

# THE ROLE OF JUDICIAL REVIEW IN CHINESE AND U.S. ENERGY AND CLIMATE CHANGE POLICY

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*Patricia Ross McCubbin*\*

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## INTRODUCTION

As part of any comparison of Chinese and U.S. policies on energy and climate change,<sup>1</sup> we should consider the role of judicial review in spurring or blocking government action. While the Chinese government can adopt broad requirements for energy efficiency and reduced greenhouse gases without being delayed by lawsuits, in the United States the efforts of the Obama Administration to regulate greenhouse gases under the federal Clean Air Act may be tied up in litigation for the next few years. Details about the Obama Administration’s rules and the lawsuits challenging them are

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\*Professor of Law, Southern Illinois University School of Law. I thank Mark Harrison Foster, Ian Sinderhoff and the other Journal staff members for successfully organizing the conference at which these remarks were delivered. I also thank Kory Watson, SIU Class of 2011, for excellent research assistance, and John Clark, SIU Class of 2012, for editorial assistance.

1. This article reflects the author’s remarks at the Vermont Journal of Environmental Law’s 2011 Symposium, where Chinese and U.S. scholars spoke about various environmental issues in China. See Symposium, *China’s Environmental Governance: Global Challenges and Comparative Solutions*, 12 VT. J. ENVTL. L. 591 (2011). The information presented here was accurate as of early March 2011, when the Symposium was held.

provided below. Although judicial oversight may provide substantive benefits in the long run, the uncertainties and delays it creates can frustrate important policy efforts. Thus, the contrast between the Chinese and U.S. approaches is a stark reminder of the pros and cons of judicial review.

### I. JUDICIAL REVIEW OF AGENCY ACTION—THE U.S. AND CHINESE PERSPECTIVES

From an American perspective, lawsuits that challenge federal agency actions are valuable because they protect the rule of law. Among other things, independent judicial oversight can enforce the will of Congress if, say, a recalcitrant agency refuses to meet an obligation specified in federal legislation.<sup>2</sup> Judicial review also ensures compliance with procedures that allow citizens to observe, participate in, and shape government policy-making.<sup>3</sup> In addition, courts can block agency actions that appear arbitrary or capricious, ferreting out decisions that may be more a product of political cronyism than reasoned deliberation.<sup>4</sup>

Intervention by courts, however, can also have adverse consequences. Because the judiciary only becomes involved on an *ad hoc* basis, considering challenges that are filed against some but not all actions of a particular agency, and because multiple judges and courts may be overseeing that one agency, the resulting judicial decisions create “regulation through random, ex-post directives rather than through managerially coherent, ex-ante controls.”<sup>5</sup> Judicial review can also disrupt agency agendas and misallocate agency resources.<sup>6</sup>

Of most relevance to this panel, judicial oversight can add considerable delays to the implementation of agency policies. One type of delay occurs through the “ossification” of the bureaucracy’s internal deliberative process, with personnel spending an inordinate amount of time trying to create an extensive administrative record to defend against “hard look” judicial

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2. See Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 522 (1989) (arguing that judicial review is a means of ensuring “legality”).

3. See *id.* at 525 (explaining that judicial review promotes “procedural regularity”).

4. See *id.* (stating judicial review promotes “protection against arbitrariness and selectivity”). Professor Sunstein also discusses other benefits of court oversight, including more efficiently allocating societal resources, ensuring better wealth distribution, promoting various social goods, and working against discrimination. *Id.* at 524-525.

5. *Id.* at 526.

6. Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1027-39 (2000).

review.<sup>7</sup> However, this article is focused on delay of a different sort—the delay that results from judicial intervention *after* an agency acts, when a court may stay the agency’s decision during the long months of litigation, and may eventually invalidate the decision altogether and send it back to the drawing board.

In contrast to the American approach, Chinese judicial oversight of administrative action is only available in narrow circumstances. As Professor Karen Halverson explains, “independent, judicial review of administrative acts” is not the Chinese norm, as “administrators tend to enjoy greater power and influence than judges.”<sup>8</sup> In particular, China’s Administrative Litigation Law only allows for review of “specific” or “concrete” acts of government bureaucracies, such as “the imposition of a fine [or] the withholding of a license.”<sup>9</sup> Chinese law, however, bars review of “administrative rules and regulations, or decisions and orders with general binding force.”<sup>10</sup>

Thus, the many broad requirements adopted by the Chinese government on energy and climate change are unreviewable. No suit could be brought, for example, to challenge China’s fuel efficiency requirements for automobiles, which are stricter than U.S. standards.<sup>11</sup> Emission limits for coal-fired power plants or any other manufacturing sector are also not subject to judicial scrutiny. Similarly safe from review are mandates to implement the 12th Five-Year Plan, issued in draft in March 2011, which is the most recent comprehensive economic planning document adopted by the national government.<sup>12</sup> That plan emphasizes energy conservation and environmental protection, calling for, among other things, a sixteen percent reduction in energy consumption per unit of gross domestic product

7. Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483-85 (1997).

8. Karen Halverson, *China’s WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT’L & COMP. L. REV. 319, 356 (2004).

9. *Id.* at 356 & n. 160.

10. Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 FORDHAM INT’L L.J. 1209, 1236 (2007). *See also id.* at 1236 n. 91.

11. In 2007, for example, China’s standards required an average fuel economy for new vehicles of 36.7 miles per gallon (“mpg”). *See* Joanna I. Lewis, *China’s Climate Change Strategy*, JAMESTOWN FOUND. (June 27, 2007), [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews\[tt\\_news\]=4263&tx\\_ttnews\[backPid\]=197&no\\_cache=1](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews[tt_news]=4263&tx_ttnews[backPid]=197&no_cache=1). Only in 2016 will new U.S. passenger vehicles have to meet an EPA emissions standard that equates to roughly 35.5 mpg fuel efficiency. *EPA and NHTSA Finalize Historic National Program to Reduce Greenhouse Gases and Improve Fuel Economy for Cars and Trucks*, U.S. EPA (April 2010), <http://www.epa.gov/otaq/climate/regulations/420f10014.htm>.

12. *Key Targets of China’s 12<sup>th</sup> Five-Year Plan*, XINHUA NEWS, March 5, 2011, [http://news.xinhuanet.com/english2010/china/2011-03/05/c\\_13762230.htm](http://news.xinhuanet.com/english2010/china/2011-03/05/c_13762230.htm).

(“GDP”) and a seventeen percent reduction in carbon dioxide emissions per unit of GDP.<sup>13</sup>

Even a government order to close certain production facilities would likely be unreviewable. In August 2010, for example, the Ministry of Industry and Information Technology directed more than 2,000 energy-intensive operations (such as cement works, iron foundries, and paper mills) to cease operations by September 30 of that year.<sup>14</sup> Although at first glance such a closure order might appear to be a “specific” or “concrete” act and thus reviewable, a Chinese colleague at this conference concluded that, in fact, an order of such broad scope would more likely count as a decision “with general binding force,” exempting it from review under the Administrative Litigation Law.<sup>15</sup>

Moreover, even if that sweeping closure order were reviewable, only litigants with “legitimate rights and interests” may bring suit.<sup>16</sup> In addition, Professor Halverson explains that “courts may only review administrative decisions for their legality—that is, they may not inquire into decisions’ appropriateness or reasonableness.”<sup>17</sup> In addition, while procedural infirmities could technically be the basis for reversal, “in practice, courts very rarely overrule the decision of an administrative body . . . for procedural reasons.”<sup>18</sup> Instead, to avoid “making the administrative body lose face,” the court may simply note the irregularity and urge the administrative body to “pay more attention to procedure” in the future.<sup>19</sup>

Thus, while the Chinese system does not leave room for the benefits of judicial review except in limited circumstances, there is also no delay of broad social policy initiatives. The government can quickly adopt mandates on energy and climate change without litigation.<sup>20</sup> Such prompt governmental action is not often found here in the United States.

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13. *Id.*

14. Michael Standaert, *China Orders 2,087 Facilities to Close Because of Outdated Production Practices*, World Climate Change Rep. (BNA), August 17, 2010. (Waiting on ILL)

15. Author’s personal communication with Jingjing Zhang at the Vermont Journal of Environmental Law 2011 Symposium (March 2, 2011).

16. Andrea Cheuk, *The Li’An (“Docketing”) Process: Barriers to Initiating Lawsuits in China and Possible Reforms*, 26 UCLA Pac. Basin L.J. 72, 80 n. 47 (2008).

17. Halverson, *supra* note 8, at 357.

18. Peter Howard Come, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 377 (2002).

19. *Id. But cf.* Titi Liu, *Transmission of Public Interest Law: A Chinese Case Study*, 13 UCLA J. INT’L L. & FOREIGN AFF. 263 (2008) (offering a more optimistic view of the potential to catalyze state action in China).

20. Of course, there is a separate question about the government’s ability to enforce these mandates. See Patricia Ross McCubbin, *China and Climate Change: Domestic Environmental Needs*,

## II. OBAMA ADMINISTRATION RULES UNDER THE CLEAN AIR ACT

With no climate change legislation moving on Capitol Hill, U.S. efforts to regulate greenhouse gases at the federal level are focusing on the Clean Air Act. In the last eighteen months, the U.S. Environmental Protection Agency (“EPA” or “the Agency”) has adopted four controversial rules under that statute that, individually or in combination, require reductions in greenhouse gases from cars, industrial facilities, and other sources.

In true American fashion, those regulatory efforts were prompted by litigation. In the seminal decision of *Massachusetts v. EPA*, the U.S. Supreme Court directed EPA to determine whether emissions of greenhouse gases endanger public health or welfare within the meaning of a key provision of the statute.<sup>21</sup> The case arose after EPA, under President George W. Bush, denied a petition from a group of states and environmental organizations asking the Agency to begin the process of restricting emissions of those pollutants from cars, trucks, and other vehicles.<sup>22</sup> When EPA denied the petition, the states and other coalition members sued, claiming the Agency violated its legal duty under the Clean Air Act.

In *Massachusetts*, the Court rejected EPA’s argument that it lacked authority under that statute to address global climate change.<sup>23</sup> Instead, the Court held that the Clean Air Act’s “sweeping definition” of an “air pollutant” included greenhouse gases, and that no activity on Capitol Hill since passage of the Act in 1970 “remotely suggests that Congress meant to curtail [EPA’s] power to treat greenhouse gases as air pollutants.”<sup>24</sup>

EPA also argued that even if it were authorized to regulate greenhouse gases, it would not be “effective or appropriate” to do so.<sup>25</sup> The Agency highlighted, for example, the “important uncertainties in our understanding of the factors that may affect future climate change.”<sup>26</sup> It also noted that setting vehicle emission standards would result “in an inefficient, piecemeal approach to addressing the climate change issue.”<sup>27</sup> In addition, EPA expressed concern that unilateral action by the United States would

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*Differentiated International Responsibilities and Rule of Law Weaknesses*, 3 ENVTL. & ENERGY L. & POL’Y F. 200, 228-234 (2008).

21. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

22. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,922 (Sept. 8, 2003) (Notice of Denial of Petition for Rulemaking).

23. *Massachusetts*, 549 U.S. at 528.

24. *Id.* at 528-29.

25. Control of Emissions from New Highway Vehicles and Engines, *supra* note 22, at 52,930.

26. *Id.*

27. *Id.* at 52,931.

interfere with President Bush's efforts to negotiate emissions reductions from China and other nations.<sup>28</sup>

The *Massachusetts* Court disagreed, holding that most of EPA's reasons for not acting, such as the Bush Administration's foreign policy goals, were improper because they had "nothing to do with whether greenhouse gas emissions contribute to climate change."<sup>29</sup> Although the Court did not direct EPA to find that greenhouse gases do endanger the public health or welfare, it directed the Agency to make a decision one way or another unless "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming."<sup>30</sup>

Without the *Massachusetts* decision, EPA might have declined to regulate greenhouse gases for years. Thus, the case illustrates the benefit of allowing parties to sue federal agencies refusing to implement congressional legislation. Such litigation can spur action that, for one reason or another, government agencies do not want to undertake.

#### *A. The Endangerment Finding*

To implement the *Massachusetts* ruling, EPA spent more than one year studying the complex scientific, legal, and policy issues involved in potentially restricting greenhouse gases under the Clean Air Act. In July 2008, EPA issued an Advance Notice of Proposed Rulemaking that presented extensive information to solicit public comment on the many regulatory questions it was facing.<sup>31</sup> In the preface, the Administrator of EPA emphasized the Bush Administration's view that greenhouse gases should not be controlled under the Clean Air Act, writing that such "an outdated law . . . is ill-suited for the task of regulating global greenhouse gases" and regulation will lead to "potentially damaging effect[s] on jobs and the U.S. economy."<sup>32</sup>

In April 2009, as one of its first major actions on climate change, the Obama Administration reversed that stance and issued a proposed finding that six prominent greenhouse gases may reasonably be anticipated to

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28. *Id.*

29. *Massachusetts*, 549 U.S. at 533.

30. *Id.* at 534.

31. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008) (to be codified at 40 C.F.R. ch. 1).

32. *Id.* at 44,355.

endanger the public health or welfare.<sup>33</sup> EPA issued the final decision incorporating that finding in December 2009.<sup>34</sup>

While this highly controversial rule is often referred to as the “endangerment finding,” it actually consists of two distinct findings, reflecting the inquiries required by section 202(a)(1) of the Clean Air Act.<sup>35</sup> First, in the true “endangerment finding,” EPA found that emissions of carbon dioxide and five other greenhouse gases “may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations” by contributing to climate change.<sup>36</sup> The adverse health effects, according to EPA, include “changes in air quality, increases in temperatures, changes in extreme weather events, increases in food and water borne pathogens, and changes in aeroallergens,” all of which can lead to illnesses and deaths.<sup>37</sup> Adverse effects on the public welfare, in EPA’s view, are posed by “numerous and far-ranging risks to food production and agriculture, forestry, water resources, . . . coastal areas, energy, infrastructure and settlements, and ecosystems and wildlife.”<sup>38</sup> Separately, in the “cause or contribute finding,” EPA also found that four greenhouse gases are emitted by new motor vehicles and cause or contribute to the pollution that endangers the public health and welfare.<sup>39</sup> (Following the common practice, this article will refer to the rule generally as the “endangerment finding,” unless addressing the Agency’s conclusions about vehicles in particular.)

### *B. Tailpipe Standards for Vehicles*

To implement the endangerment finding, on April 1, 2010, EPA finalized standards for vehicles that for the first time limited the amount of greenhouse gases that may be released from tailpipes.<sup>40</sup> The new requirements resulted from a historic agreement brokered by the Obama

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33. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Proposed Rule, 74 Fed. Reg. 18,886 (April 24, 2009).

34. Endangerment and Cause or Contribute Finding for Greenhouse Gases Under Section 202(a) the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1) [hereinafter *Endangerment Finding*].

35. 42 U.S.C. § 7521(a)(1) (2006).

36. Endangerment Finding, 74 Fed. Reg. at 66,516.

37. *Id.* at 66,526.

38. *Id.* at 66,534.

39. *Id.* at 66,536.

40. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pt. 85, 86, 531, 533, 536-38 & 600 ) [hereinafter *Light-Duty Vehicle*].

Administration with automakers, labor leaders, environmental organizations, the state of California, and other states.<sup>41</sup> Under the rule, all new passenger cars and light trucks for model year 2016 would have to restrict carbon dioxide emissions to 250 grams per mile.<sup>42</sup> Vehicles in the earlier model years of 2012 through 2015 are allowed to release slightly more carbon dioxide.<sup>43</sup> Because the only feasible way to reduce those emissions is to burn less carbon-based fuel, those tailpipe standards were issued jointly with improved fuel economy standards from the National Highway Traffic Safety Administration.<sup>44</sup> EPA's emission limit translates to roughly 35.5 miles per gallon ("mpg") of fuel usage on average,<sup>45</sup> up from 27.8 mpg for cars in 2011.<sup>46</sup>

### *C. The Tailoring Rule and the Triggering Rule*

While some critics have challenged the tailpipe standards for vehicles,<sup>47</sup> more controversy has been stirred by the potential emission limits for tens of thousands of power plants, industrial facilities, commercial operations and other buildings that emit greenhouse gases. The emission standards of particular concern stem from the Prevention of Significant Deterioration ("PSD") preconstruction review program, which requires, among other things, that new "major" facilities meet emission limits reflecting the best available control technology ("BACT").<sup>48</sup> For greenhouse gases, industries worry that meeting the BACT requirement might not simply involve improving energy efficiency, but also switching to low carbon fuels, reconfiguring the operations of particular plants, or even trying to capture and sequester carbon emissions.

The BACT requirement applies to any "pollutant subject to regulation" under the Clean Air Act.<sup>49</sup> With the tailpipe standards now in place, six greenhouse gases definitely are "subject to regulation," and, thus, any new facility with the potential to emit those pollutants above the statutory

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41. *California Leading on Global Warming Solutions*, SELECT COMMITTEE ON ENERGY INDEPENDENCE AND GLOBAL WARMING, <http://globalwarming.house.gov/impactzones/california>.

42. Light-Duty Vehicle, 75 Fed. Reg. at 25,329-30.

43. *Id.* at 25,400.

44. *Id.* at 25,328.

45. *Id.* at 25,330.

46. *Id.* at 25,331.

47. *See* Petition for Review, Coalition for Responsible Regulation, Inc. v. EPA, No. 10-1092 (D.C. Cir., filed May 7, 2010) (consolidated challenges to tailpipe standards).

48. 42 U.S.C. § 7475(a)(4) (West 2011).

49. *Id.*

thresholds would be subject to the stringent control requirements.<sup>50</sup> The Clean Air Act provides generally for a 250 ton per year threshold for new stationary sources.<sup>51</sup> With emissions of greenhouse gases several orders of magnitude greater than emissions of conventional pollutants, even schools, apartment buildings, hospitals, and farms could be caught in the PSD permitting program.<sup>52</sup> EPA estimates that 82,000 sources could be affected annually, compared to roughly 800 sources regulated per year under the current PSD program.<sup>53</sup>

In response to concerns about these potentially enormous regulatory burdens, EPA adopted two rules—known as the “tailoring rule”<sup>54</sup> and the “triggering rule”<sup>55</sup>—that attempt to phase in the control requirements and limit them to the 1600 or so largest sources.<sup>56</sup> In particular, the triggering rule provides that greenhouse gases will be “subject to regulation” as of January 2, 2011, when the tailpipe standards for model year 2012 vehicles take effect.<sup>57</sup> The tailoring rule then provides that, for the first six months of 2011, only sources that are already subject to the PSD permitting program for other pollutants will also undergo PSD review for greenhouse gases.<sup>58</sup> After that, the applicability of the program will depend on a source’s greenhouse gas emissions.<sup>59</sup>

The tailoring rule also dramatically alters the thresholds for “major” new sources. For example, a new source will be subject to the PSD program if it has the potential to emit 100,000 tons of greenhouse gases per year (measured in carbon dioxide equivalency), rather than the 250 ton threshold set by the statute.<sup>60</sup> EPA relies on the doctrines of “administrative necessity” and “avoiding absurd results” to support the tailoring rule, arguing that

50. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,557 (June 3, 2010) (to be codified at 40 C.F.R. pt. 51, 52, 70, 71) [hereinafter *Prevention of Significant Deterioration*].

51. 42 U.S.C. § 7479(1).

52. MINORITY STAFF OF S. COMM. ON ENVIRONMENT AND PUBLIC WORKS, 112TH CONG., EPA’S ANTI-INDUSTRIAL POLICY: “THREATENING JOBS AND AMERICA’S MANUFACTURING BASE” 14 (Comm. Print Sept. 28, 2010).

53. Prevention of Significant Deterioration, 75 Fed. Reg. at 31,514, 31,557.

54. *Id.* at 31,514.

55. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (April 2, 2010) (to be codified at 40 C.F.R. pt. 51, 52, 70, 71) [hereinafter *Reconsideration of Interpretation*].

56. Prevention of Significant Deterioration, 75 Fed. Reg. at 31,516; Reconsideration of Interpretation, 75 Fed. Reg. at 17,007.

57. Reconsideration of Interpretation, 75 Fed. Reg. at 17,007.

58. Prevention of Significant Deterioration, 75 Fed. Reg. at 31,516.

59. *Id.*

60. *Id.* (The tailoring rule similarly alters the scope of the Title V operating permit program.)

without it the permitting scheme will be overwhelmed by the sheer number of greenhouse gas sources now subject to regulation.<sup>61</sup>

### III. CHALLENGES TO EPA'S GREENHOUSE GAS RULES

All four of EPA's greenhouse gas rules—the endangerment finding, the tailpipe standards, the tailoring rule, and the triggering rule—are being challenged in court. The litigants represent a broad spectrum of American society, including scores of industries, many states, individual members of Congress, and even some environmental groups, who generally support EPA's efforts but criticize some aspects of the rules.<sup>62</sup>

Challengers to the endangerment finding include the states of Virginia, Alabama, and Texas, as well as the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Farm Bureau, Peabody Energy, many other industrial and commercial interests, and Republican members of the U.S. House of Representatives.<sup>63</sup> These litigants are not concerned so much by the tailpipe standards that flow directly from the endangerment finding as they are concerned about the PSD permitting requirements for stationary sources that follow. In this suit, seventeen states and several environmental organizations intervened on EPA's behalf,

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61. *Id.* The Agency also emphasizes the “one-step-at-a-time” doctrine, which, according to EPA, “authorizes agencies to implement statutory requirements a step at a time.” *Id.* Stationary sources may be subject to requirements for greenhouse gases that go beyond the PSD and Title V permitting programs. EPA is considering greenhouse gas standards for coal-fired power plants and other industries under section 111 of the Clean Air Act, which calls for “new source performance standards” or their equivalent for existing sources. Steven D. Cook, *EPA to Issue Performance Standards for Utility, Refinery Greenhouse Gases*, 41 *Env't Rep. (BNA)* 2845 (December 31, 2010). In addition, two environmental groups (the Center for Biological Diversity and 350.org) filed an administrative petition with EPA in late 2009, arguing that the endangerment finding compels the Agency to adopt national ambient air quality standards for greenhouse gases. Andrew Childers, *Advocacy Groups Ask EPA to Set Standards for Carbon Dioxide, Other Greenhouse Gases*, 40 *Env't Rep. (BNA)* 2751 (Dec. 4, 2009). See also Patricia Ross McCubbin, *EPA's Endangerment Finding for Greenhouse Gases and the Potential Duty to Adopt National Ambient Air Quality Standards to Address Global Climate Change*, 33 *S. ILL. U. L.J.* 437 (2009) (analyzing the merits of the administrative petition filed by the Center for Biological Diversity and 350.org).

62. See, e.g., *Petition for Review, Coalition for Responsible Regulation, Inc., v. EPA*, No. 09-1322 (D.C. Cir., filed Dec. 23, 2009) (challenges to the endangerment finding); *Petition for Review, Coalition for Responsible Regulation, Inc. v. EPA*, No. 10-1092 (D.C. Cir., filed May 7, 2010) (challenges to the tailpipe standards); *Petition for Review, Coalition for Responsible Regulation, Inc. v. EPA*, No. 10-1073 (D.C. Cir., filed April 2, 2010) (challenges to triggering rule); *Petition for Review, Southeastern Legal Foundation v. EPA*, No. 10-1131 (D.C. Cir., filed June 3, 2010) (challenges to tailoring rule).

63. *Petition for Review, Coalition for Responsible Regulation, Inc., v. EPA*, No. 09-1322 (D.C. Cir., Dec. 23, 2009) (documenting the consolidated challenges to the endangerment finding).

while a dozen states intervened in opposition.<sup>64</sup> Interestingly, most major players in the auto industry are not involved, having agreed not to challenge the endangerment finding or the accompanying tailpipe standards as long as the federal and state governments guarantee that the industry will face only one nationally uniform set of requirements.

The challenges to the endangerment finding will involve a complex interplay between science and the law.<sup>65</sup> A few parties, for example, may directly challenge the scientific consensus on climate change, arguing that increases in global temperatures are not caused by anthropogenic greenhouse gases.<sup>66</sup> Some parties will likely also attack EPA's reliance on the reports of the Intergovernmental Panel on Climate Change ("IPCC"), pointing to a controversy known as "Climategate" (concerning emails from climate scientists) to suggest the IPCC's data was manipulated for policy-driven purposes.<sup>67</sup> However, because the U.S. Court of Appeals for the D.C. Circuit usually defers to agency expertise on highly-technical questions, these scientific arguments may prove ineffective.<sup>68</sup>

More persuasive will be claims that, in the endangerment finding, EPA failed to comply with the framework established by the Clean Air Act for considering the dangers posed by air pollutants. Some petitioners will probably argue, for instance, that EPA failed to find a "significant" risk from greenhouse gases, as ostensibly required by case law, to prevent the Agency from imposing extraordinary burdens to address trivial harms. They will also likely argue that EPA's extreme interpretation of endangerment essentially assumes pollution is harmful unless it is shown to be safe, and thus improperly shifts the burden to opponents to demonstrate otherwise. In addition, challengers may assert that Congress expected pollutants to endanger the public health through direct routes, such as by inhalation or skin contact, rather than through the indirect changes in weather and climatic events predicted from greenhouse gases. Turning to the second

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64. *Id.*

65. At the time of this conference in early March 2011, briefing was not yet complete.

66. See Paul Bedard, *Scientist: Carbon Dioxide Doesn't Cause Global Warming*, U.S. NEWS, Oct. 7, 2009, <http://www.usnews.com/news/blogs/washington-whispers/2009/10/07/scientist-carbon-dioxide-doesn-t-cause-global-warming> (arguing that carbon dioxide does not cause global warming).

67. Indeed, shortly after EPA released the endangerment finding, it received 10 administrative petitions asking the Agency to reconsider in light of "Climategate." The Agency denied the requests for reconsideration in July 2010. See Leora Falk, *EPA Dismisses Petitions Challenging Science, Procedural Basis for Endangerment Finding*, 41 Env't Rep. (BNA) 1690 (July 30, 2010) (stating that EPA denied petitions challenging regulations based on "Climategate").

68. *Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997); *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1289 (D.C. Cir. 2004) (providing examples of technically sophisticated cases heard in the D.C. Circuit).

finding in the rule, litigants will probably argue, among other things, that emissions from new vehicles in the United States represent only a small portion of global emissions and, therefore, EPA cannot reasonably conclude that they “cause or contribute” to climate change within the context of the Act.

Finally, some parties will probably challenge the process used to adopt the endangerment finding. The U.S. Chamber of Commerce criticized EPA for not using a formal hearing overseen by an administrative law judge to determine the facts.<sup>69</sup> Others may suggest that EPA should not have issued the endangerment finding without at the same time releasing the tailpipe standards that follow from it, and that EPA should have provided much more time for comment on such a data-intensive and important rule.

Almost all of the states and industries challenging the endangerment finding also filed suit against the tailpipe standards and the triggering rule, with many of the same interveners for and against EPA.<sup>70</sup> The tailoring rule is also subject to extensive challenge, not only from the industry and state coalitions, but also from some environmental groups who disagree with EPA’s effort to reduce the number of facilities that must obtain permits for greenhouse gas emissions.<sup>71</sup>

The lawsuits raise interesting justiciability questions. The endangerment finding itself imposes no obligations on any regulated entity and, thus, may not be ripe for judicial review. In addition, many of the litigants may not have standing to challenge one or more of the rules. Parties challenging the tailpipe standards, for example, include power plants, portland cement facilities, and mining companies—none of which manufacture automobiles.<sup>72</sup> Similarly, the tailoring rule, which exempts certain facilities from permitting requirements, is being challenged by industries not exempt under the rule, who would have to rely on “competitor standing” doctrines to support their cases.<sup>73</sup> Hence, EPA or the environmental interveners may move to dismiss many of the petitioners.

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69. Steven D. Cook, *Chamber of Commerce Petitions EPA for Formal Hearing on Endangerment*, 40 *Env’t Rep.* (BNA) 1495 (June 26, 2009).

70. See *Petition for Review, Coalition for Responsible Regulation, Inc., v. EPA*, No. 10-1092 (D.C. Cir., May 7, 2010) (challenging tailpipe standards); *Petition for Review, Coalition for Responsible Regulation, Inc., v. EPA*, No. 10-1073 (D.C. Cir., April 2, 2010) (documenting court filings and briefs challenging EPA’s triggering rule).

71. *Petition for Review, Southeastern Legal Foundation v. EPA*, No. 10-1131 (D.C. Cir., filed June 3, 2010) (consolidated challenges to tailoring rule).

72. *Petition for Review, Coalition for Responsible Regulation, Inc., v. EPA*, No. 10-1092 (D.C. Cir., May 7, 2010) (documenting parties challenging tailpipe standards).

73. See, e.g., *Honeywell Int’l, Inc. v. EPA*, 374 F.3d 1363, 1370–71 (D.C. Cir. 2004) (stating that a manufacturer’s competitive interests satisfied standing requirements to challenge EPA’s rule).

All the lawsuits are being heard by the D.C. Circuit, which has extensive experience governing such complex regulatory cases.<sup>74</sup> The industry challengers urged the court to consolidate all four major topics into one large case.<sup>75</sup> While the court declined to go that far, it did urge the parties to work out schedules for filing dispositive motions and merits briefs, along with a format for oral argument that would efficiently deal with the overlapping issues among the various cases.<sup>76</sup> The time necessary for that wrangling and for writing lengthy briefs means that the court will not hear arguments for several months, and a final ruling could take a year or more.

The litigation is leading to substantial uncertainty in the implementation of federal climate change policy. Although the D.C. Circuit denied requests to stay EPA's four greenhouse gas rules while the cases proceed, the court could eventually invalidate the rules entirely. If the judges vacate the endangerment finding, then the tailpipe standards, which depend on that key finding, would also necessarily fail. Furthermore, if the tailpipe standards were invalidated—on their own merits or because of a faulty endangerment finding—then greenhouse gases would not be “subject to regulation” under the PSD program, and there would be no basis for the tailoring rule or triggering rule. Thus, although industries, state agencies, and EPA are currently implementing the greenhouse gas rules, they approach the regulations with some hesitancy, as the current regulatory regime may change substantially in the future.<sup>77</sup>

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74. *See, e.g.*, *General Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995) (adjudicating a challenge to EPA's interpretation of a complex regulatory scheme).

75. Steven D. Cook, *EPA Opposes Industry Motion to Combine Mobile, Stationary Greenhouse Gas Cases*, 41 *Env't Rep.* (BNA) 2060 (Sept. 17, 2010).

76. Petition for Review, *Coalition for Responsible Regulation, Inc., v. EPA*, No. 09-1322 (D.C. Cir., Dec. 23, 2009) (documenting court orders in consolidated challenges).

77. Judicial challenges are not the only development creating uncertainty. In the last year, various resolutions and bills have been introduced on Capitol Hill to limit and delay EPA's authority over greenhouse gases. None has passed so far, but the legislature continues to watch EPA closely. *See, e.g.*, Steven D. Cook, *Senate Rejects Murkowski Resolution Aimed at Halting Greenhouse Gas Rules*, 41 *ENV'T REP.* (BNA) 1291 (June 11, 2010) (discussing Senate rejection of a resolution that would nullify EPA rules on motor vehicle emissions); Steven D. Cook and Dean Scott, *Obama Would Veto a Bill to Delay EPA Limits on Greenhouse Gas*, *White House Aide Says*, 41 *ENV'T REP.* (BNA) 1692 (July 30, 2010).

## CONCLUSION

Judicial review of agency actions offers advantages and disadvantages. Without lawsuits, EPA would not have been forced by the Supreme Court's *Massachusetts* decision to address greenhouse gases under the Clean Air Act. Yet, the same ability to sue EPA means that implementation of the Agency's new greenhouse gas rules ultimately may be halted. Without such independent judicial oversight, by contrast, Chinese energy and climate policy moves forward far more quickly.