

CLIMATE-RELATED REGULATION AND LITIGATION UNDER THE CLEAN AIR ACT



Significant Climate-Related Rules/Actions

- California Waiver
- Endangerment Finding
- EPA/NHTSA Vehicle Rule
- PSD Timing Memo/Reconsideration
- PSD/Title V GHG “Tailoring” Rule
- GHG SIP Call and Federal Implementation Plans

Massachusetts v. EPA, 549 U.S. 497 (April 2, 2007)

- Clean Air Act section 202(a), 42 U.S.C. 7521(a) prescribes that EPA “shall” regulate new motor vehicle emissions of:
 - any “air pollutant”
 - that is anticipated to cause endangerment to public health or welfare.
- In Massachusetts v. EPA, the Supreme Court ruled (5-4):
 - GHGs meet the CAA definition of “air pollutant.”
 - Effects on climate are effects on “welfare.”
 - EPA must base its decision whether to regulate GHGs on:
 - Whether there is endangerment or not
 - Whether scientific uncertainty precludes EPA from making a reasoned judgment
 - EPA may not decline to regulate based on “policy” reasons.

California Waiver

- Under CAA section 209(a), State motor vehicle emission standards are *preempted* by the Clean Air Act.
- Preemption may be waived by EPA for California where:
 - ▣ CA standard are at least as protective as federal standard;
 - ▣ Standard is needed to meet “compelling and extraordinary conditions”;
 - ▣ Standard can be feasibly implemented in time frame provided.
- Other States may opt in to CA standards for which waiver is granted.
- In 2009, EPA granted California a waiver for GHG standards for MY 2009-2016 motor vehicles.
- On April 29, 2011, the D.C. Circuit dismissed challenges by Chamber of Commerce and auto dealers, finding a lack of standing.

Endangerment Finding

- Issued in December 2009.
- Conclusion: Mix of 6 common GHGs (carbon dioxide, methane, nitrous oxides, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) constitutes the “air pollutant” that contributes to “air pollution” that endangers public health and welfare for purposes of CAA section 202(a).
- The “endangerment” to public health and welfare is the risk of climate change.

Endangerment Finding

- 10 administrative reconsideration petitions and two related administrative stay requests were filed.
- Most raised “stolen e-mail” and other issues associated with report of the Intergovernmental Panel on Climate Change (IPCC) (“Climategate”).
- Others asserted that climate change does not endanger public health and welfare – that it’s actually a good thing.
- One asserted that EPA should decline to regulate due to effects on stationary sources.
- All were denied by EPA on July 29, 2010, with thorough explanation.

EPA/NHTSA Vehicle Rule

- Primary way to regulate motor vehicle GHG emissions is to improve vehicle fuel economy.
- National Highway Traffic Safety Administration (NHTSA) issues CAFE standards under Energy Policy and Conservation Act (EPCA).
- EPA can regulate vehicle GHG emissions under CAA section 202(a), which effectively regulates fuel economy as well.

EPA/NHTSA Vehicle Rule

- EPA and NHTSA developed proposed joint GHG/CAFE standards for model years 2012-2016 that would effectively establish a single federal standard of roughly 35.5 mpg (a 30% increase) by 2016.
- Due to lead time requirements under EPCA, joint rule had to be signed no later than 18 months before the 2012 model year (roughly April 1, 2010).
- Became applicable to MY 2012 vehicles manufactured and sold after January 2, 2011.
- Not controversial in and of itself, but triggers regulation of stationary sources of GHGs.

PSD Interpretive Memo (Johnson Memo) and Reconsideration

- Prevention-of-significant deterioration (PSD): new and modified major (i.e., large) sources of pollutants in areas that meet national air quality standards must obtain permits and install best available control technology (BACT) *before* constructing.
- Under CAA and EPA regulations, PSD permitting requirements (among other things) apply to “*any pollutant . . . subject to regulation under the Act.*” See 40 CFR 52.21(b)(50)(iv).
- December 18, 2008: Administrator Johnson issues memo finding that only regulations that require *actual control of emissions* (rather than mere monitoring or reporting) trigger this definition.

PSD Interpretive Memo (Johnson Memo) and Reconsideration

- On reconsideration (published May 4, 2010), EPA *affirms* Johnson Memo.
- Interprets Act such that GHGs will become “subject to regulation” on the first date that MY2012 vehicles may be sold (January 2, 2011) under the Vehicle Rule.
- So, on January 2, 2011, certain stationary sources of GHGs also became regulated by operation of statute.

A problem posed by the CAA

- Preconstruction PSD permitting and Title V operating permit requirements attach to facilities that emit more than 250 (or in some cases 100) tons per year (tpy) of a “regulated pollutant.”
 - For most pollutants, these thresholds capture only the very largest sources (power plants, factories, refineries, etc.), which can bear permitting costs and processes.
 - But GHGs are emitted in *vastly* greater quantities.
 - Thus, the statutory thresholds would capture offices, apartments, restaurants, and *many* small businesses.
 - PSD permits issued per year would climb from a few hundred to 15,000 or more, and Title V permits from a few thousand to over 6,000,000.
- How then to avoid creating permit gridlock once GHGs became “regulated pollutants” under the Act?

PSD/Title V GHG “Tailoring” Rule

- Raises the numeric thresholds triggering PSD and Title V permitting requirements to much higher levels (75,000 – 100,000 tpy initially) based on two legal theories:
 - *Absurd results* – Congress could not have intended to subject small sources that are incapable of bearing the burdens of PSD and Title V permitting to those programs. Therefore, EPA must “tailor” the program to avoid the absurd result.
 - *Administrative necessity* – Where it is administratively infeasible to implement a program as Congress commanded, an agency may permissibly tackle as much of the program as administratively feasible. Typically, this cannot last indefinitely.
- EPA won’t regulate smaller sources until at least April 2016, but commits to exploring in future rules whether to lower the threshold and to permanently exclude certain sources from PSD, title V, or both.

“Administrative Necessity”

- Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1980):
 - Authorizes an agency to depart from statutory requirements if the agency can demonstrate that the statutory requirements, as written, are impossible to administer.
 - The agency must first attempt to mitigate administrative problems through techniques consistent with the statutory requirements.
 - If variance from the statutory requirements nevertheless is necessary to allow administrability, the variance must be limited as much as possible.

“Absurd Results”

- E.g., Logan v. United States, 552 U.S. 23, 36-37 (2007)
 - “Statutory terms . . . may be interpreted against their literal meaning where the words ‘could not conceivably have been intended to apply’ to the case at hand.”
 - Authorizes departure from a literal application of statutory provisions if:
 - it would produce a result that is inconsistent with other statutory provisions or congressional intent, and
 - particularly if it would undermine congressional purposes.
- Petitioners argue, based on EPA’s invocation of the absurd results doctrine, that EPA should have avoided the absurd result by interpreting the statutory prevention-of-significant-deterioration provisions to apply only to pollutants for which EPA has established a National Ambient Air Quality Standard.

“Grounds Arising After” Challenges to 1978, 1980, and 2002 PSD Rules

- 12 petitions have been filed challenging EPA’s decades-old PSD/NSR rules, on grounds that Vehicle Rule re-opens and subjects those to renewed judicial review.
- Petitioners argue that PSD permitting applies only to pollutants for which EPA has issued a national ambient air quality standard (NAAQS).
 - There is no NAAQS for GHGs.
 - Therefore, EPA may not require PSD permits for sources of GHGs.
 - But EPA has regulated non-NAAQS pollutants under PSD program for 30 years.
- All 12 have been consolidated into a single case.
- DOJ filed a motion to dismiss, arguing:
 - The Vehicle Rule did not provide new grounds reopening these longstanding rules to renewed judicial review; and
 - Even if the Vehicle Rule did open these longstanding rules to renewed challenge, under the D.C. Circuit’s decision in *Ojato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C.Cir.1975), the issue must be presented to EPA first through a rulemaking petition before any petition for judicial review may be filed.
- Motion to dismiss was referred to the merits panel that will hear the cases.

GHG Litigation: Motions for Stay Pending Judicial Review

- Four motions for stay were filed on September 15, 2010, seeking variously to stay all the GHG rules and actions, or at least their “triggering effect” for regulation of stationary sources.
- On December 10, 2010, the D.C. Circuit (Judges Ginsburg, Tatel, and Brown) denied the various motions, finding movants had failed to show irreparable harm or causation.
- Effect of stay denial is that the GHG rules took effect, as planned, on January 2, 2011, and that triggered stationary source regulation as well.

Implementation of the GHG Permitting Program

- States are generally responsible for developing and administering the CAA permitting programs within their borders.
- 13 States lacked adequate authority under state law and regulations to issue required pre-construction permits to sources of GHGs as of January 2, 2011.
- To ensure such authority was in place, EPA:
 - Issued “SIP Call” to those States, requiring them to revise their programs before January 2011 to provide such authority.
 - Promulgated a Federal Implementation Plan (“FIP”) to provide such authority for States that did not have their own authority in place.

Implementation of the GHG Permitting Program

- 12 of the 13 States either timely developed programs or accepted a FIP (though some did so only reluctantly).
- Texas refused to revise its permitting program, contending EPA had no authority to require permits for pollutants for which there is no national ambient air quality standard.
 - ▣ Prompted EPA to issue “Error Correction Rule,” in which EPA partially withdrew Texas’s permitting authority and promulgated a federal program to take its place.

Current Status of Litigation

- The four major GHG rules/actions:
 - Have now all been fully briefed:
 - “After-arising” PSD rule challenges: EPA’s brief was filed June 23, 2011
 - Endangerment Finding: EPA’s brief was filed August 18, 2011
 - Vehicle Rule/CAFE Standard: EPA’s brief was filed September 1, 2011
 - Timing Decision/Tailoring Rule (consolidated): EPA’s brief was filed September 16, 2011
 - The cases will be argued together before D.C. Circuit Judges David Sentelle, Judith Rogers, and David Tatel over two days, February 28 and 29, 2012, with a decision expected before summer.
- GHG SIP Call/FIP cases:
 - Texas challenge to GHG SIP Call was filed in 5th Circuit but transferred to D.C. Circuit on our motion to dismiss or transfer; other petitions pending in D.C. Circuit as well. Texas moved to stay, but that was denied by the 5th Circuit.
 - Wyoming and other challenges to GHG SIP Call and 7-State FIP were filed in 10th Circuit. DOJ moved to dismiss or transfer to D.C., and that motion was granted.
 - Texas challenge to Error Correction Rule is pending in D.C. Circuit. The cases will be briefed this spring.

Pending GHG Litigation

The petitions are consolidated under the following lead cases:

- Endangerment Finding (and petitions relating to denials of reconsideration) – *Coalition for Responsible Regulation v. EPA*, No. 09-1322
- GHG Motor Vehicle Rule/CAFE Standards – *Coalition for Responsible Regulation v. EPA*, No. 10-1092
- PSD Interpretive Memo – *Sierra Club v. EPA*, No. 09-1018 (in abeyance)
- Final Reconsideration of PSD Interpretive Memo – *Coalition for Responsible Regulation v. EPA*, No. 10-1073 (now consolidated with Tailoring Rule)
- Tailoring Rule – *Southeastern Legal Foundation et al. v. EPA*, No. 10-1131
- 1978, 1980, and 2002 Prevention-of-Significant Deterioration/New Source Review Rule Petitions – *American Chemistry Council v. EPA*, No. 10-1167
- GHG SIP Call/FIP – *State of Texas v. EPA* (D.C. Cir.), No. 10-1425