D.C. Circuit Upholds EPA's Greenhouse Gas Regulations But Leaves Some Questions Unanswered

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On June 26, 2012, in Coalition for Responsible Regulation v. EPA (available at http://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/$file/09-1322-1380690.pdf), the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) rejected state and industry challenges to the U.S. Environmental Protection Agency (EPA)'s program for regulating greenhouse gases (GHG) under the Clean Air Act. The lawsuit involved a suite of four related GHG rules that EPA promulgated in response to the Supreme Court’s landmark 2007 decision in Massachusetts v. EPA, 549 U.S. 497, which held that GHGs constitute a pollutant under the Clean Air Act. The D.C. Circuit’s opinion offers EPA strong support for further regulation of GHG emissions, but parts of the decision leave unanswered some key questions and may open up others for future debate.

**The Court’s Holdings**

The D.C. Circuit’s opinion laid out its reasoning on the four rules as follows:

- **“Endangerment” Finding.** EPA’s finding that GHG emissions “may reasonably be anticipated to endanger public health or welfare” is not arbitrary or capricious. The court held that “EPA had before it substantial record evidence that anthropogenic emissions of greenhouse gases ‘very likely’ caused warming of the climate over the last several decades.” In addition to the conclusions previously reached by the Supreme Court, EPA had amassed additional lines of evidence, and the court concluded this evidence was strong and clearly fell within the “extreme degree of deference [the courts accord] to the agency when it is evaluating scientific data within its technical expertise.” Quoting from prior cases, the court rebuffed challengers’ arguments that uncertainties in the science prevented EPA from regulating, saying that the Clean Air Act is “precautionary in nature” and “designed to protect public health,” and in such circumstances, even if scientific evidence is “difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge,” the court “ask[s] only that it take the scientific record into account ‘in a rational manner,’” and held that EPA’s action here satisfies that standard.

- **EPA’s “Tailpipe Rule.”** The court reiterated the Supreme Court’s ruling in Massachusetts v. EPA that, under the Clean Air Act, once EPA has made an endangerment finding, it must regulate emissions of the pollutant involved (here, GHGs) from new motor vehicles. The only exceptions are if EPA were to (1) determine GHGs do not contribute to climate change or (2) provide a reasonable explanation for
why EPA could not or did not want to exercise its discretion to regulate these emissions. The court found EPA’s interpretation of the governing Clean Air Act’s provisions “unambiguously correct” and its actions in regulating motor vehicles neither arbitrary nor capricious.

- **The “Timing” and “Tailoring” Rules.** As a further “cascading” result that flowed from the endangerment finding, and based on EPA’s longstanding interpretation of the Clean Air Act, the Tailpipe Rule automatically triggered issuance of a rule under the Prevention of Significant Deterioration (PSD) program setting maximum GHG emission limits for stationary sources. The relevant statutory provisions would have required major facilities to meet emission limits of 100 or 250 tons per year (depending on the type of source), effective on the same date as the Tailpipe Rule. However, EPA concluded the number of facilities that would become subject to these very low PSD limits would have created a regulatory train wreck of epic proportions, and therefore delayed the effective date (the Timing Rule) and raised the emission thresholds (the Tailoring Rule) so that only the largest sources – those emitting 75,000 or 100,000 tons per year – would be regulated, at least initially. Many observers had handicapped opponents’ chances as strongest in challenging the Tailoring Rule, but the court held that none of the parties in the lawsuit could establish standing, that is, show that they had suffered an “injury in fact” that is “concrete and particularized,” “caused by the conduct complained of,” and “likely … to be redressed by a favorable decision.” To the contrary, the court held, the aggrieved parties in the case (which did not include environmental groups) were likely to have benefited from the ameliorative effects of the Timing and Tailoring Rules. Dismissing these claims, the court had no need to reach the merits of the question of whether EPA has the authority to deviate dramatically from the statute’s PSD thresholds (100 and 250 tons per year) and substitute much higher limits by regulation.

**Implications**

The court’s ruling clearly endorses EPA’s ability to regulate GHG emissions, including its reliance on climate change science, and will encourage EPA to promulgate further rules in this area. Further, for several reasons, it seems unlikely the outcome would change if the challengers were to seek rehearing by the full Court of Appeals or U.S. Supreme Court. First, the panel issued its opinion unanimously, and considering the ideological range of views among the three judges on the panel, the odds that either the full D.C. Circuit or the Supreme Court would grant review are low. Second, the court based much of its reasoning on and quoted liberally from the Supreme Court’s decision in *Massachusetts v. EPA*, and changes in the Supreme Court’s membership since 2007 make it more likely rather than the reverse that it would stand by those views, and therefore would see little reason to reconsider the issue.

The likelihood of immediate congressional action to change the result also seems small. While the House of Representatives will likely propose legislation, it has a low chance of passing in the current Senate, and would doubtless be vetoed by President Obama. But for the time being, because of the political sensitivity of EPA’s regulatory efforts in the face of claims that they harm jobs, EPA will likely avoid any visible effort to capitalize on this court victory by proposing further GHG rules, at least until after the November election.

Other questions have arisen as a result of the court’s reasoning in *Coalition for Responsible Regulation*. For example, due to the court’s dismissal of the petitioners’ challenges to the Tailoring Rule for lack of standing, it remains unclear how the court would have ruled on EPA’s regulatory modification of the Clean Air Act’s statutory thresholds if a decision was made on the merits. Interested parties are already speculating on how the issue could be teed up for a substantive decision by a state or industry stakeholder that did have standing to press the claim. The court pointed out the lack of record evidence that any of the states that objected to the Tailoring Rule would be adversely affected by global climate change, contrasting their situation with that in *Massachusetts v. EPA*, where Massachusetts presented evidence that its coastal land was threatened by global warming. In another lawsuit, a state might well follow Massachusetts’ lead and overcome a standing objection. Similarly, an industrial concern could potentially demonstrate injury if it was subject to costly GHG emission limits while its slightly smaller competitor fell just below the 75,000 or 100,000 ton per year regulatory threshold and escaped or delayed the need to pay for new emission controls.

The court’s holding that neither state nor industry petitioners have standing to challenge a regulatory provision that lessens the burden on the appealing party expands the existing body of D.C. Circuit case law restricting the circumstances under which challenges to regulations may be brought. The holding demonstrates the evenhanded application of the standing case law, i.e., this
specific holding is more likely to have negative effects on future state or industry challenges than on appeals by environmental advocacy groups, which have felt disproportionately constrained by prior standing decisions. At the same time, this apparent D.C. Circuit trend toward narrowing standing contrasts markedly with the Ninth Circuit's high-profile ruling in Edwards v. First American Corp., 610 F.3d 514 (2010), which allowed class action litigation to survive objections as to standing, despite the plaintiffs' acknowledgment that they had suffered no injury. The U.S. Supreme Court dismissed as improvidently granted its writ of certiorari on this case on June 28, 2012, and it is possible a split in the D.C. and Ninth, and other circuits' decisions on this issue has now emerged, which could provide the basis for another run at Supreme Court review.

EPA's untested justification for its departure from the statutory PSD limits included three administrative law doctrines: (1) avoidance of “absurd result,” (2) “administrative necessity,” and (3) proceeding “one step at a time.” There is lively interest in the regulated community in knowing whether a court would uphold these theories as a basis for EPA regulation that differs significantly from statutory requirements, and in speculating on what other contexts might lead EPA to invoke them.

Two other developments may result from the D.C. Circuit's decision and, in particular, its strong language on the settled nature of climate change science and the adverse effects of GHGs on human health. These unequivocal statements could spur environmental groups to reinvigorate their calls for EPA to promulgate a National Ambient Air Quality Standard – setting allowable levels for GHGs across the country under another Clean Air Act program – a major rulemaking effort EPA has shown reluctance to undertake. These findings also may cause insurers to expand existing “pollution exclusion” clause language to include climate-related incidents in new policies, and certainly the carriers will continue to argue that pollution exclusions in existing policies rule out coverage of GHG-based claims.

There is no question the D.C. Circuit's decision in Coalition for Responsible Regulation provides EPA with a solid basis for regulating GHG emissions. The issues it leaves for another day, and the way EPA's regulatory program will unfold, will be the subject of continuing interest in the regulated community.