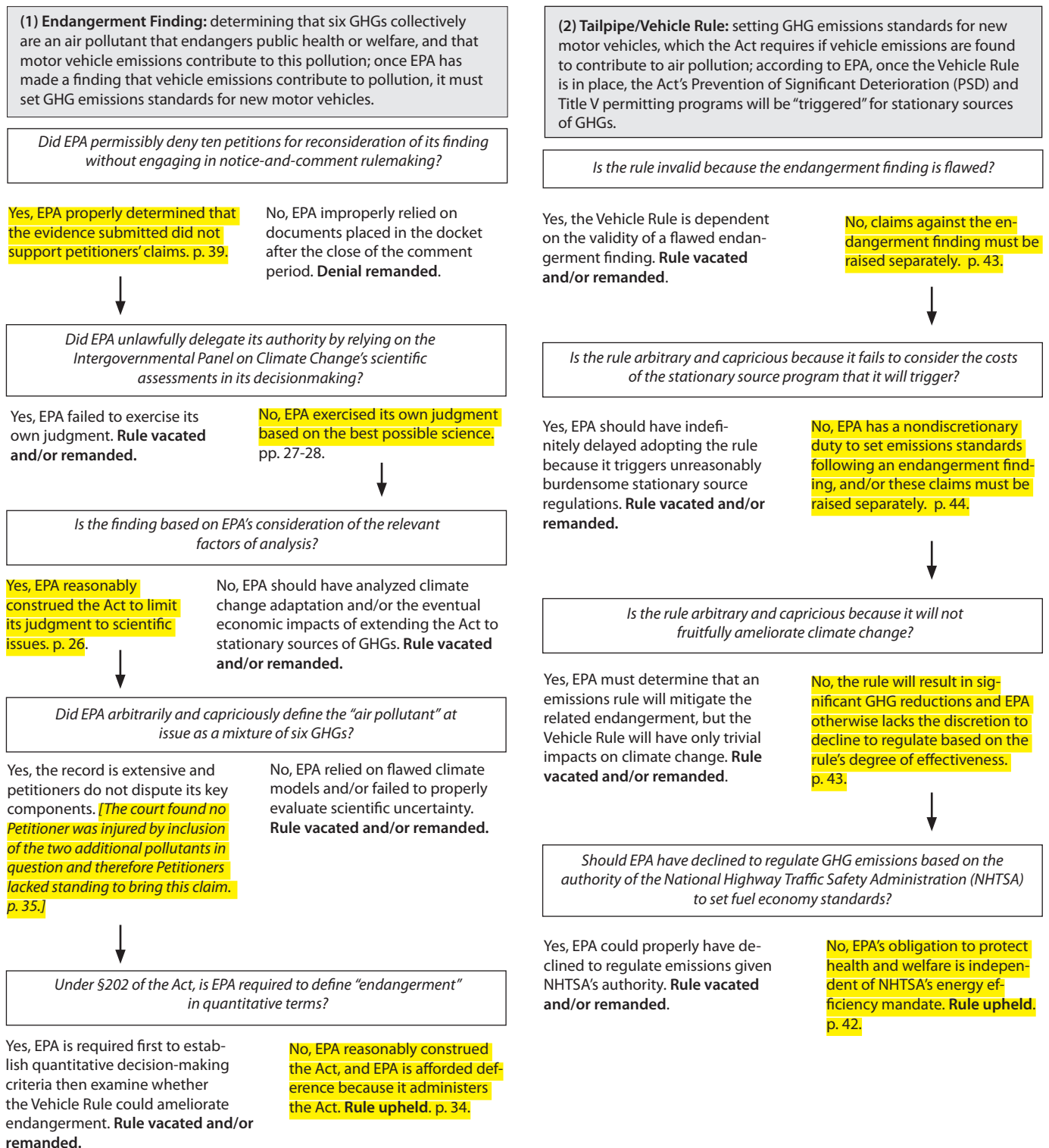


EPA Greenhouse Gas Rules Before the D.C. Circuit

On February 28 and 29, 2012, Judges Sentelle, Rogers, and Tatel of the U.S. Court of Appeals for the D.C. Circuit heard oral arguments in four consolidated cases, *Coalition for Responsible Regulation v. EPA* (Nos. 09-1322, 10-1092, and 10-1073) and *American Chemistry Council v. EPA* (No. 10-1167), challenging four EPA rulemakings on greenhouse gas (GHG) emissions and related historical rules. The challenged GHG rulemakings follow *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the U.S. Supreme Court ordered EPA to determine whether GHGs may reasonably be anticipated to endanger public health or welfare under the Clean Air Act. EPA has since determined that anthropogenic emissions of GHGs significantly contribute to global climate change. This flowchart highlights the major issues before the D.C. Circuit and some of the potential outcomes. The D.C. Circuit is expected to render a decision in summer 2012. Flowchart courtesy of Megan M. Herzog, a Law Fellow at the Environmental Law Institute.



(3) Timing Rule: extending the PSD program to facilities emitting GHGs as of the date the first vehicle engines can be certified subject to the Vehicle Rule; per EPA rules promulgated from 1978 to 2002, PSD applies to major sources of any regulated pollutant in areas satisfying National Ambient Air Quality Standards (NAAQS) for any pollutant.

(4) Tailoring Rule: phasing in the statutory thresholds at which stationary sources of GHGs will become subject to PSD and Title V permitting requirements, based on EPA's finding that immediately regulating millions of GHG stationary sources would unreasonably burden EPA and state administrators

Does the Court have jurisdiction over challenges to EPA's historical rules from 1978 to 2002?

Do petitioners have standing to challenge the Timing and Tailoring Rules?

Yes, based on the doctrines of "new grounds," ripeness, and/or reopener. [The court found it did have jurisdiction to review because the claims of at least two petitioners became ripe only with the greenhouse gas rules. p. 50. But because of the lack of standing, as indicated at the right, the analysis ended and the case was dismissed.]

Yes, based only on the doctrine of reopener, but petitioners may only challenge the Tailoring Rule. **Case No. 10-11670 dismissed.**

No, the Act requires petitions for review to be filed within sixty days of rule issuance. **Case No. 10-11670 dismissed.**

Yes, to challenge the underlying premise of the Timing and Tailoring Rules—i.e., EPA's historical interpretation that PSD applies to any pollutant regulated under the Act.

Yes, the application of PSD to GHG emissions injures petitioners, &/or because the state petitioners have standing, all petitioners have standing.

Yes, if the court enforced the Act's statutory thresholds, Congress would intervene to devise GHG-specific standards.

No, the remedy sought—literal application of the statute—would fail to alleviate petitioners' injury. p. 81. **Case No. 10-1073 dismissed.** [Petitions against both the Timing and Tailoring Rules were dismissed for lack of standing.]



Chevron Step I: Is it clear from §§161, 165, and 166 of the Act whether Congress intended GHGs, which are a non-NAAQS pollutant, to be subject to PSD once they have been regulated under the Vehicle Rule (the "trigger")?

Yes, permit requirements are clearly based on emissions of "any air pollutant" regulated by the Act, including non-NAAQS pollutants. **Rule(s) upheld.**

Yes, under the "NAAQS-only situs" reading of the Act, PSD only applies to a NAAQS-pollutant source in an area in attainment for that pollutant. **Rule(s) vacated and/or remanded.**

Yes, the structure and purpose of the PSD program, and the unique characteristics of GHGs, signal Congress' intent not to regulate GHGs. **Rule(s) vacated and/or remanded.**

No, the Act is ambiguous, but EPA has not had a chance to interpret the ambiguity; EPA thought its rules were compelled by *Massachusetts v. EPA* or *Alabama Power v. Costle*. **Rule(s) remanded.**

No, the Act is ambiguous, but EPA's rules have interpreted the ambiguity.

Chevron Step II: Is EPA's interpretation of the Act, through its rules, based on a permissible statutory construction?

Yes, although there are multiple interpretations, EPA's rational interpretation receives deference as long as EPA properly invoked the doctrine of administrative necessity, one-step-at-a-time, or absurd results as its basis for departing from statutory emissions thresholds.

No, EPA's interpretation of the trigger is unreasonable because it will have absurd results in the case of GHGs, and petitioners suggest alternative interpretations of the Act that would avoid absurd results (e.g., the "NAAQS-only situs" interpretation, or the interpretation that PSD cannot reasonably be applied to GHGs). **Rule(s) vacated and/or remanded.**

No, Congress set statutory emissions thresholds of 100/250 tons per year for the application of PSD, and EPA is not permitted to alter those standards in the Tailoring Rule. **Rule(s) vacated and/or remanded.**

Did EPA properly invoke the doctrines of administrative necessity, one-step-at-a-time, and/or absurd results in the Tailoring Rule?

Yes, EPA invoked at least one of the doctrines in accordance with its statutory authority and Congress' intent. **Rule(s) upheld.**

Yes, EPA's invocation of the one-step-at-a-time doctrine is permissible, but EPA must demonstrate it is on track towards full implementation. **Rule(s) upheld, but EPA must draft an implementation schedule.**

No, EPA has improperly invoked each of the doctrines. **Rule(s) vacated &/or remanded.**