

EPA's Impending Greenhouse Gas Regulations: Digging through the Morass of Litigation

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Executive Summary

As the U.S. Congress has failed to pass meaningful climate legislation, the EPA has initiated a series of regulations designed to recognize greenhouse gases as endangering human health and welfare, and set greenhouse gas emission standards for vehicle fleets and for major stationary sources.

Unsurprisingly these efforts have been challenged in the DC Circuit Court of Appeals. Challenges to the Endangerment Finding (which focus on EPA's reliance on the Intergovernmental Panel on Climate Change) and to the Tailpipe Rule (which claim that it is redundant, and that EPA improperly failed to consider its effects on other regulations) rely on climate skepticism more than they do on legal doctrine. The case against EPA's Timing Rule, which justifies application of GHG regulations to stationary sources, centers on real ambiguities in the Clean Air Act, though it may fairly claim judicial deference via *Chevron v. NRDC*. This makes the "Tailoring" Rule claim, that it disregards explicit statutory regulation guidelines (in order to accomplish the "broader intent" of the statute), the strongest challenge to EPA's actions.

One striking fact about these suits is the pure number of claims: over 80 distinct claims were filed by 35 different petitioners to these four rules. This has necessitated extensive simplification of the litigation, including consolidation into three major cases (and a minor sub-case). Petitioners have sought further to have all three consolidated cases heard by the same panel, perhaps in an effort to link all regulations together as one set of illegal activity. However, the three cases cover three different Titles of the Clean Air Act, so coordination here may not improve judicial efficiency to the extent that has justified coordination of cases in the past.

The petitioners have also moved to stay implementation of EPA's rules, due to take effect on January 2, 2011. The most relevant question here, apart from a preliminary determination of the merits of the case, will be whether they would suffer "irreparable harm" if regulations were to move forward. This argument will focus around the economic harm to national industries that could come with increased costs, specifically whether it could lead to immediate loss of economic activity; and around the possibility of avoiding a debilitating backlog of building permits once these requirements take hold. The case against staying vehicle regulations looks strong; that against stationary source permit requirements will depend significantly on economic analyses.

There is also some question of what remedy might be appropriate if the DC Circuit rules against EPA in these cases. The two-prong analysis used in such cases will consider the extent of EPA's deviation from the law and the detrimental effect of immediately overturning existing regulations. Treatment of similar rules in the past suggests that a strong detrimental effect to an established existing permit structure will make courts hesitant to step in with a heavy hand, instead remanding to agencies for modification in line with their decision. Thus, the outcome of motions for stay may well affect the final remedy even beyond its obvious predictive power of the ultimate ruling on the merits: it will determine whether EPA will already have a working regulatory structure in place.

This litigation activity merits attention. In the absence of viable climate legislation for at least two years, these decisions will have important bearing on the extent to which the United States is able to address its greenhouse gas emissions going forward.

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I. Introduction

In the absence of climate legislation in the U.S. Congress, parties in the United States seeking meaningful action on climate change mitigation have turned to the Environmental Protection Agency (EPA) for action. However, despite express Supreme Court authorization to regulate greenhouse gases (GHGs) in *Massachusetts v. EPA* in 2007, EPA's efforts to regulate GHGs have been heavily contested.

This report gives a preliminary summary of the state of litigation today, including a description of the major cases and arguments that have been raised thus far. Its main focus, however, is to provide a procedural background on the litigation process, including consolidation and coordination procedures, motions for stay of judgment, and possible remedies.

II. Legal Overview

Four separate EPA rulemakings are under review: (1) the "Endangerment Finding," which says that carbon emission from moving vehicles are "reasonably likely" to threaten public health and welfare; (2) the "Tailpipe Rule," which, based on the Endangerment Finding, sets GHG emission standards for Light Duty Vehicles; (3) the "Timing Rule," or "Reconsideration Decision," which builds off of the Tailpipe Rule, interpreting the Clean Air Act's (CAA's) language to authorize regulation of stationary sources; and (4) the "Tailoring Rule," which exempts small emitters from stationary source regulations.¹

As outlined below, three different groups have filed motions to stay EPA's rulemaking power pending a final decision in the DC Circuit. The briefs filed in support and opposition to these stay motions can provide the first glimpse into the legal arguments both sides expect to pursue.² An analysis of the legal arguments on both sides suggests that petitioners' claims against the Endangerment Finding and Tailpipe Rule are the weaker challenges, and their Tailoring Rule claim is the strongest challenge.

¹ *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009); *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010); *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010); *Prevention of Significant Deterioration and Title VI Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, Att. A (June 3, 2010).

² Petitioners' Motion for Partial Stay of EPA's Greenhouse Gas Regulations, D.C. Cir. (Sep. 15, 2010), available at http://www.eenews.net/assets/2010/09/16/document_gw_02.pdf (hereinafter NAM Stay Motion); State of Texas's Motion for Stay of EPA's Endangerment Finding, Timing Rule and Tailpipe Rule, D.C. Cir. (Sep. 15, 2010), available at https://www.oag.state.tx.us/newspubs/releases/2010/091610motion_to_stay_ett.pdf (hereinafter Texas Stay Motion 1); State of Texas's Motion for a Stay of EPA's Greenhouse Gas Tailoring Rule, D.C. Cir. (Sep. 15, 2010), available at https://www.oag.state.tx.us/newspubs/releases/2010/091610motion_to_stay_tailoring.pdf (hereinafter Texas Stay Motion 2); Motion for Stay, D.C. Cir. Doc: 1266030 (Sep. 15, 2010), available at http://www.eenews.net/assets/2010/09/16/document_gw_03.pdf (hereinafter CRR Stay Motion); EPA Response to Motions to Stay, D.C. Cir. (Oct. 28, 2010), available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=a896cdb9-6166-4202-be03-b9bfaf12bf30 (hereinafter EPA Response to Stay Motions); State and Environmental Intervenors' Joint Response to Motions to Stay, D.C. Cir. (Nov. 1, 2010), available at http://www.eenews.net/assets/2010/11/02/document_gw_01.pdf (hereinafter States Response to Stay Motion).

A. Endangerment Finding

The major case against the Endangerment Finding rests on allegations that EPA illegally delegated its duties to unreliable outside parties (specifically the UN Intergovernmental Panel on Climate Change, or IPCC), and that it was impermissibly vague in its rulemakings. These arguments face an uphill climb: EPA has a long history of relying on outside peer-reviewed scientific reports with strong judicial deference.³ Notably, legal precedent such as *Ethyl Corp. v. EPA* has allowed endangerment findings to be made at the discretion of the Administrator, even without specific numerical determinations.⁴ Further arguments, which focus on the unreliability of EPA's sources, attack the credibility of the IPCC, in part based on the well-publicized "Climate-gate" controversy. These arguments reflect a small minority view in the scientific and international community; their value in this case will depend on the court's reading.

B. Tailpipe Rule

Petitioners' primary arguments against the Tailpipe Rule are that its benefits are too trivial to justify action, and that it is duplicative of already-existing Corporate Average Fuel Economy (CAFE) Standards under the National Highway Traffic Safety Administration (NHTSA). However, EPA responds by pointing out that carbon emissions are not redundant to the emissions of various ozone-causing gases (they impose a different type of obligation, which allows more nimble regulatory options), and that there is no mandate in the CAA that regulations meet any minimum effectiveness threshold so long as the benefits exceed the costs.⁵ EPA's points here largely mirror those made by the Supreme Court in *Mass v. EPA*.

C. Timing Rule

The Timing Rule Challenge focuses on an ambiguity in interpretations of §§161, 165, and 166 in the Prevention of Significant Deterioration (PSD) Chapter of the CAA. Section 165 bans construction of a facility "in any area to which [PSD] applies" unless, among other requirements, the facility meets Best Available Control Technology (BACT) standards "for each pollutant subject to regulation" under the CAA.⁶ Thus, there are two restricting variables: area and pollutant. For the first (area), §161 applies PSD to areas that "satisfy"⁷ an EPA-determined Natural Ambient Air Quality Standard (NAAQS). Petitioners argue that a given area must satisfy a NAAQS for a given pollutant to be subject to PSD requirements for that same pollutant. EPA disagrees, arguing that satisfying NAAQS for *any* pollutant can subject an area to *all* PSD requirements.⁸ For the second limitation (pollutant), petitioners interpret a provision in

³ This principle is most famously codified in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

⁴ 74 Fed. Reg. 66,496, 66,507.

⁵ Texas Stay Motion 1, *supra* note 2, at 22-24; CRR Stay Motion, *supra* note 2, at 43-47; EPA Response to Stay Motions, *supra* note 2, at 41-44.

⁶ 42 U.S.C. §7475(a)(4).

⁷ An area may satisfy a NAAQS either by being in actual compliance with, or if, for outside reasons, it is impossible to say whether or not it is in compliance with, the NAAQS air quality requirements for any given pollutant.

⁸ 42 U.S.C. §7471; *see also* NAM Stay Motion, *supra* note 2, at 18-19; Texas Stay Motion 1, *supra* note 2, at 26-27; EPA Response to Stay Motions, *supra* note 2, at 50-53; States Response to Stay Motions, *supra* note 2, at 17-19.

§7476(a), which requires PSD standards within two years once a pollutant is subjected to a NAAQS, as being the only avenue to add to the list of pollutants eligible for PSD regulation. Respondents instead argue that the “subject to regulation” language in §165 is the true indicator of when BACT guidelines must be created under PSD.⁹ Both sides cite *Alabama Power v. Costle* to support their case.¹⁰

Petitioners’ interpretation of these three sections is logical. However, EPA’s interpretation also has merit, and is supported by a 30-year-old agency interpretation. EPA is empowered under *Chevron* to pick any reasonable interpretation of an ambiguous statutory provision.¹¹ The fate of petitioners’ challenge here will depend on how ambiguous the DC Circuit reads the CAA to be in this case.

D. Tailoring Rule

The fourth case (now consolidated with the Timing Rule case; *see above*) challenges the Tailoring Rule for directly violating clear and unambiguous requirements in the CAA. It is true that CAA lays out clear numeric guidelines for when stationary sources must be subject to PSD permitting requirements. The main argument here is over the validity of three separate doctrines: that of “absurd results,” “administrative necessity,” and “one-step-at-a-time.” Petitioners’ challenge to the “absurd results” doctrine focuses on the argument that EPA could avoid these results with a more natural reading of the CAA: namely that EPA cannot distort the CAA and then use this distortion to overturn direct requirements elsewhere. Respondents naturally disagree, emphasizing the larger intent of CAA as being more important than specific and outdated procedural points. For the other two doctrines petitioners question the foundation of the doctrines themselves, and say that they would not apply to deviations as potent as EPA suggests in this rule.¹² This part of petitioners’ challenge is probably their strongest – EPA will not get deference in its attempt to bypass statutory text and the doctrinal issues could go either way.

E. Procedural Challenges

Petitioners also raise a number of procedural challenges to EPA’s regulatory process. Notably, they claim that EPA should have considered possible impacts of stationary source regulatory activities when evaluating the costs and benefits of the Tailpipe Rule. They also generally accuse EPA of avoiding consideration of certain required factors by shuffling complaints around such that they are never directly addressed. Beyond contesting petitioners’ statement of the law here, respondents argue that evaluating the effects of unknown potential future rules before those rules have been implemented would be infeasible and is unnecessary.¹³ On policy, EPA can validly say this would be impossible, which may underlie any court decision here.

⁹ 42 U.S.C. §7476(a); *see also* NAM Stay Motion, *supra* note 2, at 15-17; CRR Stay Motion, *supra* note 2, at 49-53; EPA Response to Stay Motions, *supra* note 2, at 53-55; States Response to Stay Motions, *supra* note 2, at 18-19.

¹⁰ 636 F.2d 323 (D.C. Cir. 1979).

¹¹ *Chevron v. NRDC*, 467 U.S. at 837.

¹² NAM Stay Motion, *supra* note 2, at 28-32; CRR Stay Motion, *supra* note 2, at 53-56; Texas Stay Motion 2, *supra* Note 2, at 9-13; EPA Response to Stay Motions, *supra* note 2, at 61-65.

¹³ NAM Stay Motion, *supra* note 2, at 33-39; Texas Stay Motion 1, *supra* note 2, at 20-22; EPA Response to Stay Motions, *supra* note 2, at 44-47; States Response to Stay Motions, *supra* note 2, at 14-15.

F. Synthesis

Undeniably, the CAA is imperfectly tailored to the problem of regulating carbon emissions. However, EPA's interpretations of its four rules do stand a reasonable chance of surviving DC Circuit review. Both sides' specific arguments (and who makes which) are laid out in Appendices A and B.

III.Procedural Overview

Over 80 individual cases have been filed against the four rules listed above, from 35 distinct parties. Just two of these parties have called for more stringent regulation (those from the Sierra Club and the Center for Biological Diversity).¹⁴ The cases split roughly evenly among challenges to the four major EPA regulations (listed above), as detailed below.

Seventeen petitioners filed challenges to EPA's Endangerment Finding by the February 16, 2010 deadline. These cases were consolidated on February 18, under the name *Coalition for Responsible Regulation v. U.S. Environmental Protection Agency (CRR v. EPA)*, and given a docket number of 09-1132. Ten more cases were consolidated with this group on November 15 that challenged EPA's refusal to reconsider the Endangerment Finding (originally *CRR v. EPA*, docket 10-1234), bringing the total to 26 (minus one environmental lawsuit, see below).

Similarly, seventeen (separate) cases have been filed so far challenging EPA's Tailpipe Rule, and were consolidated under the case *CRR v. EPA* on August 20, 2010 and assigned to docket 10-1092. The 44 remaining suits challenging EPA's Timing Rule and Tailoring Rule were consolidated into one case on November 15, 2010, as *CRR v. EPA* (docket 10-1073). This consolidation, requested by the EPA, combined 17 (also separate) suits filed challenging EPA's Timing Rule (same name); with 25 challenges to the Tailoring Rule (originally consolidated as *Southeastern Legal Foundation v. EPA*, docket 10-1131).

Three challenges to EPA regulations from environmental groups (urging further activity) were removed from the main group of cases on November 15 and consolidated with *Sierra Club v. EPA* (docket 09-1018) to form a group of five environmental cases. The consideration of this consolidated group has been held in abeyance pending the results of motions to stay (see below).

However, DC Circuit internal procedural rules hold that even after a case is consolidated, individual litigants still maintain the ability to file separate motions.¹⁵ Petitioners have taken advantage of this fact. On September 15, 2010, three different coalitions of petitioners filed motions to stay all or part of EPA's climate regulations. One such motion was filed by Texas. A second was filed by a coalition of interest groups led by CRR, SLF, the Competitive Enterprise Institute, Landmark Legal Foundation, and the Ohio Coal Association, and also requests a stay of all EPA action. A group of trade associations led

¹⁴ Much of the information compiled here and below can be accessed from the CCCL Climate Litigation Chart, available at <http://www.climatecasechart.com>.

¹⁵ United States Court of Appeals for the District of Columbia Circuit, Handbook of Practice and Internal Procedures 23 (Amended May 10, 2010).

by the National Association of Manufacturers filed the third motion, but asks only to stay the Timing and Tailoring rules, and the Endangerment Finding as it could be applied to stationary sources. This group does not request a stay of the core of the Endangerment Finding or the Tailpipe Rule.

Finally, a coalition of businesses, interest groups, and U.S. Representatives¹⁶ have filed a motion for coordination of related cases, alleging that because the four EPA regulations are so closely related they should be heard as a group by the same panel. EPA disagrees, and has filed a response to this motion, as has a coalition of 19 states and the City of New York.¹⁷ Other motions, including one request for expanded page limits, are largely procedural, although they only add to the mass of litigation activity.

IV. Consolidation and Coordination Possibilities

To manage the multitude of lawsuits, the U.S. Court of Appeals for the District of Columbia Circuit has considered consolidation and coordination procedures to combine more than 80 cases into a more manageable number. Industry-affiliated groups and individuals generally favor some form of case combination. On the other hand, environmentalist-affiliated groups intervening on the EPA's side ("state intervenors") and the EPA prefer separate hearings for reasons explained below.¹⁸

The first, simpler, fix is to consolidate claims, essentially making them one large case. Consolidation is allowed "[i]n order to achieve the most efficient use of the Court's resources," for "all petitions for review of agency orders entered in the same administrative proceeding."¹⁹ This has already occurred among the challenges to each individual EPA rule and between the challenges to EPA's Timing and Tailoring Rules, as detailed above.

¹⁶ Chamber of Commerce; Clean Air Implementation Project; Competitive Enterprise Institute; Freedom Works; Science and Environmental Policy Project; Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation"; Mark R. Levin and Landmark Legal Foundation; Portland Cement Association; Southeastern Legal Foundation; The Langdale Company; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Langboard, Inc.; and 14 Representatives [Nathan Deal (GA-5th); John Shadegg (AZ-3rd) and Dan Burton (IN-5th); John Linder (GA-7th); Dana Rohrabacher (CA-46th); John Shimkus (IL-19th); Phil Gingrey (GA-11th); Lynn Westmoreland (GA-3rd); Tom Price (GA-6th); Paul Broun (GA-10th); Steve King (IA-5th); Jack Kingston (GA-1st); Michele Bachmann (MN-6th); Kevin Brady (TX-8th)].

¹⁷ The 19 states in this coalition are: California, Massachusetts, New York, Arizona, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Pennsylvania.

¹⁸ See Motion for Coordination of Related Cases, D.C. Cir. Doc.: 1262772 (Aug. 26, 2010), available at http://www.eenews.net/assets/2010/09/13/document_gw_06.pdf; Respondent's Opposition to Motion for Coordination of Cases and Cross-Motion for Consolidation of Consolidated Case No. 10-1131 with Consolidated Case No. 10-1073, D.C. Cir. Doc.: 1265175 (Sep. 10, 2010), available at http://www.eenews.net/assets/2010/09/13/document_gw_01.pdf; Response to Petitioners' Motion to Coordinate Cases by Intervener States, D.C. Cir. Doc.:1265212 (Sep. 10, 2010), available at http://www.eenews.net/assets/2010/09/13/document_gw_02.pdf.

¹⁹ United States Court of Appeals for the District of Columbia Circuit, Handbook of Practice and Internal Procedures 23 (Amended May 10, 2010).

Petitioners have also moved to “coordinate” the four separate cases. Case coordination involves hearing multiple cases before the same panel, with a goal of yielding complementary decisions in cases where challenges cover related activities. In their motion for consolidation, petitioners argue that case coordination under a single panel is standard procedure, citing four cases that make this point.²⁰ The court ruled on November 15, 2010 that immediate coordination of the cases was not justified, but has left the door open to effectively coordinate cases after the motions for stay (below) are decided.

A. Petitioners’ Arguments

Petitioners’ main argument is that the cases are substantively interrelated so as to “amount[] to a single policy approach,” and should be decided by the same panel to avoid “duplicative briefing” and “conflicting decisions.” The duplication would come from the DC Circuit’s consideration of “core questions of EPA’s legal authority to regulate and record support for that authority.”²¹ To support their contention that the rules are interrelated, petitioners quote EPA itself: “In recent months, EPA has taken four related actions that, taken together...will subject GHGs emitted from stationary sources to PSD requirements, and limit[] the applicability of PSD requirements to GHG sources on a phased-in basis.”²²

Petitioners further argue that combining the cases into one case will prevent EPA from attempting to dismiss challenges to its rules based on jurisdictional principles (particularly standing, in the injury-in-fact and causation inquiries). They contend that separate review could result in an attempt to call for “a more appropriate forum” in every case, and thereby deny all forums for review.²³

B. Respondents’ Arguments

EPA and state intervenors disagree, and strongly oppose coordinating these cases with those reviewing the Endangerment Finding and Tailpipe Rule. EPA argues that combining these cases will confuse the courts with largely irrelevant piles of documents and cause a proliferation of lawsuits, in violation of CAA rules.²⁴ To support this, it and state intervenors point out that the EPA regulations deal with entirely different administrative records and legal questions, and involve “an *entirely* separate set of issues.”²⁵

²⁰ Motion for Coordination of Related Cases, *supra* note 1, at 14; cases discussed in detail below.

²¹ *Id.* at 2, 11, 16.

²² Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, Proposed Rule (Aug. 10, 2010), available at <http://www.epa.gov/airquality/nsr/documents/20100810FinalGHGSIPCallProposal.pdf>.

²³ Motion for Coordination of Related Cases, *supra* note 1, at 16-19.

²⁴ “[J]udicial review for any agency action is to be based ‘exclusively’ on the administrative record for that particular action.” *Id.* at 11; see also 42 U.S.C. § 7607(d)(7)(A).

²⁵ For two different arguments laying out the different questions, see Respondent’s Opposition to Motion for Coordination of Cases, *supra* note 1, at 12-14, 16; and Response to Petitioners’ Motion to Coordinate Cases by Intervener States, *supra* note 1, at 2-5.

Furthermore, EPA argues that separating the cases will not present justiciability issues with respect to parties, or to individual arguments. It points out that DC Circuit rules allow petitioners to use evidence outside the administrative record to establish standing.²⁶

C. Synthesis

Petitioners' showing that EPA views the regulations as four parts of an interrelated block of regulation gives strong support to their claim. Beyond that, however, their arguments are incomplete. The fundamental linking question said to justify coordination (whether EPA has "authority to regulate") is vague, and the guidelines for the four regulations are in three entirely different sections of the CAA.²⁷ Also, standing, as a constitutional justiciability issue, is not beholden to administrative records and looks to the final results of agency action. Thus, petitioners' standing case should not be weakened if their challenges are separated.

Neither EPA nor state intervenors respond to petitioners' case support. However, an analysis of the four cases reveals little. In the first cited case, *Davis v. DOJ*, two petitions were heard and decided by the same panel on the same day – but they both involved the very narrow question of retroactive application of attorneys' fees under 2007 amendments to the Freedom of Information Act.²⁸ Similarly, in *Noramco of Del. v. DEA* two petitions were coordinated, but both involved DEA approval of specialized importers under §823(a) of the Controlled Substances Act.²⁹ For the *In re TMI* Litigation, the quote relied on in petitioners' text³⁰ refers to consolidation (as opposed to coordination) of the cases at issue, and the issue in common (application of a particular evidentiary rule) was similarly particular.³¹

The most similar situation to the claims above comes from the *New York v. EPA* cases, where the same parties challenged two distinct rules interpreting CAA's New Source Review (NSR) program.³² The court here denied consolidation but granted coordination, similar to what petitioners ask for here. However, even here both cases involved NSR guidelines, thereby looking substantially more similar than EPA's regulations here.

²⁶ D.C. Cir. R. 15(c)(2), 28(a)(7).

²⁷ The endangerment finding would turn largely on the adequacy of the scientific basis for climate change and rules established in Title I Part A; the tailpipe rule deals with Title II Federal Emission Standards for Moving Sources, and the Timing and Tailoring Rules cover Prevention of Significant Deterioration (PSD) concerns in Title I, Part B.

²⁸ *Davis v. DOJ*, 610 F.3d 750 (D.C. Cir. 2010); *Judicial Watch v. BLM*, 610 F.3d 747 (D.C. Cir. 2010).

²⁹ *Noramco of Del. v. DEA*, 375 F.3d 1148, 1153, 1155-57 (D.C. Cir. 2004).

³⁰ The "purpose of similar device under Federal Rule of Civil Procedure 42(a) is to "avoid duplication of effort" and "prevent conflicting outcomes" in interconnected cases." Motion for Coordination of Related Cases, *supra* note 1, at 14).

³¹ This was a nuclear radiation exposure case, where two claims were identical (appealing dismissal of evidence), and the third was similar (appealing manipulation of evidence fines). *In re TMI Litig.*, 193 F.3d 613, 622-629, 724 (3d Cir. 1999).

³² One case challenged procedures for calculating emissions, special treatment of certain plants, and recordkeeping under NSR. *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). The other challenged the exemption of certain-sized projects from NSR Review altogether. *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006).

The battle lines on this issue appear to be clear-cut: petitioners see some advantage from consolidation, EPA some disadvantage. It is possible that petitioners hope to sully EPA's Endangerment Finding defense by linking it directly to other parts of EPA's regulatory regime that are less legally supportable (and more politically controversial). However, coordination here will be difficult for petitioners to justify given prior practice in this area.

V. Motions to Stay Implementation of the Regulations

As the complex of litigation moves forward in the DC Circuit, opponents of EPA regulations have voiced concerns that rules due to take effect in January 2011 may severely harm their economies before they have a chance to be overturned in court. To avoid this, three different groups of petitioners moved on September 15 to stay all or part of EPA's regulations. As outlined above, two motions, one headed by the Coalition for Responsible Regulation (CRR) and one filed solely by the State of Texas, seek to stay all regulations. The third motion, from a coalition headed by the National Association of Manufacturers (NAM), asks only to stay the portion of the rules that would allow GHG regulation of stationary sources (including manufacturing plants). EPA filed a response on October 28, 2010.³³

In requesting a stay of defendants' activities, petitioners must show four things: 1) that they are likely to prevail on the merits of the case; 2) that they will suffer irreparable injury if defendants are allowed to pursue their activities during litigation; 3) that enforcing this stay will not hurt other interested parties; and 4) that a stay is in the public interest.³⁴ The DC Circuit has noted that "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak."³⁵ A preliminary analysis of the merits of these challenges is given above, though it is worth noting that the movants here "by a clear showing, carr[y] the burden of persuasion."³⁶

A. Petitioners' Arguments

Petitioners claim irreparable injury by discussing a wide range of potential harms. NAM points to business losses from carbon requirements and an expensive permitting process, as well as concerns with uncertainty for small emitters protected by the Tailoring Rule. CRR echoes these economic concerns, while Texas focuses more on administrative harms (including the lost right to implement its own regulatory program, and administrative costs imposed). All three complain that, permits will be immediately required, they will be impossible to acquire at the outset, which could cause a de facto moratorium on construction work.

³³ The briefs analyzed here are the same as those analyzed above. See the list of briefs, *supra* note 2.

³⁴ *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009); see also *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998) (relied upon by NAM et al.).

³⁵ *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C.Cir.1995); see also *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998) (Relied on by Texas).

³⁶ *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

In arguing that a stay will not harm other parties, petitioners argue that a mere delay could not harm EPA's regulatory purpose. CRR and NAM particularly point out that because the benefits of permits were not quantified, there can be no loss of benefits; and Texas says that, "subject to judicial review," other states are free to revise their own laws to comply with these regulations. NAM goes on to argue that there will be no lost "immediate" environmental benefit, and indeed there could be a loss if carbon "leakage" sends manufacturing to more carbon intensive countries. NAM also emphasizes that the Tailpipe Rule as applied to vehicles could stay in place, achieving EPA goals.

Finally, petitioners argue that a stay is in the public interest in many ways. CRR argues that it is necessary to give Congress time to speak on the matter. NAM agrees, and adds its previous points that enforcement would harm the economy and possibly lead to carbon leakage. Texas, meanwhile, emphasizes the need for regulatory certainty before beginning actual regulation.

B. Respondents' Arguments

After responding to the merits of petitioners' claims, EPA turns first to irreparable injury. Its response is thorough, and follows six main lines of argument in challenging a finding of irreparable injury:

1. Economic loss, even if real, cannot be considered irreparable harm;
2. The chain of causation leading to economic stagnation is exaggerated, based on faulty predictions, and speculative (no injunction is available for speculative harms).
3. EPA regulations decrease, rather than increase, regulatory uncertainty by establishing rules;
4. PSD and Title V permit costs are regulatory burdens, which cannot be irreparable harm;
5. Permit availability concerns are mostly false: EPA's implementation process is eminently workable and there will be no de facto construction ban. Texas' implementation concerns thus would be due to Texas' own irresponsible actions, so cannot be blamed on the EPA; and
6. Texas has no sovereign right not to regulate GHGs, so there is no federalism concern.

EPA's responses to the harm to other interested parties and to the public interest are interrelated. EPA first mentions environmental harms that will result with any delay of implementation, pointing to its Endangerment Finding and *Mass v. EPA* to argue that its failure to quantify damages does not mean there are none. EPA then points out specifically that the Vehicle Rule has been partially implemented (including in California), and relied upon by the auto industry, and so staying that rule would particularly harm other parties.

C. Synthesis

The DC Circuit's decision will be influenced by how convincing it finds the respective arguments about the certainty and severity of harms caused by EPA regulations to business and the economy. EPA's point that merely economic harms cannot qualify will strengthen its case, but permanent closure of factories and loss of economic activity, if petitioners are deemed correct in this prediction (by no means certain), would still be relevant to any decision. EPA's arguments around permit costs and availability are more solid. EPA's structure for issuing permits provides a federal backstop that states may opt into if their

own plans are delayed. States may opt not to use this backstop, but any argument focusing on political eventualities would seem to violate DC Circuit Rules against preventing speculative damages. EPA's arguments look the strongest against a stay of the Vehicle Rule, particularly since one petitioner group agrees with them. They look the weakest when they minimize the possibility of economic upheaval these regulations may bring as companies adhere to new BACT standards, though the point about "purely economic harms" not qualifying as irreparable injury will help.

A decision by the DC Circuit here is likely in late November or December (any stay must be issued before January 2, 2011 to prevent all agency action).

VI. Looking Forward: Remedy Options for the Court

Assuming the case moves forward, questions remain as to what, exactly, the DC Circuit will do if it rules in favor of the challengers on the merits of their cases. The two primary options here are: absolute vacatur (removing all force of law from the regulations), and remand of the case without vacatur (maintaining the regulations until EPA issues valid replacements).

A. Severability of Rules

The first question to ask is if remedies should apply to all regulations together, or to individual regulations. Here, the severability of an agency's set of related actions "depends on the issuing agency's intent."³⁷ In the present cases, language petitioners have cited showing that EPA considers its regulations thus far to be "four related actions" may be damaging to the EPA if the court determines that one of the four rules is unlawful. However, EPA's regulations likely fall short of being a "single, regional program" that justified unified treatment of CAIR. Given that some petitioners have asked for partial stays of EPA action, EPA will have a strong case that its regulations do not amount to a single program, in a train of argument mirroring that in pending case coordination motions (above).

B. The Rule for Remand vs. Vacatur

Some precedent on these tradeoffs comes from the Clean Air Interstate Rule (CAIR), which was successfully challenged in the DC Circuit as *North Carolina v. EPA*. At issue in that case was an EPA rulemaking that established a cap and trade system to reduce upwind states' ability to interfere with air quality for fine particulate matter in downwind states. The Court ultimately ruled that a cap and trade system improperly interfered with National Ambient Air Quality Standard (NAAQS) obligations in violation of the CAA, but allowed EPA's program to continue until it issued a replacement³⁸ (EPA just released a replacement Proposed Transport Rule in July 2010 with the final rule expected spring 2011).³⁹

³⁷ *North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984).

³⁸ Two separate rulings are discussed here. The December 2008 decision, *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008), overturned the July 2008 vacatur issued in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

³⁹ *Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone*, 75 Fed. Reg. 45,210 (Aug. 2, 2010).

In *North Carolina*, the court runs a two-part test to determine whether to vacate EPA's rules: "the seriousness of the order's deficiencies . . . and the disruptive consequences of an interim change."⁴⁰ For the first, the court has justified a vacatur by saying that very little of overturned EPA regulations would survive in "anything approaching recognizable form." In current litigation, the EPA's rules have been challenged as being completely invalid (not merely incorrect), which would seem to support a vacatur if EPA loses on the merits.

However, the first question may not be the determining factor here. Even an unjustifiable regulation may remain in place depending on consideration of the other prong, which looks at disruptive consequences; and this prong may be of more use to the EPA. In the *North Carolina* litigation, the court initially vacated the ruling with a justification that regulation activity over fine particulate matter would continue through traditional channels.⁴¹ The same panel later overturned this initial determination:

The parties' persuasive demonstration, extending beyond short-term health benefits to impacts on planning by states and industry with respect to interference with the states' ability to meet deadlines for attaining national ambient air quality standards . . . shows that the rule has become so intertwined with the regulatory scheme that its vacatur would sacrifice clear benefits to public health and the environment while EPA fixes the rule. *NC v. EPA*, 550 F.3d at 1178-79.

This describes the requirements to avoid vacatur fairly clearly: EPA will have to show that vacating its GHG regulations would harm clear benefits to the environment (so it must justify its Endangerment Finding), in a way that interferes with an existing regulatory scheme (such that disrupting that scheme would constitute a major setback for regulatory efforts). The court has demonstrated particular concern with disrupting already-existing and well established trading markets.

C. Synthesis

Interestingly, this determination may thus be affected by the outcome in the pending motions to stay enforcement of EPA regulations: if EPA is prevented from regulating during litigation, there will be no regulatory structure to interrupt, as there was in *North Carolina* (though delay in carbon regulation could still justify avoiding a vacatur if EPA regulatory activities are stayed). This prong may also affect remedies in a partial victory for challengers: the Tailoring Rule has been said to face the strongest legal challenges, but it also reduces the regulatory burden imposed by the other rules. Realistically, the court may have to perceive a strong legal challenge to both the Tailoring and Timing rules in order to vacate.

⁴⁰ Here, the court quotes *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 998 F.2d 146, 150-51 (D.C. Cir. 1993).

⁴¹ Notably, the court was comforted that State Implementation Plan (SIP) Calls could continue to be issued in conjunction with Nonattainment Area (NA) and Prevention of Significant Deterioration (PSD) requirements under Title I of the CAA. *NC v. EPA*, 531 F.3d at 930.

EPA may claim further support from language suggesting that “it is appropriate to remand without vacatur in particular occasions where the vacatur ‘would at least temporarily defeat . . . the enhanced protection of the environmental values covered by’ the EPA rule at issue.” This language could be used to argue against suspending carbon regulations, assuming the Endangerment Finding is supported. However, petitioners may respond by pointing out that “the threat of disruptive consequences cannot save a rule when its fundamental flaws ‘foreclose EPA from promulgating the same standards on remand.’”⁴²

Scholars generally note that remand without vacatur is normally reserved for procedural flaws and inadequate explanations: “the D.C. Circuit does not [waive vacatur] where it finds that the agency’s rules violate the statute the agency is administering.”⁴³ This plain language looks bad for EPA, which is after all defending its interpretation of the CAA. However, the comparison to *North Carolina* is particularly instructive here: both cases will potentially involve misapplication of CAA Rules in evolving regulation activities, and so the lenience granted to EPA in the first ruling should help EPA’s chances in the second.

VII. Conclusion

The resolution of this and other similar cases will be important to watch, because EPA’s regulations here present the strongest source of national GHG mitigation activity in today’s political climate. Furthermore, successful regulation may also catalyze legislative action: because such regulations would likely be preempted by Congressional action, regulated entities may see a market mechanism as superior to the command-and-control type of regulation that has characterized EPA’s efforts thus far.

⁴² This language comes from the later-reversed *NC v. EPA* decision, but quotes a still-valid ruling from 2007, *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1261-62 (D.C. Cir. 2007).

⁴³ Kristina Daugirdas, *Evaluating Remand Without Vacatur: a New Judicial Remedy for Defective Agency Rulemaking*, 80 N.Y.U. L. REV 278, 283 (2005). Further support for this comes from cases: see *EDF v. EPA*, 898 F.2d 183 (D.C. Cir. 1990) (remanding an EPA decision for inadequate consideration of factors); *Allied-Signal, Inc. v. U.S. NRC*, 988 F.2d 146 (D.C. Cir. 1993).

Appendix A: Summary of Arguments against EPA Regulations

Legal Argument	CRR	Texas	NAM
Endangerment Finding Challenge	X	X	
EPA unlawfully delegated its judgment to others (IPCC)	x	x	
The IPCC is an unaccountable body, and does not consider the policy-relevant risk/harm issues that EPA is obligated to consider	x		
The IPCC has also shown itself to be unreliable in its assessments	x	x	
Relying on the IPCC keeps relevant facts from the public record	x	x	
EPA understated uncertainty and ignored alternative explanations	x		
EPA misconstrued endangerment finding by not defining at what level GHGs are dangerous; that they are a "risk" is not enough	x	x	
EPA must consider policy choices in determining "endangerment"	x		
EPA invalidly considered GHGs not emitted by vehicles in its finding		x	
Tailpipe Rule Challenge	X	X	
Any benefits from tailpipe reductions are too trivial to justify regulation because they are a tiny fraction of global emissions	x	x	
This rule has no rational basis; it is redundant to NHTSA CAFE Standards	x	x	
EPA invalidly failed to consider all impacts of the tailpipe rule - particularly its role in allowing stationary source regulation		x	x
Timing/Triggering Rule Challenge	X	X	X
"Subject to regulation" covers pollutants listed when CAA was passed	x		x
EPA must issue a NAAQS to institute a PSD program and add to this list	x	x	x
<i>Alabama Power</i> clearly says location must be the basis for PSD; areas must show attainment of GHG NAAQS to be subject to PSD GHG rules		x	x
Linking moving source emissions regulation to stationary source regulation makes no sense within CAA structure	x		
EPA's interpretation here would lead to absurd results	x	x	x
EPA's interpretation differs from Congress' presumptive intent			x
Tailoring Rule Challenge	X	X	X
EPA directly violates clear, numerical regulation rules in the CAA	x	x	x
EPA usurps state sovereignty, violating EPA-state partnership rules	x	x	
EPA's new state requirements followed improper procedure by requiring reinterpretation of SIPs instead of new issued SIPs	x	x	
Even if proper, states are entitled to more implementation time	x	x	
"Absurd results" doctrine cannot be used because a natural reading of the CAA would more easily avoid such results	x		x
"Absurd results" doctrine cannot be used because CAA guidelines are specific and numeric, not "words of general meaning"		x	
"Administrative necessity" doctrine cannot be used because CAA's standards are clear and allow no deviation		x	x
"Administrative necessity" doctrine is little more than dicta		x	
"One-step-at-a-time doctrine" cannot be used because EPA is not putting itself "on the track to compliance" - so it does not qualify here		x	x
Also, EPA's regulations are industry-changing, not merely procedural			x
"One-step-at-a-time" doctrine is EPA-created and not valid			x
General Challenges			
EPA ducked oversight by bouncing comments between rules and not considering any directly; these actions were arbitrary and capricious			x
EPA failed to consider effects on minorities, energy supply, information requests, and the economy as required by various laws			x

Appendix B: Summary of Responses in Support of EPA Regulations

Legal Argument	EPA	States & Envtls.
Endangerment Finding Response	X	X
EPA did not delegate its judgment: it vetted reports in Notice and Comment	x	x
The IPCC is reliable and uses stringent peer review: weak isolated attacks on alleged misconduct do not undermine its conclusions	x	x
The IPCC is well respected even by the IAC (cited by petitioners)	x	x
EPA need not reprint reports in the public record; it is impractical	x	
EPA also relied on USGCRP/NRC, whose validity is not at issue		x
EPA did evaluate uncertainties and consider other explanations	x	x
Finding Endangerment does <i>not</i> require quantitative data; a rational discretionary judgment that there is risk is sufficient	x	x
Regardless, EPA <i>did</i> define endangerment thresholds		x
Finding endangerment does <i>not</i> require consideration of policy implications	x	
Petitioners' demands here contradict the mandate in <i>Mass v. EPA</i>	x	
All six gases act together, so were considered together; the endangerment finding need not be limited to the four GHGs emitted by vehicles	x	
Tailpipe Rule Response	X	X
CAA requires EPA to regulate sources that contribute <i>at all</i> to endangerment	x	
Regardless, vehicle emissions are non-trivial contributors to climate change	x	
Mass v. EPA directly says that NHTSA regulation cannot replace CAA action	x	
Further, the CAA allows more targeted, effective EPA regulation	x	
EPA need not consider the Tailpipe Rule's role in enabling other regulations	x	x
Considering costs/benefits of derivative rules is disfavored, and impractical		x
Timing/Triggering Rule Response	X	X
A pollutant can be subject to regulation for PSD even without a NAAQS: CAA §7476 requires a PSD finding after a NAAQS, but not <i>only</i> after a NAAQS	x	x
Area is the basis for applying PSD; but being in attainment for <i>any</i> pollutant (not just GHGs) will subject an area to PSD regulations: see <i>Alabama Power</i>	x	x
PSD regulations and permits must consider <i>all</i> CAA-regulated pollutants	x	x
Title V permits are a separate issue, and must be issued even without PSD because other greenhouse gas regulations will still apply to major sources	x	
As <i>Mass v. EPA</i> notes, Congress wanted CAA to be flexible for new threats	x	
These PSD policies have been in place for years; review is no longer available	x	
Tailoring Rule Response	X	X
"Absurd Results" doctrine values intent and larger purpose over specific text	x	
A natural reading of the CAA support's EPA's conclusion. EPA hews closely to the text while preserving Congress' intent to regulate dangerous pollutants	x	
"Administrative necessity" doctrine values substantive over regulatory laws	x	x
CAA requires GHG regulation, so EPA can justify regulatory deviations here	x	x
"One-step-at-a-time doctrine" is usable: EPA's Four-step regulatory process notes, and some petitioners agree, that EPA will cover all sources eventually	x	x
The tailoring rule is critical to the viability of EPA's other regulations. Petitioners confirm this fact when challenging the other three rules	x	x
Note: no response to allegations that EPA improperly mandated state actions - these issues were primarily addressed in the "irreparable harm" discussion		
General Responses		X
EPA's interpretive regulations are non-discretionary; economic, other effects must be considered when issuing individual rules (particular BACTs, etc.).		x