

The Legality of the Tailoring Rule: Regulating Greenhouse Gases Under the Clean Air Act

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While the debate over new legislation that would regulate Carbon Dioxide (CO₂) and other greenhouse gases (GHGs) has gone in and out of the political limelight during the Obama administration, Congress has decidedly placed new climate legislation on the backburner for the foreseeable future.¹ Although Congress has failed to establish a new mechanism for regulating GHGs, it won't be able to escape regulation itself.² In 2007 the Supreme Court authorized the United States Environmental Protection Agency (EPA) to regulate GHGs as air pollutants under the Clean Air Act (CAA).³

In response to *Massachusetts v. EPA*, the has EPA “tailored” the applicability criteria that determine which sources of GHGs will require Title I (Prevention of Significant Deterioration) and Title V (Operating) permits under the CAA.⁴ In essence, the Tailoring Rule provides the EPA with a mechanism for regulating GHGs under the CAA without reading the Act literally.⁵ Under the normal CAA framework, the thresholds for regulating criteria pollutants such as lead, sulfur dioxide and nitrogen dioxide are 100 or 250 tons per year.⁶ While these thresholds are appropriate for some air pollutants, they do not reflect appropriate standards for CO₂ and other GHGs.⁷ The Tailoring Rule takes this difference into account and sets different standards for

¹ Ryan Lizza, *As the World Burns: How the Senate and the White House missed their best chance to deal with climate change*, THE NEW YORKER, Oct. 11, 2010, http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza.

² Robin Bravender, *EPA Issues Final Tailoring Rule for Greenhouse Gas Emissions*, N.Y. TIMES, May 13, 2010, <http://www.nytimes.com/gwire/2010/05/13/13greenwire-epa-issues-final-tailoring-rule-for-greenhouse-32021.html>.

³ *Massachusetts v. EPA*, 549 U.S. 497, 528, 127 S. Ct. 1438, 1459-60 (2007).

⁴ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 40 C.F.R. §§ 51, 52, 70, 71 (2010).

⁵ *Id.*

⁶ Bravender, *supra* note 2.

⁷ *Id.*

CO₂ and other GHGs for the Title 1 PSD program and Title V permit requirements.⁸

A Two Step Approach

The Tailoring Rule is a two step process for phasing major emitters of GHGs into the CAA regulatory framework.⁹ The first step will begin in January 2011 when the EPA will require facilities that are already subject to PSD or Title V requirements for non-GHG pollutants to obtain PSD or Title V permits for their GHG emissions as well.¹⁰ For projects in the PSD program, the requirements will apply to projects that increase net GHG emissions by at least 75,000 tons per year of CO₂-equivalent (CO₂e), if they also increase the emissions of at least one non-GHG pollutant.¹¹ For sources in the Title V program, sources that already have a Title V permit or are obtaining new permits for non-GHG pollutants will be required to obtain permits for their GHG emissions.¹² As a result, the EPA will not require any new sources or modifications not already subject to PSD or Title V to obtain permits during step one of the process.¹³

Step two will begin in July 2011 when EPA will extend the permitting requirements to large sources of GHG emissions that are not already subject to PSD or Title V because of other non-GHG emissions.¹⁴ Step two will subject existing sources that emit at least 100,000 tons of CO₂e per year, or have the potential to emit that amount, to PSD and Title V requirements for

⁸ 40 C.F.R. §§ 51, 52, 70, 71. The Title I preconstruction permitting program is known as the New Source Review (NSR) program. In attainment areas, areas that have attained the national ambient air quality standard (NAAQS) for a criteria pollutant, or for which there is no standard, the NSR permitting requirements are within the program known as the prevention of significant deterioration (PSD) program. There is no NAAQS for GHGs currently but the EPA has proposed to use this program to regulate them. The PSD permit requirements include compliance with the applicable PSD standards in a state's state implementation plan (SIP) and the employment of the "best available control technology" (BACT) for the subject air pollutant. EPA has not determined what constitutes BACT for GHGs. *Id.*

⁹ *Id.*

¹⁰ 40 C.F.R. §§ 51, 52, 70, 71.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

those emissions.¹⁵ Furthermore, new construction projects that have the potential to emit at least 100,000 tons per year of CO₂e and facilities that increase their emissions by at least 75,000 tons per year will be subject to PSD requirements.¹⁶

EPA has outlined plans for scaling up the Rule after the first two phases but has not made any tangible plans.¹⁷ The agency will issue a supplemental notice of proposed rulemaking in 2011 which will include a third step covering more sources of GHGs in July 2013.¹⁸ The rulemaking process for step three will be complete no later than July 2012 to allow at least one year before it goes into effect.¹⁹ The Rule also explains that no source with emissions below 50,000 tons per year of CO₂e and no modification resulting in net GHG increases of less than 50,000 tons per year of CO₂e will be subject to PSD or Title V requirements before April 2016.²⁰ Finally, the Rule commits EPA to studying new techniques to further tailor the PSD and Title V programs to make them more efficient for regulating GHGs.²¹

The Legal Authority for the Tailoring Rule

The Supreme Court granted the EPA the authority to regulate GHGs in the 2007 decision *Massachusetts v. EPA*.²² In 1999, Massachusetts, along with several other states, petitioned EPA to regulate CO₂ and other GHGs from new motor vehicles.²³ The petitioners argued that the CAA required the EPA to regulate GHGs because it states that Congress must regulate "any air pollutant" that can "reasonably be anticipated to endanger public health or welfare."²⁴ EPA denied the petition, claiming that the Act does not authorize the Agency to regulate GHGs

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Massachusetts v. EPA*, 549 U.S. at 528.

²³ Brief for Petitioner at 3 *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120).

²⁴ Clean Air Act, 42 U.S.C. § 7521 (2010).

because it could not classify global climate change as “air pollution.”²⁵ After the denial of the petition, Massachusetts and the other petitioners petitioned the Court to clarify the EPA’s responsibilities.²⁶ The Supreme Court found that GHG emissions from new motor vehicles do qualify as air pollutants.²⁷ Furthermore, the Court held that the CAA required the EPA to determine whether GHG emissions from mobile sources, like motor vehicles endanger public health or welfare, and in the case of a “finding of endangerment,” to regulate the emissions.²⁸

After the Supreme Court ruled that GHGs qualify as air pollutants, the EPA examined the public health and welfare impacts of GHG emissions from motor vehicles.²⁹ In December 2009, the EPA issued two findings of endangerment:

- **Endangerment Finding:** *[T]he current and projected concentrations of the six key well-mixed greenhouse gases — carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆) — in the atmosphere threaten the public health and welfare of current and future generations.*
- **Cause or Contribute Finding:** *[T]he combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution which threatens public health and welfare.*³⁰

With these findings, the EPA expressly determined that GHG emissions from new motor vehicles threaten public health and welfare. Section 202(a) of the CAA explicitly states that the EPA shall regulate “any air pollutant” that can “reasonably be anticipated to endanger public health or welfare.”³¹ The EPA’s findings required the Agency to develop regulations for those

²⁵ Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52922-02 (Sept. 8, 2003).

²⁶ Petition for Writ of Certiorari, *Massachusetts v. EPA*, 549 U.S. 497 (No. 05-1120).

²⁷ *Massachusetts v. EPA*, 549 U.S. at 528.

²⁸ *Id.* at 533

²⁹ John Monast, Tim Profeta & David Cooley, *Avoiding the Glorious Mess: A Sensible Approach to Climate Change and the Clean Air Act 4* (Nicholas Institute for Environmental Policy Solutions, Duke Univ., Working Paper Oct. 2010), <http://nicholasinstitute.duke.edu/climate/policydesign/avoiding-the-glorious-mess>.

³⁰ EPA REGULATORY INITIATIVES, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, (2009), <http://www.epa.gov/climatechange/endangerment.html>.

³¹ Clean Air Act, 42 U.S.C. § 7521 (2010).

emissions.³²

In March 2010, the EPA and the US Department of Transportation announced a new system for regulating GHG emissions from light-duty vehicles and for increasing fuel economy standards.³³ The Triggering Rule requires that once a pollutant is regulated under any other section, that the Act also regulate the pollutant from large new or modified stationary sources.³⁴ To interpret the CAA with respect to GHGs, EPA used the *Chevron* analytical framework for statutes administered by agencies.³⁵ That framework allows agencies to interpret statutes in a reasonable manner when statutes are not clear and unambiguous.³⁶

In the first step of the *Chevron* framework, the agency must determine whether Congress has directly spoken to the precise question at issue.³⁷ If the intent of Congress is clear, that is the end of the matter—the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.³⁸

In these circumstances, the CAA does not clearly relate Congress’s intent to the question of how to regulate GHGs.³⁹ First, if EPA interpreted the words of the statute literally with respect to GHGs, absurdly high administrative burdens would ensue.⁴⁰ The normal standards for the PSD program and Title V permits of 100 or 250 tons per year would create an undue burden if applied to GHGs because the EPA would regulate close to 6 million GHG emitting facilities.⁴¹ These circumstances would burden small sources of CO₂ and other GHG with the costs of

³² *Id.*

³³ Monast, *supra* note 29, at 4.

³⁴ Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17004, 17004 (2010).

³⁵ *Id.*

³⁶ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

³⁷ *Id.* at 843.

³⁸ *Id.* at 842.

³⁹ Bravender, *supra* note 2.

⁴⁰ *Id.*

⁴¹ *Id.*

individualized technology requirements and permit applications.⁴² Furthermore, state and local administrative bodies would have an inordinate number of permit applications which would vastly exceed their resources.⁴³ EPA estimates that these standards would cost local and state permitting authorities nationwide in excess of \$20 billion per year.⁴⁴

Because it would create an administrative impossibility, Congress cannot have intended for EPA to apply the PSD and Title V provisions literally to GHG sources.⁴⁵ However, the agency still has authority under the second step of *Chevron* to reasonably interpret the statute so as to apply the PSD and Title V provisions to GHG sources.⁴⁶ The second step of *Chevron* authorizes an agency to reasonably interpret statutory language that is silent or ambiguous with respect to the issue at hand so that the court reviewing the administrative decision would uphold that interpretation.⁴⁷ The EPA contends that the Tailoring Rule fulfills this step.⁴⁸ The Rule takes a modified step-by-step approach to reaching the Congressional goals of the PSD and Title V programs of the CAA.⁴⁹

Arguments against the Legality of the Tailoring Rule

Industry groups, environmental groups, and states have expressed concern with the Tailoring Rule.⁵⁰ Industry groups claim that Congress did not intend for the CAA to be used to mitigate climate change and that the approach is too heavy handed for this kind of problem.⁵¹

⁴² 40 C.F.R. §§ 51, 52, 70, 71.

⁴³ Bravender, *supra* note 2.

⁴⁴ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,540, Table V-1 (June 3, 2010).

⁴⁵ 40 C.F.R. §§ 51, 52, 70, 71.

⁴⁶ *Id.*

⁴⁷ *Massachusetts v. EPA*, 549 U.S. at 527.

⁴⁸ 40 C.F.R. §§ 51, 52, 70, 71.

⁴⁹ *Id.*

⁵⁰ Seth Jaffe, *Time to See if the Suit Fits: EPA Releases the Tailoring Rule*, LAW AND THE ENV'T, Mar. 14, 2010, <http://www.lawandenvironment.com/2010/05/articles/climate-change/time-to-see-if-the-suit-fits-epa-releases-the-tailoring-rule/>.

⁵¹ *Id.*

States including Mississippi and Alabama have voiced concern over the Rule.⁵² Most recently, and most vociferously, Texas has informed EPA that the state refuses to comply with the Tailoring Rule and the January 2011 deadline.⁵³ On the other hand, the environmental group, the Center for Biological Diversity has challenged the Tailoring Rule, claiming that it does not go far enough to curtail GHG emissions.⁵⁴ Even some environmental policy experts argue that the CAA is a vestige of command and control policy techniques and is poorly equipped to regulate GHGs to mitigate climate change.⁵⁵

Some states and industry groups have gone so far as to claim that with the Tailoring Rule, the EPA has stepped outside the bounds of what Congress has legally authorized the Agency to do.⁵⁶ Many have challenged the EPA's rulemaking process following the Supreme Court's *Massachusetts* decision.⁵⁷ The most significant opposition to the Rule has come from the state of Texas.⁵⁸ In a motion to stay the rule, Texas argues that *Chevron* does not allow EPA to stretch its discretion so far that it can adopt an unworkable interpretation of a statute.⁵⁹ *Chevron* allows an agency to interpret statutes but the case explicitly says that the interpretation must be reasonable.⁶⁰ Texas claims that because EPA's interpretation is both contrary to the text of the

⁵² Bravender, Robin. *Sierra Club, States File Challenges to EPA's 'Tailoring' Rule for Greenhouse Gases*. N.Y. TIMES, Aug. 3, 2010, <http://www.nytimes.com/gwire/2010/08/03/03greenwire-sierra-club-states-file-challenges-to-epas-tai-24900.html>.

⁵³ Elizabeth McGowan, *EPA Says Texas Lawsuit Will Not Thwart Enforcement of 'Tailoring' Rule*, SOLVE CLIMATE NEWS, Aug. 10, 2010, <http://solveclimatenews.com/news/20100810/epa-says-texas-lawsuit-will-not-thwart-enforcement-tailoring-rule>.

⁵⁴ Robin Bravender, *Enviro Group Sues EPA over 'Tailoring' Rule*, N.Y. TIMES, Aug. 2, 2010, <http://www.nytimes.com/gwire/2010/08/02/02greenwire-enviro-group-sues-epa-over-greenhouse-gas-tail-49225.html>.

⁵⁵ Jaffe, *supra* note 51.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Brief for the State of Texas at 9 *Coalition for Responsible Regulation Inc., et. al. v. EPA*, No. 09-1322 and consolidated cases, (D.C. Cir. Sept. 16, 2010).

⁵⁹ *Id.*

⁶⁰ *Chevron* at 844.

CAA and absurd, it is unreasonable and a court will strike it down.⁶¹

Texas also claims that the Rule forces the state to act on deadlines that are not only unlawful under the CAA but impossible for Texas to meet.⁶² The Rule,

*“[deprives] Texas of its right to manage its own air permitting program; [demands] 30 time-consuming, burdensome and ultimately unnecessary SIP revisions; [causes] expensive and unnecessary hiring and training of personnel to implement the requirements; and [results] in an effective ban on the construction of new projects.”*⁶³

The U.S. Court of Appeals for the D.C. Circuit will determine the outcome of Texas’s motion to stay.⁶⁴ In the mean time, Texas has expressed to EPA that the state plans to resist the EPA regulations even if the state loses its court battle.⁶⁵ The State Attorney General and the Chairman of the Texas Commission on Environmental Quality told the EPA in a letter dated August 2010 that Texas would openly defy the regulations and refuse to ensure that companies comply.⁶⁶

Another important opposition to the Rule comes from a coalition of industry groups who have filed a motion to stay the rule with the U.S. Court of Appeals for the D.C. Circuit.⁶⁷ The petitioners include the Coalition for Responsible Regulation, the Southeastern Legal Foundation, the Competitive Enterprise Institute, Landmark Legal Foundation, and the Ohio Coal Association.⁶⁸ These groups contend that the “[EPA’s] endangerment finding proceeds from a misapprehension of EPA’s obligation under Section 202(a),...the tailpipe rule suffers from fundamental legal defects, ...[and that] the Tailoring [Rule] is an illegal solution to a legal

⁶¹ Brief for the State of Texas, *supra* note 59 at 9.

⁶² *Id.* at 29-30.

⁶³ *Id.*

⁶⁴ Kate Galbraith, *Texas Leads Resistance to EPA Climate Action*, THE TEXAS TRIBUNE, Sept. 23, 2010, <http://www.texastribune.org/texas-state-agencies/attorney-generals-office/texas-leads-resistance-to-epa-climate-action/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Brief for Coalition for Responsible Regulation, Inc. et. al. at 23, *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322 and consolidated cases, (D.C. Cir. Sept. 15, 2010).

⁶⁸ *Id.*

problem of the EPA's own creation."⁶⁹

The petitioners first argue that the EPA's endangerment finding is not valid under §202(a) of the CAA.⁷⁰ The Act requires the EPA Administrator to promulgate new standards for air pollutants when "in her judgment" the pollutants threaten public health and welfare.⁷¹ Because the EPA did not undertake their own study of the impact of CO₂ and other GHGs, but instead relied heavily on the Intergovernmental Panel on Climate Change's reports for the endangerment finding, the decision was not made "in her judgment."⁷² As a result, the EPA trusts this outside entity, the IPCC, to make crucial decisions about statutory interpretation.⁷³ "When an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision making."⁷⁴

Furthermore, the petitioners argue that the endangerment finding is not valid because the EPA used different standards for determining that CO₂ is a threat to public health and welfare than it did for determining the threat of other criteria pollutants.⁷⁵ They argue that the finding conclusively jumps from "GHGs cause the greenhouse effect" to "GHGs endanger public health and welfare..." without fully explaining or justifying that the threat is sufficient to warrant regulation under the Act.⁷⁶ Finally, they argue that the endangerment finding is flawed because there is still "significant uncertainty" as to whether anthropogenic GHGs are actually causing the observed warming that EPA concludes is a threat to public health and welfare.⁷⁷

The petitioners also claim that the Tailpipe Rule also suffers legal defects. EPA bases the

⁶⁹ *Id.* at 1.

⁷⁰ *Id.* at 23.

⁷¹ *Id.* at 24.

⁷² *Id.* at 24-25.

⁷³ *Id.* at 25.

⁷⁴ *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004).

⁷⁵ Brief for Coalition for Responsible Regulation, Inc. et. al., *supra* note 67 at 31.

⁷⁶ *Id.* at 35.

⁷⁷ *Id.* at 42.

Tailpipe Rule on the endangerment finding.⁷⁸ The petitioners argue that since the endangerment finding is flawed, the Tailpipe Rule is also based on shaky legal grounds.⁷⁹ Furthermore, they argue that the Tailpipe Rule ineffectively reduces the impact of CO2 on climate change.⁸⁰ EPA admits that the estimated impacts of the Rule are small relative to the projected global mean temperature changes for the next century.⁸¹ Because these changes are so insignificant, the limits accomplish nothing that the new CAFE standards do not already accomplish.⁸² The only impact of the Rule is that, according to the Triggering Rule, it makes GHGs subject to regulation under other sections of the CAA.⁸³

Finally, the petitioners argue that the Tailoring Rule is an illegal solution to a problem that the EPA has created for itself.⁸⁴ They argue that if the EPA read the CAA properly, it would not need to create the Tailoring Rule to shoehorn GHGs into the regulatory framework.⁸⁵ In drafting Part C of the Act, Congress intended for it to administer the regulation of the criteria pollutants detailed at the time of the enactment.⁸⁶ The language “subject to regulation under this chapter” in Section 165(a)(4) implies that the PSD program applies to pollutants subject to regulation at the time of the enactment in 1977.⁸⁷ It does not apply to any pollutants that might be regulated in the future.⁸⁸

In *Alabama v. Costle*, the Court gave the EPA authority to adjust the statute to use the “administrative necessity” doctrine, which authorizes the Agency to apply statutory requirements

⁷⁸ 75 Fed. Reg. 25,398-99 (2010).

⁷⁹ Brief for Coalition for Responsible Regulation, Inc. et. al., *supra* note 67 at 43.

⁸⁰ *Id.* at 23.

⁸¹ 75 Fed. Reg. *supra* note 78 at 25,495.

⁸² Brief for Coalition for Responsible Regulation, Inc. et. al., *supra* note 67 at 45.

⁸³ *Id.* at 45.

⁸⁴ *Id.* at 47.

⁸⁵ *Id.* at 48.

⁸⁶ *Id.* at 49.

⁸⁷ *Id.* at 50.

⁸⁸ *Id.* at 50.

in a way that avoids impossible administrative burdens.⁸⁹ However, in the same ruling, the court held that the EPA cannot create its own “administrative necessity” by ignoring one provision of the CAA and then solve that manufactured necessity by ignoring another.⁹⁰ The EPA ignored part of the CAA by determining that it could be used to regulate any pollutants other than the criteria pollutants named at the enactment.⁹¹ The petitioners argue that by determining that the Act regulates GHGs, the EPA manufactured the “administrative necessity” to tailor the PSD program to those pollutants.⁹² In effect, the EPA created the “administrative necessity” of tailoring the rule to avoid absurd results by applying the Act to a pollutant that was never intended to be regulated under the Act.⁹³ The petitioners and other opponents to the Tailoring Rule firmly believe that the courts will not support the EPA’s “administrative necessity” argument on which the Rule stands.⁹⁴

Conclusion

With *Massachusetts v. EPA*, the Court gave Congress two options for how to deal with GHGs: either pass climate legislation or regulate under the current available framework.⁹⁵ When Congress decidedly failed to pass new legislation on climate change, the EPA was left with a mandate to use the Clean Air Act as a mechanism for regulating GHG emissions.⁹⁶ The EPA justifies the legality of the Tailoring Rule saying that the ruling in *Massachusetts v. EPA* created an administrative necessity to alter the rules of the PSD program to best regulate GHGs.⁹⁷ Opponents to regulation argue that the EPA has stepped outside the bounds of its legal authority

⁸⁹ *Alabama Power v. Costle*, 636 F.2d 323, 358 (1980).

⁹⁰ Brief for Coalition for Responsible Regulation, Inc. et. al., *supra* note 67 at 53.

⁹¹ *Id.* at 53.

⁹² *Id.* at 54.

⁹³ *Id.* at 54.

⁹⁴ *Id.* at 55.

⁹⁵ Monast, *supra* note 29, at 3.

⁹⁶ Bravender, *supra* note 2.

⁹⁷ 40 C.F.R. §§ 51, 52, 70, 71.

in creating the Tailoring Rule.⁹⁸ The economic and climate impacts of the Rule will not be felt until it goes into effect in January 2011.⁹⁹ Similarly, whether or not the EPA prevails or a court vacates the rule is yet to be seen.¹⁰⁰ Until then, the Rule will continue to incite controversy.¹⁰¹

⁹⁸ Brief for Coalition for Responsible Regulation, Inc. et. al., *supra* note 67.

⁹⁹ Bravender, *supra* note 2.

¹⁰⁰ Bravender, *supra* note 52.

¹⁰¹ Bravender, *supra* note 2.