

THE NECESSITY OF THE TAILORING RULE: REGULATION OF GREENHOUSE GAS EMISSIONS UNDER THE CLEAN AIR ACT

I. INTRODUCTION

Regulation of greenhouse gas emissions is paramount to public health and welfare. However the Clean Air Act (CAA) is not the best legislative vehicle to regulate the harmful gases. The CAA was enacted to solve local or regional pollution problems.¹

The 1970 and 1990 revisions to the CAA are impeding the U.S. Environmental Protection Agency (EPA) from regulating motor vehicle emissions; thus the EPA is now forced to diverge from the plain meaning of the CAA. There is a crucial need for new legislation that is designed to deal with this global issue. The deliberate process of creating new legislation is not a timely solution to this existing problem. The tailoring rule issued by the EPA is essential to successful regulation of new motor vehicle emissions of greenhouse gases (GHGs). The national science academy of Brazil, Canada, China, France, Germany, India, Italy, Japan, Mexico, Russia, South Africa, United Kingdom and the United States, agree that “the need for urgent action to address climate change is now indisputable.”² “According to NOAA and NASA data, the Earth’s average surface temperature has increased by about 1.2 to 1.4° F in the last 100 years. The eight warmest years on record (since 1850) have all occurred since 1998, with the warmest year being 2005.”³

Greenhouse gases trap heat in the atmosphere.⁴ Human activities result in the emissions of four main greenhouse gases: CO₂, methane (CH₄), nitrous oxide (NO₂), and halocarbons.⁵ Anthropogenic climate change is caused by these gases, most notably CO₂ which increases the amount of heat from the sun that the atmosphere absorbs and reflects back into space.⁶ “Most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations.”⁷ The IPCC defines “very likely” as a 90% probability.⁸

II. THE CLEAN AIR ACT

The CAA gives the EPA a range of tools to regulate air pollutants.⁹ In 1970 Congress added a new air pollution control scheme, the Prevention of Significant Deterioration (PSD), which regulates modified and stationary air pollution emitters.¹⁰ The PSD requires a permit to be obtained before construction of any “major emitting facility” commences.¹¹ In 1990, Congress again amended the CAA to add Title V which was intended to “consolidate into a single document all of the clear air requirements applicable to a particular source of air pollution” in an effort to harmonize all of the CAA’s requirements.¹² Under Title V, major stationary sources of air pollution must obtain an operating permit.¹³

III. THE U.S. SUPREME COURT HOLDS GREENHOUSE GASES ARE “AIR POLLUTANTS” UNDER THE CLEAN AIR ACT

In 2007 the Supreme Court held that because greenhouse gases constitute air pollutants, the EPA was authorized by the CAA to regulate greenhouse gas emissions of new motor vehicles.¹⁴ Section 202(a)(1) of the CAA would authorize the EPA to regulate these emissions if the EPA found that such emissions contribute to air pollution which “may reasonably be anticipated to endanger public health or welfare.”¹⁵

The EPA found GHGs are conclusively dangerous to human health.¹⁶ In December 2009, the Administrator of the EPA signed the endangerment finding stating “that current and projected concentrations of the six key well-mixed greenhouse gases ... in the atmosphere threaten the public health and welfare of current and future generations.”¹⁷

The EPA’s first step in regulating GHGs under the CAA was to regulate auto emissions under the CAA § 202(a).¹⁸ The proposed regulation would affect vehicles sold in model years 2012 through 2016 and all aimed to “reduce GHG emissions from the U.S. light-duty fleet by approximately 21 percent by 2030 over the level that would occur in the absence of the national program.”¹⁹

IV. THE PROBLEM & THE NECESSITY OF THE TAILORING RULE

As soon as greenhouse gases from vehicle emissions are regulated under CAA § 202(a) as air pollutants, the PSD and Title V will similarly be required to start regulating greenhouse gases.²⁰ The regulation triggers PSD and Title V, placing the programs’ permit requirements on facilities that emit greenhouse gases.²¹ This is problematic because the current statutory output thresholds were not contemplated with greenhouse gases in mind.

The PSD requires permits for any facility that emits or has potential to emit 100 tons per year of any air pollutant from a list of twenty-eight types of stationary sources, or any source with potential to emit 250 tons per year of any air pollutant.²² Title V requires operating permits for any major stationary source.²³ A major stationary source is “any stationary facility or source of air pollution, which directly emits, or has potential to emit, 100 tons per year” of any air pollutant.²⁴

The application of the PSD and Title V permit requirements, with GHGs constituting an air pollutant, would necessitate approximately six million permits.²⁵ The EPA has issued a tailoring rule to raise the threshold amount of emissions that require a facility to obtain a permit. Effective until at least April 30, 2016, the tailoring rule increases threshold limits for air pollutant emissions by up to 100 times.²⁶ However, the tailoring rule contradicts the plain language of the CAA.²⁷ The EPA contends that the plain language of the CAA creates administrative burdens, which yield absurd results.²⁸ The EPA dually argues that due to administrative necessity and the absurd results doctrine they are authorized to ignore the literal interpretation of the CAA.²⁹

V. ADMINISTRATIVE NECESSITY & THE ABSURD RESULTS DOCTRINE

The D.C. Circuit has established a strict, yet broad principal that ““frowns upon categorical administrative exemptions,” but administrative necessity may justify a finding of implied authority for an administrative approach not explicitly provided by the CAA.³⁰ Courts may uphold an agency’s approach that avoids impossible administrative burdens that would “prevent the agency from carrying out the mission assigned to it by Congress.”³¹

Implementation of the PSD and Title V programs would impose a multitude of administrative burdens on the EPA. The EPA reports that state and local permitting authorities would be overwhelmed by the extraordinary increase in permit applications, as it would “vastly exceed the current administrative resources of the permitting authorities.”³² Opponents of the tailoring rule think the EPA’s administrative necessity argument is invalid because the EPA created the necessity by wrongly applying and interpreting the CAA.³³

The EPA states that the administrative burdens are so severe that it creates absurd results by citing the absurd results doctrine as an authorization for non-compliance with the plain meaning of the CAA.³⁴ Literal implementation of the PSD and Title V would be adverse to Congress’s intent. Permits would be required for millions of small source emitters possibly including residential homes, commercial buildings and retail stores which would [1] substantially increase already high permitting costs

for these small sources and [2] cause permitting programs to “increase several hundred-fold larger than what Congress appeared to contemplate.”³⁵

The Senate Committee Report for the CAA stated that permitting procedures would be too costly and potentially unreasonably for small source emitters.³⁶ Additionally, this would cause permit agencies to have multi-year backlogs in the issuance of PSD and Title V permits; even though under §165(c) of the CAA all permit applications are required to be processed within 12 months.³⁷ Congress would not create a statutory mandate that was impossible to execute.

Most importantly, “the sheer magnitude of the numbers involved -- millions of permits requiring [full-time employees to process the permits] at a cost to the permitting authorities of billions of dollars, all this beginning immediately at the time that GHGs become subject to regulations.”³⁸ Small source emitters requiring permits, the backlog of permit applications and the immediate high cost to permitting authorities is not what Congress intended.

Trade associations, businesses, environmental organization, and states including Mississippi, Alabama and Texas are “less than satisfied” with the tailoring rule requirements.³⁹ Since the tailoring rule was proposed both industry and environmentalists have filed suit against the EPA for this controversial rule. The Sierra Club, the Louisiana Department of Environmental Quality, National Alliance of Forest Owners, Texas and a joint petition from Alabama, North Dakota, the governor of Mississippi, South Carolina, and Nebraska are just a few of the petitions filed with the appeals court.⁴⁰

The CAA is not the best legislative vehicle to regulate greenhouse gas emissions long term, and though both industry and environmentalists are fighting the tailoring rule, it is the only option that is fungible right now. The legislative process is laborious by design and a call for new legislation is not practical. The tailoring rule is necessary because without it, the EPA would not have been able to start regulating greenhouse gas emissions in new motor vehicles. Implementing the PSD and Title V simultaneously with the vehicle emissions regulations would have depleted necessary resources and detracted the permitting authorities’ attention away from larger stationary sources.

VI. CONCLUSION

As the damage caused by greenhouse gases becomes more prevalent, it is apparent that immediate regulation of GHGs by the EPA is necessary. The EPA has stated valid reasons why the tailoring rule is so crucial to the success of the vehicle emissions regulations, including billions of dollars of immediate costs that permitting authorities do not have. The EPA, under suit by several different entities, defends the tailoring rule on the basis of administrative necessity and the absurd results doctrine. Ultimately, the EPA is likely to succeed, as it would be virtually impossible for the EPA to enforce the provisions set forth under the PSD and Title V program.

Footnotes

¹ Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354-01 (proposed July 30, 2008. 28) (to be codified at 40 C.F.R. ch. 1).

² G8+5 Academies’ joint statement: Climate change and the transformation of energy technologies for a low carbon future, (June 7, 2005), available at www.nationalacademies.org/includes/G8+5energy-climate09.pdf.

³ Climate Change: Basic Information, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/climatechange/basicinfo.html> (last visited Apr. 20, 2011).

⁴ Climate Change: Greenhouse Gas Emissions, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/climatechange/emissions/index.html#ggo> (last visited Apr. 20, 2011).

⁵ See IPCC Report at 37.

6 What Are Greenhouse Gases?, ENERGY INFORMATION ADMINISTRATION,
<http://www.epa.gov/climatechange/emissions/index.html#ggo> (last visited Apr. 20, 2011).

7 Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report, 2007, available at
http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm. (IPCC Report).

8 Id. at 27.

9 42 U.S.C § 7521(a)(1); 42 U.S.C § 7602(g).

10 *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 561 (2007).

11 Id.

12 *Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1348 (11th Cir. 2006); 42 U.S.C. § 7661a (2006).

13 Id.

14 *Mass. v. E.P.A.*, 549 U.S. 497, 532 (2007).

15 Id. at 528-33.

16 Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74
Fed. Reg. 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

17 Climate Change -- Regulatory Initiatives: Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section
202(a) of the Clean Air Act, U.S. ENVIRONMENTAL PROTECTION AGENCY, [http://
www.epa.gov/climatechange/endangerment.html](http://www.epa.gov/climatechange/endangerment.html) (last visited Apr. 20, 2011).

18 Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel
Economy Standards, 74 Fed. Reg. 49,454 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86, 600, and 49 C.F.R. pts.
531, 533, 537, 538).

19 Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel
Economy Standards, 74 Fed. Reg. at 49,460.

20 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292(proposed Oct. 27, 2009)
(to be codified at 40 C.F.R. pts. 51, 52, 70, and 71).

21 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. at 55,292.

22 42 U.S.C. § 7479(1) (emphasis added).

23 42 U.S.C. § 7661(a).

- 24 42 U.S.C. § 7602(j).
- 25 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. at 55,295.
- 26 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514- 01, 31518 (June 3, 2010)
(to be codified at 40 C.F.R. pts. 51, 52, 70 and 71).
- 27 Id. at 31544.
- 28 Id. at 31516.
- 29 Id.
- 30 Ala. Power Co. V. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979).
- 31 Id.
- 32 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31517.
- 33 Coalition for Responsible Regulation, Inc. v. EPA, No. 09-1322 (D.C. Cir. Sept. 15, 2010) (Brief for Coalition for Responsible
Regulation).
- 39 Elizabeth McGowan, EPA Says Texas Lawsuit Will Not Thwart Enforcement of ‘Tailoring Rule’, SOLVE CLIMATE NEWS,
(Aug. 10, 2010), [http://
solveclimate.com/news/20100810/epa-says-texas-lawsuit-will-not-thwart-enforcement-tailoring-rule?page=2](http://solveclimate.com/news/20100810/epa-says-texas-lawsuit-will-not-thwart-enforcement-tailoring-rule?page=2).
- 40 Robin Bravender, Sierra Club, States File Challenges to EPA’s “Tailoring’ Rule for Greenhouse gases, THE 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](http://www.nytimes.com/gwire/2010/08/03/03greenwire-sierra-club-states-file-challenges-to-epas-tai-24900.html).