Oral Argument Not Yet Scheduled

NO. 10-1092 (LEAD) AND CONSOLIDATED CASES (COMPLEX)

United States Court of Appeals
For the District of Columbia Circuit

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LISA P. JACKSON, ADMINISTRATOR, AND
NATIONAL HIGHWAY AND TRAFFIC SAFETY ADMINISTRATION
Respondents.

On Petition for Review of Environmental Protection Agency Final Order
75 Fed. Reg. 25,324 (May 7, 2010)

REPLY BRIEF OF STATE PETITIONERS AND SUPPORTING INTERVENOR

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SUMMARY OF THE ARGUMENT

EPA's regulation of motor-vehicle greenhouse-gas emissions in the Tailpipe Rule is arbitrary and capricious and not in accordance with the Clean Air Act (CAA) because it did not fully consider the costs of compliance, as required by § 202(a)(2). EPA also lacked authority to issue the Tailpipe Rule because it rests on an invalid Endangerment

Finding. For either of these reasons, the Tailpipe Rule cannot stand. EPA's brief only confirms these errors and highlights the serious problems with EPA's divide-and-conquer approach to greenhouse-gas regulation. The Court should vacate and remand the Tailpipe Rule.

ARGUMENT

I. EPA'S REFUSAL TO ACCOUNT FOR THE FULL COST OF COMPLIANCE RENDERED THE TAILPIPE RULE ARBITRARY AND CAPRICIOUS.

Section 202(a) allows EPA to implement emissions regulations only after a time period "necessary to permit the development and application of the requisite technology," a decision that must be informed by "appropriate consideration to the cost of compliance within such period." 42 U.S.C. § 7521(a)(2) (CAA § 202(a)(2)). EPA failed to appropriately consider the full cost of compliance in the Tailpipe Rule because it refused to account for the Rule's direct and immediate impact on stationary sources. *See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324, 25,402 (May 7, 2010) (Tailpipe Rule) (directing comments regarding stationary-source impact to the then-pending Tailoring Rule rulemaking). Because EPA "entirely failed to

consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), the Tailpipe Rule fails the arbitrary-and-capricious standard.

EPA defends its willful blindness to the Tailpipe Rule's direct impact on stationary sources by mischaracterizing the costs as "indirect," EPA Br. 31-34, even while touting the resulting reduction in stationary-source greenhouse-gas emissions as a *justification for* the Tailpipe Rule, EPA Br. 52. This self-serving and arbitrary tactic is not limited to the Tailpipe Rule; throughout its other greenhouse-gas regulations (two of which were issued prior to the Tailpipe Rule) EPA acknowledged the Tailpipe Rule's direct impact on stationary sources, yet refused to consider compliance costs for stationary sources in the Tailpipe Rule itself.

In the Endangerment Finding, for example, EPA acknowledged the proposed Tailpipe Rule and the concerns that regulation of vehicles would trigger stationary-source regulations. *See, e.g.*, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,499, 66,516 n.17 (Dec. 15, 2009) (Endangerment Finding) (noting EPA's proposed joint

rulemaking with NHTSA for vehicle emissions and EPA's rulemaking to reduce the impact on stationary sources by "tailoring" the CAA's statutory thresholds). In its Timing Rule—also issued before the Tailpipe Rule—EPA acknowledged that its interpretation of the CAA meant that promulgation of the Tailpipe Rule would automatically impose direct regulations on stationary sources. *See, e.g.*, *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004, 17,007 (April 2, 2010) (Timing Rule) (deciding that stationary-source "PSD program requirements will apply to GHGs upon the date that the anticipated tailpipe standards for lightduty vehicles . . . take effect").

The Tailoring Rule also acknowledges the automatic and direct imposition of massively burdensome greenhouse-gas regulations on stationary sources due to the Tailpipe Rule. *See, e.g., Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (Tailoring Rule) (explaining that but for the Tailoring Rule, "PSD and title V would apply to all stationary sources that emit or have the potential to emit more than

100 or 250 tons of GHGs per year beginning on January 2, 2011," which represents "the date when EPA's recently promulgated Light-Duty Vehicle Rule (LDVR) takes effect"). Thus, the greenhouse-gas regulations are replete with EPA's recognition of the direct and immediate impact of the Tailpipe Rule on stationary sources, but in the Tailpipe Rule EPA adopted an irrationally narrow interpretation of § 202(a) that allowed it to entirely overlook those crushing compliance costs.

EPA primarily relies on *Motor & Equipment Manufacturers Association v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (*MEMA*), for its argument that it need not consider so-called indirect costs under §202(a)(2). EPA Br. 31-32. But EPA misinterprets *MEMA*. That case addressed a fundamentally different issue from EPA's error in the Tailpipe Rule; it concerned EPA's duty—under a different section of the CAA—to consider the social costs born by non-regulated companies due to state vehicle regulations. *MEMA*, 627 F.2d at 1100.

The *MEMA* petitioners challenged EPA's preemption waiver over California's vehicle regulations under CAA § 209, arguing (among other things) that EPA's waiver decision failed to consider whether

California's regulations were anticompetitive. *Id.* at 1110, 1115-1116. The petitioners contended that EPA's duty to assess the anticompetitive implications of California's regulations sprung, in part, from § 202(a)(2)'s "cost of compliance" provision, which they claimed "compels appropriate consideration of the 'social costs' of pollution control." *Id.* at 1117. In rejecting that argument, the Court interpreted § 202(a)'s "cost of compliance" language to concern economic costs, not the "'social costs' of the type petitioners advance." *Id.* at 1118.

MEMA did not limit consideration of costs to only vehicle manufacturers, it simply interpreted the phrase "cost of compliance" to concern only economic costs. *See, e.g., id.* (explaining that the statutory language "refers to the economic costs of motor vehicle emission standards and accompanying enforcement procedures"). Thus, EPA confuses *MEMA*'s limitation of the *type* of costs to be considered with the *scope* of costs to be assessed. *See* EPA Br. 32. The *MEMA* court had no reason to determine the latter.

To the extent that *MEMA* is relevant, it lends support for considering the economic impact of the Tailpipe Rule on stationary-sources because the costs EPA refused to consider are direct and

economic, as EPA acknowledged in the Tailoring Rule. *See, e.g.*, 75 Fed. Reg. at 31,517 (recognizing that with the Tailpipe Rule's triggering of stationary-source regulations, "many small sources would be burdened by the costs of the individualized PSD control technology requirements and permit applications that the PSD provisions" require).

EPA also makes much of its "nondiscretionary obligation" to regulate greenhouse-gas emissions from vehicles, *e.g.* EPA Br. 61, but any rational approach to rulemaking would consider the inevitable and direct impact on stationary sources. Plus, even if EPA is obligated to promulgate regulations for vehicle emissions (assuming a valid endangerment finding), it enjoys considerable discretion about when to implement regulations under § 202(a)(2). *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (noting that EPA "has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies").

EPA claims that it could not delay issuing vehicle regulations because it would increase the cost to vehicle manufacturers by requiring them to comply with multiple standards. EPA Br. 38, 58. EPA argued that delaying implementation of the Tailpipe Rule would create

disharmony with the NHTSA's CAFE standards and would lead California to impose more stringent greenhouse-gas regulations than the CAFE standards, which California threatened to do unless EPA's standards were adopted. EPA Br. 37-39, 58. These are not rational reasons for avoiding consideration of the full impact of its Tailpipe Rule.

EPA cannot shrink from its statutory duty to fully consider compliance costs merely to avoid being held hostage by California. After all, California's regulations require approval from EPA and they must be consistent with the CAA. *See* EPA Br. 7; 42 U.S.C. § 7543(b). Additionally, there is no reason to think that a delay in implementing its vehicle regulations would result in a different vehicle standard from NHTSA, given the joint rulemaking and essentially identical standards promulgated by the two agencies.

In sum, EPA's rush to regulate does not justify its failure to fully consider the compliance costs from the Tailpipe Rule any more than its erroneous characterization of stationary-source costs as "indirect." EPA's refusal to consider stationary-source compliance costs from the Tailpipe Rule was arbitrary and capricious because those costs are a

direct and "an important aspect of the problem." *State Farm*, 463 U.S. at 43.[1]

II. THE TAILPIPE RULE IS INVALID BECAUSE IT IS BASED ON AN INVALID ENDANGERMENT FINDING.

EPA concedes that the Tailpipe Rule cannot stand if the Endangerment Finding is invalid. EPA Br. 62. But EPA claims that the Court cannot consider whether this knocks out authority for the Tailpipe Rule because EPA (for the first time ever) bifurcated its Endangerment Finding from its regulatory response. But EPA's divide-and-conquer strategy does not preclude this Court from reviewing the impact of its invalid Endangerment Finding on the Tailpipe Rule; the two are interdependent. Indeed, the Tailpipe Rule's dependence on the Endangerment Finding for validity—and the Tailpipe Rule's automatic triggering of stationary-source regulations—highlight the inextricably intertwined nature of EPA's greenhouse-gas regulatory actions. One regulation cannot be properly evaluated independent of the others,

[1] Notably, EPA does not view its disregard of stationary-source costs as a matter of authority. Rather, EPA declined to consider the inevitable impact on stationary sources because "nothing in the Act *requires* EPA to assess such costs as part of a Section 202 rulemaking." EPA Br. 31 (emphasis added).

despite EPA's best attempts to seal off each rulemaking from the others.

The legal flaws in EPA's Endangerment Finding are numerous, but two are especially conspicuous. First, the arbitrary-and-capricious standard requires an agency to "articulate a satisfactory explanation for its action," *see State Farm*, 463 U.S. at 43, and the Endangerment Finding fails this test because EPA never bothered to define or apply standards or criteria for assessing when GHG emissions or climate change harm public health or welfare. *See* Brief of Texas, No. 09-1322, at 17-21. Second, the arbitrary-and-capricious test precludes agency actions that "entirely fail[] to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and EPA's Endangerment Finding refuses to consider voluntary (non-regulatory) and natural adaptation to and mitigation of climate change, even though EPA acknowledges that these factors will reduce the negative effects of climate change. *See* Brief of Texas, No. 09-1322, at 21-22. As a consequence of these and other fatal defects in the Endangerment Finding, the Tailpipe Rule is also invalid because EPA lacked authority

to regulate greenhouse-gas emissions from motor vehicles and engines under § 202(a).

CONCLUSION

The Court should vacate and remand EPA's Tailpipe Rule because the rule violates the arbitrary-and-capricious test and because EPA lacked statutory authority to enact it.

Respectfully submitted.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing **Reply Brief of State Petitioners and Supporting Intervenor** was filed electronically with the Court by using the CM/ECF system on this 31st day of October 2011. Parties, intervenors, and amici that are registered CM/ECF users will be served by the appellate CM/ECF system. The counsel that are not CM/ECF users will be served via Federal Express, standard overnight delivery.

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CERTIFICATE OF COMPLIANCE

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Dated: October 31, 2011