TEXAS LAWYER

An ALM Publication

texaslawyer.com | DECEMBER 5, 2017

Unwinding the Finding

Combatants on both sides of the battle over regulating greenhouse gases see the 2009 Endangerment Finding as an on-off switch: With the Finding "on,"…

BY ERIC GROTEN

COMBATANTS ON BOTH SIDES of the battle over regulating greenhouse gases see the 2009 Endangerment Finding as an on-off switch: With the Finding "on," all Clean Air Act circuits stay activated, forcing regulation/frustrating deregulation. The partisans also see the Finding as flag: Tear it down as an act of anthropogenic global warming (AGW) apostasy, or defend it in fealty to planetary salvation. This binary view of the Finding (and of AGW) accounts for the struggle to undo it, including but certainly not limited to petitions for reconsideration now pending before the new Administrator.

Shutterstock.com

But this is a poor hill on which to die. Properly understood, the 2009 Finding can be left alone without any adverse effect on a deregulatory agenda. Or without prejudice to future EPA actions premised on changing assumptions about the existence or significance of AGW. And the blood shed taking the hill could leave the deregulatory army too depleted for the rest of its mission.

I precede these thoughts about unwinding the Finding by announcing agreement with those who believe that *Massachusetts v. EPA* was wrongly decided. The court had no business taking the case at all, having effectively to ignore Article III standing requirements in order to assert jurisdiction. Then, having reached over that wall to grab the case, the court ignored straightforward language in the Act to declare a trace constituent of clean air vital to life on Earth a "pollutant," as though it were sulfur dioxide or lead. The Court also imposed a duty on EPA to find or not find danger from cars, even though Congress

distinguishes between mandated obligations to make (or decline) a finding under the Act (e.g., Section 122) and discretionary delegations to do so (e.g., Section 202(a), from whence sprang the 2009 Finding).

But that 2007 opinion and the Finding that followed can be left alone without causing any further damage to law or sense. *Mass v. EPA* decided only that "Section 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change." 549 U.S. 497, 528 (2007). It did not, and could not, hold that the Act authorizes EPA broadly to declare, once and for all time and all purposes, that EPA must (or may not) undertake regulation under the remainder of the Act's manifold grants of regulatory power.

Section 202(a)(1) is but one of the Act's more than a dozen very specific grants of authority or obligation—large and small—to find endangerment to public health or welfare as predicate for a specified regulatory response. Others range broadly from listing criteria pollutants for development of national ambient air quality standards (Section 108) and major stationary sources for development of new source performance standards (Section 111), and narrowly to regulating engine rebuilding practices (Section 202(a)(1)(D)) and marine tankers (Section 183(f)(1)(A)). By requiring findings predicate to exercising any of these various regulatory authorities, Congress necessarily required of EPA a finding specific to the regulation that would follow. Accordingly, a finding for one regulatory purpose has no direct bearing on the finding for another.

Confusion on this point is understandable, indeed perhaps deliberately sowed. EPA purposefully published an abstract Finding separate from the automobile tailpipe rules that followed. And that Finding lacks any meaningful attempt to relate the dangers found to emissions from the limited source category actually in play. Even so, legally, the Finding was nothing but the prerequisite for imposing fuel efficiency standards on 2010-2016 cars, to which standards the vehicle manufacturers generally had agreed.

Commenters criticized the publication of a Finding "rule" separate from the tailpipe rules for which that Finding served as predicate. *See* 74 Fed. Reg. at 66,496, 66,501 (Dec. 15, 2009). But in poohpoohing that criticism, EPA had to and did acknowledge that the Finding indeed was no more than a predicate for setting carbon dioxide limits on 2010-16 vehicle fleets. *Id*. Nowhere in the preamble did or could EPA identify some provision of the Act that allowed it to wave a magic wand pronouncement to serve as predicate for any other rule to limit GHG emissions.

One also could be forgiven the thought that the Finding was not limited to one generation of cars, because it had so little to say about them. The published Finding did not establish that emissions from the potentially regulated source category (2010-16 model year cars) caused any danger; on the contrary, EPA acknowledged that the tailpipe rules would avoid an unmeasurable change in temperatures a century from now, and an amount of sea level rise less than the dimension of this dot ◦. *See* 75 Fed. Reg. 25,324, 25,495 (May 7, 2010) (preamble to final tailpipe rule).

No doubt because it could not, the last Administration's EPA made no real effort to show that translating mileage standards for new cars into tailpipe limits would yield measurable effect on any climate indicator; rather, EPA broadly asserted the presence of too much greenhouse gas in the atmosphere, and that cars generally (not model years 2010-16) are a big part of the U.S.'s anthropogenic GHG emissions. EPA never described the ideal climate or even temperature, or what atmospheric level of carbon dioxide would achieve that idyll. Instead, most of the Finding's many pages were dedicated to describing the potential adverse effects of a catastrophic change in climate (assuming it were to occur), *An Inconvenient Truth* as told to the Office of Federal Register.

Subsequent EPA actions became even more divorced from any environmental outcome-based rationale for their adoption. From the Clean Power Plan and its Section 111(b) new source predicate, to the uses of Section 111(b) and (d)

to regulate hydrocarbon production, and the "endangerment finding" for aircraft, every new GHG control rule or proposal under the Clean Air Act since 2010 has rested on that 2009 Finding. Each time, EPA disclaims the need to make a finding of ameliorable danger from the source category under consideration for regulation. Instead, EPA has said, in essence, "in 2009, we found that cars are dangerous. [Power plants/oil and gas operations/airplanes/etc.] emit [more than that/about the same amount/a lot, too]. Our work here is done."

To the extent EPA has addressed the alleged climate effects of any rules, it is to acknowledge that they are vanishingly small. Instead, the rules have been justified either because "every little bit helps" or "it sends a signal of our commitment." Neither of these justifications, of course, are consistent with *Mass v. EPA*, which expressly held that EPA may not rely on extra statutory factors in making a decision to regulate or not. In short, over the past eight years, EPA completely separated the decision to regulate from the ability to demonstrate that the regulation would meaningfully reduce the danger that allegedly justified the rules' adoption.

And so the way to unwind greenhouse gases from the Clean Air Act (except for the 2010 tailpipe rule) is for EPA's new management to acknowledge error in its prior *legal* position that EPA is not obligated to make a finding specific to the source category under consideration. EPA need only acknowledge that it must find that a particular source category's emissions cause a particular consequence, and that the imposition of an authorized scope of regulation of that source category would meaningfully mitigate that adverse consequence. A finding about 2010 model year cars is not the finding that must precede the adoption of Section 111(b) standards for new power plants or oil and gas infrastructure, or Section 111(d) standards for existing such sources. (This is especially but not exclusively true because Section 111, unlike Section 202(a), requires a finding of *significant* contribution.)

EPA simply needs to construe the laws in such a way as to assume Congress made sensible delegations of law-making authority: Regulate if you find that the authorized scope of regulation (e.g., imposition of the "best system of emission reduction") will meaningfully reduce an identified danger.

Without the obligation to link a source category to a consequence, EPA freed itself to adopt as much or little control as it wished (for political convenience, to award interest groups in the "renewables" or electric cars business, etc.). If instead EPA advanced the basic principle any rule must meaningfully mitigate the risks that justified its adoption, it would pull the common thread that unwinds each rule, regardless of where it is in its life cycle (final but in litigation, proposed, or under development). And of course the need to show that the rule is effective in combating the problem being used to justify its adoption is unlikely to yield the conclusion that it is, even using "settled science." No public policymaker should tremble from the burden of defending a decision not to regulate when even the rule's proponents can't identify any meaningful benefit from the rule. Indeed, every public policymaker—*especially* those who see AGW as existential crisis—should be insisting on *effective* action.

The 2009 Finding is a past, completed action that cannot be undone. But it is also irrelevant. Those who question its validity need not ask for its repeal, but instead its repetition before any other action is taken or upheld in the name of the Clean Air Act.

Eric Groten *is an Environmental and Natural Resources partner in Vinson & Elkins' Austin office. Eric is a full-service Clean Air Act practitioner.*