Oral Argument Not Yet Scheduled

No. 09-1322 (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.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Environmental Protection Agency Final Orders, 74 Fed. Reg. 66,496 (Dec. 15, 2009) and 75 Fed. Reg. 49,556 (Aug. 13, 2010)

REPLY BRIEF OF TEXAS FOR STATE PETITIONERS AND SUPPORTING INTERVENORS

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STATUTES AND REGULATIONS

The following statutory provision is pertinent to this case:

42 U.S.C. § 7521(a)(1) [CAA § 202(a)(1)]: "The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d), relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution."

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SUMMARY OF ARGUMENT

EPA's Endangerment Finding fails the arbitrary-and-capricious standard in at least two ways. First, EPA neglected to assess and define a threshold level at which climate conditions, climate change, or greenhouse-gas concentrations endanger public health and welfare. This omission represents a failure to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S.

29, 43 (1983) (citation omitted). Second, EPA "entirely failed to consider an important aspect of the problem," *id.*, by refusing to consider voluntary adaptation to climate change and mitigation of greenhouse-gas emissions—even though EPA adopted a long time horizon for evaluating endangerment and acknowledged that these factors could reduce the harmful effects of climate change. EPA's response confirms these shortcomings.

ARGUMENT

I. EPA FAILED TO PROVIDE A REASONED BASIS FOR THE ENDANGERMENT FINDING BECAUSE IT REFUSED TO DEFINE A THRESHOLD LEVEL AT WHICH CLIMATE CHANGE ENDANGERS PUBLIC HEALTH OR WELFARE.

EPA's discretion to make an endangerment finding under § 202(a) of the Clean Air Act (CAA), 42 U.S.C. § 7521(a), is bound by "reasonable limits," and any finding must be based on consideration of the relevant factors. *Ethyl Corp. v. EPA*, 541 F.2d 1, 18 n.32, 34 (D.C. Cir. 1976) (en banc). With its Endangerment Finding, *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), EPA breached the limits of its discretion under § 202(a) by failing to consider and identify an endangerment threshold.

EPA asserts that the CAA permits endangerment findings based entirely on qualitative measures without any quantitative assessment or determination of endangerment thresholds. EPA Br. 84-85. But without criteria or thresholds for determining the climates that endanger, § 202(a) would represent little more than regulatory *carte blanche*. As the Supreme Court warned in *Massachusetts v. EPA*, § 202(a)'s call for EPA to exercise its "judgment" "is not a roving license to ignore the statutory text." 549 U.S. 497, 532-33 (2007). Rather, EPA must provide a "reasonable explanation" for its endangerment decision. *Id*. It has not done so here.

EPA misinterprets *Ethyl* when it asserts that qualitative measures suffice for an endangerment finding.[1] EPA maintains that *Ethyl* does not require its endangerment finding to assess "safe" or "unsafe" climate-change levels. Instead, EPA claims that it need only undertake a qualitative balancing of risks and potential harms on a fact-specific, case-by-case basis. EPA Br. 85. But EPA ignores *Ethyl*'s requirement to consider "the relevant factors," *Ethyl*, 541 F.2d at 34

[1] The cases that EPA cites to support its argument, EPA Br. 85, are inapposite and distinguishable on a number of levels, but most notably, none concerns § 202(a) or a determination of endangerment.

(internal quotation marks omitted)—a requirement that EPA satisfied in *Ethyl* by calculating an endangerment threshold for blood lead levels. *Id*. at 38-39. Although EPA abandoned an attempt to determine a "safe" air lead concentration, EPA's calculation of a "safe" blood lead level and lead absorption rate was critical to its regulatory decision. *Id*. at 56.

In contrast to *Ethyl*, EPA here characterizes endangerment as changing climate conditions and the pace of climate change, but it never assesses or defines a point at which human health and welfare and welfare is endangered. 74 Fed. Reg. at 66,499. EPA's failure to consider this highly "relevant factor[]," *Ethyl*, 541 F.2d at 34, is especially problematic in this case because EPA admits that climate change occurs naturally, 74 Fed. Reg. at 66,499, and that anthropogenic global warming will likely benefit some areas of the United States, *e.g.*, 74 Fed. Reg. at 66,498, 66,532.

EPA also mischaracterizes the error alleged. The failure to provide concrete criteria for assessing endangerment is not for lack of scientific proof of cause and effect, as EPA suggests Petitioners argue. EPA Br. 86. Even assuming that EPA is correct to assert that man-

made greenhouse-gas emissions contribute to climate change, EPA still must assess and explain the point at which climate conditions and climate change endanger public health and welfare; this is necessary for EPA to have a rational basis for evaluating the danger from human emissions.

EPA also argues that its Endangerment Finding tracks the finding in *Ethyl*, and claims that the data undergirding *Ethyl*'s endangerment determination was "essentially qualitative in nature" because EPA never quantified a safe level of exposure. EPA Br. 86-87. But the Endangerment Finding in *Ethyl* calculated an endangerment threshold for blood lead levels, which it used to calculate an air lead concentration threshold, which it then used to promulgate regulations. *Ethyl*, 541 F.2d at 38-39, 56. Contrary to EPA's gloss, the regulations upheld in *Ethyl* sprung from EPA's determination of a specific harm threshold.

By insisting that its endangerment finding can rely exclusively on qualitative rather than quantitative factors, EPA also misses the larger point. There is little doubt that an endangerment finding can consider qualitative information, but that does not abrogate EPA's duty to define

or explain a threshold of endangerment. And that does not require, as EPA suggests, "quantify[ing] the myriad possible combinations of risk of harm and severity of harm." EPA Br. 87. It merely obliges EPA to explain its conclusion by identifying some threshold format which climate conditions or the rate of climate change will "endanger" public health or welfare.

The unique nature of the challenges posed by greenhouse gases and climate change underscores the need for an endangerment threshold. As EPA admits, climate change is a natural phenomenon, one that has caused both global cooling and global warming. *See, e.g.*, 74 Fed. Reg. at 66,523 (agreeing that there was a Medieval Warm Period around 1000 A.D.). Moreover, greenhouse gases occur naturally in the atmosphere and are naturally emitted by humans. And, unlike other pollutants regulated under the CAA, the presence of greenhouse gases is necessary for life to exist. *See, e.g.*, 74 Fed. Reg. at 66,499 (noting that greenhouse gases "help[] keep the Earth warm enough for life"). Thus, a rational evaluation of endangerment requires some theory that explains when these beneficial, naturally occurring gases and the natural dynamism of the climate reach a level that

"endanger[s]" human health and welfare. Because it refused to undertake this important and necessary assessment, EPA's Endangerment Finding was arbitrary and capricious.

EPA also thinks that *Massachusetts v. EPA* precludes this Court from requiring a threshold definition of "endangerment," because *Massachusetts* forbids EPA to invoke "residual uncertainty" as a reason not to make an endangerment finding. EPA Br. 88. But residual scientific uncertainty does not prevent EPA from establishing the threshold levels of climate change or greenhouse-gas concentrations necessary for its endangerment finding. In *Ethyl*, EPA recognized uncertainty regarding the health effects of varying blood lead levels, but this did not render improper its conclusion that a specific blood lead level endangers health. *Ethyl*, 541 F.2d at 39.

There will always be some uncertainty when agencies address environmental challenges, but that does not preclude EPA from defining a threshold for endangerment. Its failure to do so deprives its Endangerment Finding of any rational explanation, and EPA's wholesale reliance on the scientific assessments of outside groups for its Endangerment Finding only magnifies that failure. *See State Farm*,

463 U.S. at 43 (requiring a "rational connection between the facts found and the choice made") (internal quotation marks omitted).[2]

II. EPA'S ARBITRARY REFUSAL TO CONSIDER ADAPTATION AND MITIGATION IS NOT CURED BY CHARACTERIZING THOSE FACTORS AS CLIMATE CHANGE "RESPONSES."

EPA's Endangerment Finding recognizes that a proper endangerment determination requires "reasonable projections of future trends and possibilities." 74 Fed. Reg. at 66,505. It also notes that voluntary adaptation and mitigation will likely blunt the harmful effects of climate change. *Id.* at 66,512. Nevertheless, EPA refused to

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[2] In response to an internal investigation by EPA's Inspector General (IG) regarding the Endangerment Finding, EPA told the IG that its Technical Support Document (TSD)—which served as "the underlying scientific and technical basis" for the Endangerment Finding, 74 Fed. Reg. at 66,510—"is not a scientific assessment" because "no *weighing* of information, data and studies occurred in the TSD. That had already occurred in the underlying assessments, where the scientific synthesis occurred and where the state of the science was assessed." EPA Office of Inspector General, *Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes*, Report No. 11-P-0702 at 54 (Sept. 26, 2011) (Ex. A to Non-State Petitioners' Request for Judicial Notice, Sept. 30, 2011, Docket No. 09-1322, Document No. 1332845). Because those outside assessment reports were not concerned with an endangerment finding under § 202(a), there was no need to address endangerment thresholds. It is little wonder, then, that EPA's complete reliance on those outside assessment reports for the Endangerment Finding arbitrarily lacks any consideration of endangerment thresholds.

consider future adaptation to climate change and mitigation of greenhouse-gas emissions, even while adopting a decade-to-century-long time frame for assessing endangerment. *Id.* at 66,513-14.

EPA defends its approach by characterizing adaptation and mitigation as mere *responses* to endangerment, outside the scope of endangerment analysis. EPA Br. 114-16. This effort to brush aside adaptation and mitigation cannot allow EPA to ignore how the changing natural, political, societal, and economic landscape will affect greenhouse-gas emissions and reduce the impact of climate change, especially in light of EPA's long time horizon for projecting endangerment. 74 Fed. Reg. at 66,514. Even if EPA wants to characterize adaptation and mitigation as responses to endangerment, these responses will moderate any harmful consequences from climate change, and this must be deemed relevant to the ultimate endangerment analysis because a rational endangerment determination depends on an assessment of the expected harm. By ignoring adaptation and mitigation, the Endangerment Finding violates the arbitrary-and-capricious test by "entirely fail[ing] to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

EPA says that accounting for adaptation and mitigation would be too complicated and would exceed its authority under § 202(a) because political, economic, and societal changes are not sufficiently scientific. EPA Br. 114-15. That position cannot be squared with EPA's duty under § 202(a) to determine "whether sufficient information exists to make an endangerment finding." *Massachusetts v. EPA*, 549 U.S. at 533-34. If considering important climate-change factors is too complex or beyond its authority, EPA must acknowledge that a lack of "sufficient information" stands in the way of an endangerment finding. EPA cannot make a rational endangerment determination by excluding important elements from its analysis. *State Farm*, 463 U.S. at 43.

CONCLUSION

The Court should vacate and remand EPA's Endangerment Finding as arbitrary and capricious and a violation of the Clean Air Act.

Respectfully submitted.

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Dated: October 17, 2011

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Undersigned counsel hereby certifies that a true and correct copy of the foregoing brief was filed electronically with the Court by using the CM/ECF system today, October 17, 2011. Parties, intervenors, and amici that are registered CM/ECF users are being served by the appellate CM/ECF system. Counsel that are not CM/ECF users are being served via Federal Express.

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