

D.C. Circuit Hears Challenges to EPA's GHG Rules

MARCH 5, 2012

Last week, the U.S. Court of Appeals for the D.C. Circuit heard two days of oral arguments in cases challenging four of EPA's greenhouse gas (GHG) rules: the endangerment finding, the tailpipe rule, the timing rule, and the tailoring rule. The three-judge panel consisted of Judge Judith Rogers, as well as Chief Judge David Sentelle and Judge David Tatel, who were both part of the panel that decided *Massachusetts v. EPA* before it was appealed to the Supreme Court. During oral arguments, the judges and the litigants made several references to *Massachusetts v. EPA*, debating the extent to which the Supreme Court's decision in that case should control the outcome of the cases at issue.

The first day of oral arguments focused on EPA's endangerment finding and the tailpipe rule. The petitioners challenged the endangerment finding on the grounds that the agency did not consider the broader policy ramifications of finding that GHGs endanger the public health and welfare under section 202(a) of the Clean Air Act, which applies to new motor vehicles. Specifically, petitioners alleged that EPA should have considered that regulating GHG emissions from new vehicles would require EPA to regulate GHGs emitted from millions of stationary sources under the Prevention of Significant Deterioration (PSD) and Title V permitting programs. The judges did not seem to be persuaded by the petitioners' arguments, with Judge Tatel remarking that nothing in section 202(a) appeared to allow EPA to consider non-science policy factors in making its endangerment finding.

The court appeared more receptive to the petitioners' arguments during the second day of oral arguments, which focused on the timing and tailoring rules. A substantial portion of the argument was devoted to whether the petitioners had standing to challenge the rules. Chief Judge Sentelle, who determined in *Massachusetts v. EPA* that the petitioners had not demonstrated standing, was particularly focused on this issue. The judge asked the petitioners how they were harmed by the tailoring rule, which limits the sources subject to GHG regulations under the PSD program and Title V, and how vacating the tailoring rule and subjecting additional sources to regulation would provide relief. Although the judges appeared unconvinced that the state petitioners could demonstrate standing, they appeared receptive to the argument that the industry petitioners had standing to challenge the rules. The oral arguments also addressed the merits of the petitioners' challenge, including whether EPA had violated the separation of powers doctrine by promulgating the tailoring rule and whether EPA could decline to regulate GHGs under the PSD program because GHGs are not a criteria pollutant.

The D.C. Circuit is expected to issue its decisions in these cases later this year. No matter the outcome, it is likely that these decisions will be appealed to the Supreme Court.

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