Coalition for Responsible Regulation v. EPA: An Analysis of Judicial Deference and Regulatory Discretion

INTRODUCTION

Between 2009 and 2012, the Environmental Protection Agency (EPA) issued several landmark rules that sought to address the global concern of climate change but immediately faced a judicial challenge from industries and states that argued EPA had no authority to regulate greenhouse gases (GHGs). In *Coalition for Responsible Regulation, Inc. v. EPA*, the D.C. Circuit considered these complaints and validated EPA's actions.[1] The main issue in *Coalition* was whether EPA's attempts to regulate GHGs were permitted by the Clean Air Act (CAA). In a *per curiam* decision, the D.C. Circuit issued three significant findings regarding four EPA actions.[2] First, the court held that the EPA's Endangerment Finding and Tailpipe Rule were neither arbitrary nor capricious, thus allowing EPA to regulate motor vehicle GHG emissions.[3] Second, "EPA's interpretation of the governing CAA provisions [was] unambiguously correct."[4] Finally, the court held that none of the petitioners had standing to challenge the Timing Rule and Tailoring Rule, thereby permitting EPA to regulate stationary source emitters of GHGs under existing CAA programs.[5] Because the court never analyzed the merits of the third finding, it left unanswered a critical question of whether EPA could alter explicit numerical goals set by Congress to promulgate a rule with laxer thresholds, thus decreasing the regulatory burden of stationary source permitting.

I. BACKGROUND

A. The Clean Air Act and Massachusetts v. EPA

Coalition cited the "genesis" of its case as *Massachusetts v. EPA*, in which the Supreme Court sustained EPA's interpretation of CAA section 202 and held that GHGs "'unambiguous[ly]' may be regulated as an 'air pollutant' under the

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1. Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 113–14 (D.C. Cir. 2012).
2. *Id.*
3. *Id.* at 113.
4. *Id.*
5. *Id.* at 113–14.

Clean Air Act."[6] Section 202 requires the EPA Administrator to prescribe regulations for new motor vehicles and engines that cause or contribute to air pollution "which may reasonably be anticipated to endanger public health or welfare."[7] Historically, section 202 has been the statutory authority used by the EPA in promulgating regulations for vehicle emissions[8] such as hydrocarbons[9] and particulate matter.[10]

In *Massachusetts*, EPA argued that the CAA "does not authorize it to issue mandatory regulations to address global climate change" and that it would have been unwise to regulate GHGs since no causal link was established between GHGs and an increase in temperatures.[11] In a five-to-four decision, the Court rejected EPA's claims and decided that section 202(a)(1) authorized the regulation of GHGs from new motor vehicles.[12] EPA's failure to provide a "reasoned explanation" for not regulating GHGs was determined to be arbitrary and capricious.[13]

B. EPA Regulatory Actions

Following the *Massachusetts* decision in 2007, EPA issued its Endangerment Finding in December 2009, which found that "six [GHGs] taken in combination endanger both the public health and the public welfare of current and future generations."[14] The Endangerment Finding set into action a "cascade" of regulations.[15]

The first subsequent action was the promulgation of the Tailpipe Rule, which sought to reduce GHGs from motor vehicle emissions, pursuant to the section 202 requirement to regulate pollutants that may endanger public health or welfare.[16] On May 7, 2010, EPA and the National Highway Traffic Safety

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6. *Id.* at 114 (citing Massachusetts v. EPA, 549 U.S. 497, 529 (2007)).

7. 42 U.S.C. § 7521(a)(1) (2006).

8. *See generally* Jay M. Zitter, *Construction and Application of § 202(a)(1) of Clean Air Act (42 U.S.C.A. § 7521(a)(1)) Allowing for Promulgation of Standards Applicable to Emission of Air Pollutants from New Motor Vehicles or Engines, Which Cause, or Contribute to, Air Pollution, Which May Reasonably be Anticipated to Endanger Public Health or Welfare*, 13 A.L.R. FED. 2d 703 (2006) (explaining the historical applications of CAA to regulate air pollution).

9. *See* Ford Motor Co. v. EPA, 604 F.2d 685 (D.C. Cir. 1979) (holding that EPA's regulation of hydrocarbons was authorized by section 202(a)).

10. *See* Natural Res. Def. Council, Inc. v. EPA, 655 F.2d 318 (D.C. Cir. 1981) (holding that regulations of particulates for light-duty diesel vehicles and trucks and waivers for nitrous oxide emissions for light-duty vehicles were permissible under the EPA's broad authority as governed by section 202).

11. Massachusetts, 549 U.S. at 497.

12. *Id.* at 532.

13. *Id.* at 534.

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

15. ROBERT MELTZ, CONG. RESEARCH SERV., LEGAL CONSEQUENCES OF EPA'S ENDANGERMENT FINDING FOR NEW MOTOR VEHICLE GREENHOUSE GAS EMISSIONS 1 (2009), *available at* http://cnie.org/NLE/CRSreports/10Jan/R40984.pdf.

16. Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 115 (D.C. Cir. 2012) (quoting 42 U.S.C. § 7521(a)(1) (2006)).

Administration (NHTSA) issued a joint rule that will require vehicles to "meet an estimated combined average emissions level of 250 grams/mile of CO_2 in model year 2016."[17] The Tailpipe Rule had a far-reaching effect that went beyond mobile sources. Because it regulated an air pollutant deemed harmful to public health, it "automatically triggered" further GHG regulation from two different sections of the CAA that required regulation for known pollutants from stationary source emitters.[18]

The first triggered section of the CAA was the Prevention of Significant Deterioration of Air Quality Program (PSD), which "requires state-issued construction permits for certain types of stationary sources."[19] PSD requires permitting for steel and iron mills if they have the potential to emit over 100 tons per year (tpy) of any air pollutant and all other stationary sources if they have the potential to emit over 250 tpy of any air pollutant.[20] The second triggered provision, Title V of the CAA, "requires state-issued operating permits for stationary sources that have the potential to emit at least 100 tpy of 'any air pollutant.'"[21]

The confusion over when stationary sources would come under regulation led EPA to issue the Timing Rule, which stated that regulated air pollutants would be "subject to regulation" under PSD and Title V once the Tailpipe Rule took effect.[22] The Timing Rule specified that GHGs from stationary sources would be subject to regulation beginning on January 2, 2011, "the date when [GHGs] first became regulated under the CAA."[23]

In order to limit the number of industries adversely affected by PSD and Title V permitting, EPA then issued the Tailoring Rule, which "[d]epart[ed] from the CAA's 100/250 tpy emissions threshold" and instead required permitting for "only the largest sources—those exceeding 75,000 or 100,000 tpy" of carbon dioxide equivalent (CO_2e).[24] The rule is effectively a three-step process.[25] In step one, all stationary sources that are already regulated for non-GHG emissions and have the potential to emit 75,000 tpy CO_2e require a PSD permit.[26] Step two requires PSD permits for newly regulated sources if they have the potential to emit 100,000 tpy CO_2e.[27] The rule also requires Title V

17. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,329–30 (May 7, 2010).

18. *Coalition*, 684 F.3d at 115.

19. *Id.*

20. *Id.* (citing 42 U.S.C. §§ 7475, 7491(1)).

21. *Id.* (citing 42 U.S.C. § 7602(j)).

22. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,006 (Apr. 2, 2010).

23. *Coalition*, 684 F.3d at 115.

24. *Id.* at 116.

25. Meredith Wilensky, *The Tailoring Rule: Exemplifying the Vital Role of Regulatory Agencies in Environmental Protection*, 38 ECOLOGY L.Q. 449, 459 (2011).

26. *Id.*

27. *Id.*

permits for all sources that have the potential to emit 100,000 tpy CO_2e.[28] At the time of *Coalition*'s ruling, EPA had yet to finalize a third step, which includes the "possibility of regulating smaller sources."[29]

Coalition was brought to action when "[a] number of groups—including states and regulated industries—filed petitions for review of EPA's [GHG] regulations, contending that the agency misconstrued the CAA and otherwise acted arbitrarily and capriciously."[30] The case consolidated the petitions for review of EPA's four regulatory actions.[31]

II. HOLDINGS IN *COALITION FOR RESPONSIBLE REGULATION*

A. EPA's Endangerment Finding Neither Arbitrary Nor Capricious

The court in *Coalition* rejected multiple challenges to the Endangerment Finding and held that EPA's analysis of the evidence before them on climate change sufficiently justified its action.[32] First, petitioners alleged that EPA misinterpreted CAA section 202 when it failed to take into consideration policy concerns in issuing the Endangerment Finding.[33] As in *Massachusetts*, the court rejected the challenge and ruled that questions regarding public health or welfare and causes of endangerment "require a 'scientific judgment' . . . not policy discussions."[34] Second, industry petitioners asserted that "the scientific evidence does not adequately support the Endangerment Finding."[35] Again, the D.C. Circuit turned to *Massachusetts*, where "the Supreme Court confirmed that EPA may make an endangerment finding despite lingering scientific uncertainty."[36] Given this standard and a substantial body of evidence indicating that GHG emissions are the likely root cause of climate change, the court found the scientific evidence in support of the finding sufficient.[37] Third, petitioners argued that the Endangerment Finding was arbitrary and capricious because EPA did not "define, measure, or quantify . . . the atmospheric concentration at which [GHGs] endanger public health or welfare" or the rate and risks of climate change.[38] Drawing upon the findings in *Ethyl Corp. v. EPA*, the court held that EPA did not need to establish a minimum level of

28. *Id.*

29. *Coalition*, 684 F.3d at 145; *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits, 77 Fed. Reg. 41,051 (July 12, 2012) (promulgating Tailoring Rule Step 3, which maintains the permitting thresholds established in steps 1 and 2 of the Tailoring Rule in 2010).

30. *Coalition*, 684 F.3d at 116.

31. *Id.*

32. *See id.* at 117–25.

33. *Id.* at 117–18.

34. *Id.* (quoting Massachusetts v. EPA, 549 U.S. 497, 534 (2007)).

35. *Id.* at 120.

36. *Id.* at 122.

37. *Id.* at 120.

38. *Id.* at 122 (internal quotation marks omitted).

harm.[39]

B. EPA's Interpretation of the CAA Is Unambiguously Correct

The court then addressed petitioners' claim that "EPA relied on an improper interpretation of CAA section 202(a)(1), and was arbitrary and capricious in failing to justify and consider the cost impacts" of triggers for PSD and Title V regulations.[40] The court applied the *Chevron v. NRDC* "two-step" test for statutory interpretation, which required the court to first look at express statutory intent, then, if Congress's intent as to the particular issue before the court is unclear, examine whether an agency's decision is based on a permissible interpretation of the statute.[41] Applying the *Chevron* test, the court held that the statutory interpretation applied in *Massachusetts* compelled EPA's interpretation of section 202(a)(1).[42] As stated in *Massachusetts*, "[i]f EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles."[43] The court further found that the "plain text of Section 202(a)(1) also negates Industry Petitioners' contention that EPA had discretion to defer the Tailpipe Rule on the basis of NHTSA's authority to regulate fuel economy."[44] In fact, the final rule was jointly issued by NHTSA and EPA, and addressed both GHG emissions and fuel economy standards.[45]

C. No Standing to Challenge Timing and Tailoring Rules

The court addressed petitioners' challenges to the stationary source regulations by holding that the CAA authorized PSD and Title V permitting of GHGs and that petitioners had no standing to challenge the rules.[46] The court began its stationary source permitting analysis by considering respondent EPA's contention that the petitioners' "challenge is untimely because its interpretation of the PSD permitting triggers was set forth in its 1978, 1980, and 2002 Rules."[47] Because the PSD regulations affected sources that had never previously been regulated by the CAA, the court found that their petitions were timely and worthy of judicial consideration.[48]

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39. *Id.* at 123 (citing Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976)).

40. *Id.* at 126.

41. *Id.* at 116; Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

42. *Coalition*, 684 F.3d at 126.

43. Massachusetts v. EPA, 549 U.S. 497, 533 (2007).

44. *Coalition*, 684 F.3d at 127.

45. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,329–30 (May 7, 2010).

46. *Coalition*, 684 F.3d at 129, 134–35, 146.

47. *Id.* at 129.

48. *See id.* at 130–132 ("[B]ecause petitioners NAHB and NOPA's challenges to EPA's PSD permitting triggers are newly ripened upon promulgation of the Tailpipe Rule and they filed petitions for review within sixty days thereof, their challenge to EPA's interpretation of the PSD permitting triggers is timely.").

Next, the court addressed petitioners' claim that the CAA did not require permitting for major stationary source emitters and analyzed the PSD and Title V provisions of the CAA by applying the rules of statutory construction specified in *Chevron*.[49] Here, the dispute "center[ed] largely on the scope of the PSD program—specifically, which stationary sources count as 'major emitting facilities' subject to regulation."[50] The court started with a plain language reading of CAA section 169, governing the PSD program, and found that "Congress's use of the broad, indiscriminate modifier 'any' . . . strongly suggests that the phrase 'any air pollutant' encompasses [GHGs]."[51] The court also applied the broad definition of "air pollution" used in *Massachusetts* and concluded that the CAA's plain language explained that GHGs were air pollutants.[52] EPA's interpretation was also supported by CAA language that PSD regulates "each pollutant subject to regulation" under the CAA[53] and congressional intent specifying that PSD's purpose is to "protect public health and welfare from any actual or potential adverse effect . . . from air pollution."[54] Having established that the CAA empowers EPA to regulate GHGs under the PSD program and Title V, the court addressed petitioners' specific challenges to the Tailoring and Timing Rules.[55] Specifically, the petitioners claimed that EPA had no authority to depart from the CAA's permitting thresholds and create its own standards.[56]

Before assessing the merits of the claim, the court questioned whether the petitioners had standing based upon the doctrine applied in *Lujan v. Defenders of Wildlife*.[57] *Lujan* held that in order "[t]o establish standing, a petitioner must have suffered an injury in fact that is 1) concrete and particularized . . . , 2) was caused by the conduct complained of, and 3) is likely, as opposed to merely speculative [to] be redressed by a favorable decision."[58] Applying the *Lujan* elements, the court held that the petitioners fell far short of the standing requirements because they could not claim injury under the Timing and Tailoring Rules and could not seek redress from vacatur of the two rules.[59] Because the court held that plaintiffs lacked standing, it did not address the fundamental issue of whether EPA had proper authority to change the 100/250 tpy thresholds to the laxer ones promulgated in the Tailoring Rule.[60]

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49. *Id.* at 132–36.
50. *Id*. at 133.
51. *Id.* at 134 (quoting 42 U.S.C. § 7479(1) (2006)).
52. *Id.*
53. *Id.* at 135.
54. *Id.* at 135–36.
55. *Id.* at 144. The court specifically noted that "[p]etitioners fail to make any real arguments against the Timing Rule" and the analysis that follows mainly focuses on the Tailoring Rule. *Id.*
56. *Id.* at 145.
57. *Id.* at 146.
58. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted).
59. *Id.*
60. *Id.*

III. ANALYSIS—THE UNRESOLVED CHALLENGE FROM PETITIONERS REGARDING THE TAILORING RULE

Coalition followed the key policy ramifications of *Massachusetts* by requiring the EPA to regulate GHGs for vehicles. However, it left unaddressed a crucial question of how much leeway EPA has in crafting GHG rules for stationary sources. The first two key holdings in *Coalition*, which upheld the EPA's mobile source emissions actions and EPA's reading of the CAA, relied heavily on the Supreme Court's decision in *Massachusetts*. The court, however, did not directly analyze the merit of the petitioners' claims on EPA's stationary source regulations because the petitioners lacked standing. In particular, EPA's decision in the Tailoring Rule to relax statutory requirements for PSD and Title V permitting rules amounted to a great deal of regulatory discretion in the face of specific statutory text that set thresholds of 100/250 tpy for permitting air pollutants.[61] Instead of following the CAA text, EPA opted to tailor stationary source permitting to emitters reaching far different thresholds of 75,000/100,000 tpy CO_2e. Why did the EPA take such an inconsistent departure from a plain reading of the CAA text when the courts in *Massachusetts* and *Coalition* deferred to the "unambiguously expressed" intent of Congress?[62]

The EPA was particularly concerned that moving forward with the automatic triggering of PSD and Title V permitting without modification of its rules would impose undue financial burdens and overwhelm state and local permitting authorities.[63] EPA justified its decision by noting that PSD program permitting for GHGs under a threshold of 100/250 tpy CO_2e would increase applications "from 280 per year to over 81,000 per year."[64] The corresponding figure for Title V permitting under the 100/250 tpy threshold would increase the amount of operating permits from "14,700 per year to 6.1 million per year."[65] EPA cited three precedential authorities for its decision: the "absurd results" doctrine, which permits regulatory discretion when a literal reading of statutory law would lead to absurd consequences;[66] the "administrative necessity" doctrine, which permits agencies to avoid the impossibility of applying statutory requirements;[67] and a "one-step-at-a-time" doctrine allowing

61. *See id.* at 144–47 (explaining EPA's policy rationale for issuing the Tailoring Rule and increasing the air pollutant thresholds for permitting under PSD and Title V).

62. *See* Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

63. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010).

64. *Coalition*, 684 F.3d at 144.

65. *Id.*

66. *Id.* at 145 (citing Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1271 (D.C. Cir. 1994)); *see* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

67. *Coalition*, 684 F.3d at 145 (citing Envtl. Def. Fund, Inc. v. EPA, 636 F.2d 1267, 1283 (D.C. Cir. 1980)); *see generally* Kirti Datla, *The Tailoring Rule: Mending the Conflict Between Plain Text and*

for a gradual and piecemeal regulatory approach.[68]

Despite EPA's convincing argument that the resources to enforce a literal interpretation of the PSD and Title V sections do not exist, it remains to be seen whether EPA's three cited rationales would withstand judicial scrutiny. The "absurd results" doctrine cited from *American Water Works Association v. EPA* refers to a dispute over the meaning of the word "feasible," which is a term that is likely more difficult to define than the plainly-stated numerical thresholds in the CAA.[69] *American Water Works* itself draws its rule from *Chemical Manufacturers Association v. NRDC*, where the Supreme Court held that the word "modify" has no plain meaning and is thus subject to regulatory interpretation—hardly an explicit pronouncement of a rule supporting regulatory discretion over explicit congressional direction.[70] Moreover, a thorough search revealed no other instances where this interpretation of *American Water Works* was advanced in subsequent Supreme Court or federal appellate cases. The administrative necessity doctrine is also an untested rationale for regulatory modification of statutory language as the requirements for proving necessity are vague and the D.C. Circuit has not been faced with the question of whether "administrative necessity is the right solution to the problem of agency resource constraints."[71]

CONCLUSION

Coalition effectively extended the Supreme Court's 2007 decision in *Massachusetts* by legitimizing federal regulation of GHGs from mobile and stationary source emissions. Together, these two cases have provided the legal backing for EPA to address the threat of climate change and extended the reach of the CAA to reduce GHGs. While *Coalition* avoided the question of whether EPA's Tailoring Rule was permitted by the CAA, it remains to be seen if the rule would survive a new challenge from a party with proper standing.

Francis Choi

Agency Resource Constraints, 86 N.Y.U. L. REV. 1989 (2011) (arguing that cases cited by EPA in the Tailoring Rule do not support the administrative necessity of the Tailoring Rule).

68. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,578.

69. *See Am. Water Works*, 40 F.3d at 1270–71.

70. *See* Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 126 (1985).

71. Datla, *supra* note 67, at 2014.

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