



BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG HOUSTON LONDON LOS ANGELES NEW YORK PALO ALTO SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.



EPA's Existing Source Performance Standard for Greenhouse Gases Legal Issues and Ramifications

Roger Martella
rmartella@sidley.com
(202) 736-8097

Three Core Legal Questions

- I. Authority to Promulgate an NSPS for Existing EGUs.
- II. Authority to Set State Specific Standards.
- III. Authority to Provide Proposed Range of Compliance Options.



EPA able to proceed



EPA authority in question



EPA authority at risk

Authority to Promulgate NSPS for Existing EGUs



Authority to Regulate GHGs under the Clean Air Act.



Overall Standard of Judicial Review.



Authority to Regulate Sources Under Section 111(d) that Are Subject to Clean Air Act Section 112.



Authority to Promulgate Section 111 Rules without "Significant Contribution" Endangerment Determination.



Severability and Departure from 111(b) Rule.



Potential Impact of Supreme Court *UARG* Decision

Relevance of Supreme Court GHG Decision

When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” *Brown & Williamson*, 529 U. S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.” Slip Op. at 19.

Since, as we hold above, the statute does not compel EPA’s interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant. Slip Op. at 20.

In the Tailoring Rule, EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches—and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate. We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. Slip Op. at 23

Authority to Set State Specific Standards



Rulemaking authority to set state standards generally.



Authority to differentiate standards by state.



Is actual treatment of different states or EPA's assumptions arbitrary and capricious?



Defining BSER to include gas and coal collectively.



Defining BSER to look outside the fence.



Defining BSER to consider renewables, nuclear, and end use energy efficiency.

Authority to Provide Proposed Compliance Options



Broad flexibility to states in meeting standards.



Existing state programs can be incorporated.



States can require compliance beyond the fence line.



States can merge coal and gas for compliance purposes.



Challenges to EPA decisions on individual state plans likely to be considered outside DC Circuit.



States can adopt “portfolio” approaches and hold other industries liable.