professor of Professional Practice and Director of the Center for Climate Change Law at Columbia Law School, and Senior Counsel to Arnold & Porter LLP. He may be reached at Michael.Gerrard@APorter.com

354365