

Endangerment-related Litigation Update

for the

U.S. Climate Partnership Association

June 27, 2011

National Chamber Litigation Center

U.S. Chamber of Commerce

Lawsuit Groupings Based on Complex Designation & Scheduling Order

Endangerment Rule/
Reconsideration Denial

Tailpipe Rule

Timing (“Triggering”)
& Tailoring Rules

Pre-2009 Rules

“the most costly, complex, and far-reaching environmental regulatory program in all American history”

- 85 lawsuits filed challenging 5 interrelated GHG rules occupying a total of 610 pages in the Federal Register’s dense, tri-columnar format.
- Opening briefs have been filed for each, totaling ~75,000 words for the industry petitioners.
- 98 unique petitioners in total, representing diverse interests.
- “Any given argument presented or incorporated in this brief should not be construed as necessarily representing the views of each of these parties.”

Recurring Themes in Opening Briefs

- EPA's "shell game"
- EPA's "gerrymandering" of the record evidence

EPA's SHELL GAME



Endangerment
Rule

Tailpipe
Rule

Timing &
Tailoring Rules

Endangerment Rule



Endangerment
Rule

For the first time in the over forty-year history of CAA Section 202(a)(1) EPA now interprets Section 202(a)(1) to require two separate regulatory actions:

“[The Administrator must base] her decision about endangerment on the science, *and not on policy considerations* about the repercussions or impact of such a finding.”

74 Fed. Reg. at 66,515

Tailpipe Rule

- According to EPA's interpretation of model results reported by the Intergovernmental Panel on Climate Change ("IPCC"), its final rule would have no perceptible effect on climate.
- EPA nonetheless concluded that the extent to which projected climate effects might be addressed or mitigated by its standards was irrelevant.



Timing & Tailoring Rules



Timing &
Tailoring Rules

- EPA recognized that its interpretation subjects thousands of stationary sources, including small, non-industrial sources, to PSD and Title V regulation, and creates (by EPA estimates) \$22.5 billion in permitting paperwork costs alone. 75 Fed. Reg. at 31,540 (Table V-I).
- According to EPA, these absurd consequences are contrary to Congress's intent and exceed available administrative capabilities.
- So what's an Administrator to do?

EPA's Red Pen



- EPA rejected interpretations of the CAA that would have avoided absurd results and, instead, rewrote the statutory text (“tailored”) it to try to avoid the absurdity created by its own interpretation.

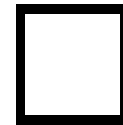
Pre-2009 PSD Trigger Interpretation

- EPA: the Tailpipe Rule automatically requires stationary sources emitting major amounts of GHGs to obtain pre-construction PSD permits.
- Industry interpretation: A stationary source of GHGs may be subjected to PSD permitting only after (1) EPA establishes a NAAQS; (2) the stationary source is located in an area attaining the NAAQS for a particular GHG; and (3) the source will have major emissions of that particular GHG.
- BUT can EPA ever lawfully establish a NAAQS for GHGs or is the NAAQS program too bad a mismatch for global pollutants?

EPA's GERRYMANDERING



Evidence EPA will consider



Evidence EPA won't consider

Gerrymandering the Record

- ... but never considered all the benefits to health and welfare that have resulted from increased use of GHGs over time.
- ... but explicitly refused to consider human responses that would cut against an endangerment finding, such as adaptation and mitigation.
- ... but disregarded projected beneficial effects of climate change as too uncertain.
- ... so it cited indirect impacts 10 to 20 years down the road.

What's Next

- Next up: “reopener” case fully briefed by Aug. 5
- EPA’s Endangerment brief due August 16
- Briefing continues through end of 2011 (final briefs in timing/tailoring = Dec. 14)