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Administrative Law Bulletin: *Coalition For Responsible Regulation v. Environmental Protection Agency* — Highly Deferential Judicial Review of Agency Scientific Determinations

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On June 26, 2012, the Court of Appeals for the D.C. Circuit upheld a series of United States Environmental Protection Agency (EPA) rules relating to the regulation of greenhouse gases under the Clean Air Act (CAA), referred to in the Court's opinion as the Endangerment Finding, the Tailpipe Rule, and the Timing and Tailoring Rules. *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency*, No. 09-1322 (D.C. Cir. June 26, 2012). Immediate reaction to the decision has focused principally upon its potential for economic disruption and job losses in major industries including coal production and power generation. The implications of the decision, however, may extend far beyond the field of greenhouse gas regulation. The Court's permissive ruling upholding the agency's reliance upon and according deference to scientific findings made not by EPA but by unrelated scientific organizations appears to be a significant departure from prior law and may have profound implications for the exercise of rulemaking authority by EPA and other federal agencies.

Case Origins and Background

Coalition for Responsible Regulation emerged from the long battle amongst regulated industry, environmental activists, and EPA over whether and how to regulate greenhouse gases. EPA initially took the position that greenhouse gases are not an "air pollutant" subject to

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regulation under the CAA, but the Supreme Court disagreed with that construction of the statute in *Massachusetts v. EPA*, 549 U.S. 497 (2007), finding that "greenhouse gases" are "air pollutants" under the CAA and directing EPA to consider whether greenhouse gases might pose a danger to public health. In response, EPA promulgated regulations (1) finding that greenhouse gases may pose a danger to public health; (2) setting certain standards for greenhouse gas emissions; and (3) setting down procedures for the implementation of the standards adopted. The regulations were challenged from different perspectives by states, industries, and environmental groups.

States and industries in particular challenged the "endangerment finding" — EPA's determination that greenhouse gases might pose a danger to public health — on the ground that it was insufficiently supported by the administrative record. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Construing the CAA, the D.C. Circuit found that the statute required "EPA to answer only two questions: whether particular 'air pollution' — here, greenhouse gases — 'may reasonably be anticipated to endanger public health or welfare,' and whether motor-vehicle emissions 'cause, or contribute to' that endangerment." Slip Op. at 23. Interpreting the Court's opinion in *Massachusetts v. EPA*, the court found that "[t]hese questions require a 'scientific judgment' about the potential risks greenhouse gas emissions pose to public health or welfare — not policy discussions." Id. at 23-24.

EPA's Reliance Upon the Conclusions of Other Organizations

EPA's determination that greenhouse gases may "reasonably be anticipated to endanger public health or welfare" — the so-called "Endangerment Finding" — is the predicate for the regulation of greenhouse gases in the corollary Tailpipe Rule and Timing and Tailoring Rules. In reaching that decision, EPA relied upon "'major assessments' addressing greenhouse gases and climate change issued by the Intergovernmental Panel on Climate Change (IPCC), the U.S. Global Climate Research Program (USGCRP), and the National Research Council (NRC)." Slip Op. at 26-27. According to the Court, "[t]hese peer-reviewed assessments synthesized thousands of individual studies on various aspects of greenhouse gases and climate change and drew 'overarching conclusions' about the state of the science in this field." Id. at 27. EPA did not independently analyze the scientific data supporting the assessments.

The state and industry petitioners challenging the rule argued that EPA, by relying upon the IPCC, USGCRP and NRC assessments, improperly had delegated the agency's rulemaking authority to those organizations. The Court rejected that argument, dismissing it as "little more than a semantic trick." Slip Op. at 27. In the Court's view,

EPA simply did here what it and other decision-makers often must do to make a science-based judgment: it sought out and reviewed existing scientific evidence to determine whether a particular finding was warranted. ***It makes no difference that much of the scientific evidence in large part consisted of "syntheses" of individual studies and research.***

Id. at 27 (emphasis added). The Court stated that "it appears from the record that EPA used the assessment reports not as substitutes for its own judgment but as evidence upon which it relied to make that judgment," adding that:

EPA evaluated the processes used to develop the various assessment reports, reviewed their contents, and considered the depth of the scientific consensus the reports represented.

Id at 28.

The Court's Departure from Prior Law Regarding Reliance Upon Outside Entities

The Court's approach reflects a profound change, in substance if not in rhetoric, from prior law. From the New Deal era through more recent decisions, it has been understood that Congress may not delegate rulemaking authority to private entities, nor may rulemaking agencies subdelegate their authority to outside entities.

In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court held unconstitutional provisions of the National Industrial Recovery Act that authorized the President to approve "codes of fair competition" developed by trade or industry associations, and established criminal penalties for violations of such approved codes. Although more frequently remembered for its holding that the authority granted to the President to approve or prescribe such industry codes, in the absence of any Congressionally established standards for the exercise of that authority, was an unconstitutional delegation of legislative authority, *Schechter Poultry* also rests upon the Court's holding that legislative authority may not be delegated to private organizations, regardless of their expertise:

But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

295 U.S. 537.

Similarly, more recent decisions, including decisions from the D.C. Circuit, have held that federal agencies and officers may subdelegate rulemaking authority to their subordinates, but may not subdelegate authority to outside parties in the absence of explicit congressional authorization. For example, in *United States Telecom Assn v. Federal Communications Commission*, 359 F. 3d 554 (D.C. Cir. 2004), the Court set aside a federal agency subdelegation to state commissions. The Court explained, in part:

When an agency delegates authority to its subordinate, responsibility — and thus accountability — clearly remain with the federal agency. But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. [ ] Also, delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," [ ] and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.

359 F. 3d at 565-566 (citations omitted). The Court also held that "[t]he fact that the subdelegation in this case is to state commissions rather than private organizations does not alter the analysis." Id. at 566.

The ruling in *Coalition for Responsible Regulation* contravenes the spirit and substance, if not the letter, of these prior cases. While EPA did not acknowledge a formal subdelegation of authority to IPCC, USGCRP and NRC, it is inescapable that the agency deferred to their expertise and conclusions, rather than making an independent determination of matters entrusted to it by Congress.

The Court's Extreme Deference To EPA's Determination

The Court not only permitted EPA to rely upon the analyses and conclusions of other organizations, but granted extraordinary deference to those conclusions, treating them as exercises of the agency's rulemaking authority. The Court thus extended the deference normally accorded to an agency's independent exercise of its own scientific expertise to EPA's adoption of conclusions reached by unaccountable third party organizations.

In evaluating EPA's scientific finding, the Court found that "in reviewing the science-based decisions of agencies such as EPA, 'although we perform a searching and careful inquiry into the facts underlying the agency's decisions, we will presume the validity of agency action as long as a rational basis for it is presented.'" Id. at 28, quoting *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009). The court also reiterated that in making that evaluation, it will "give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." Id. (quoting *Am. Farm Bureau*, 559 F.3d at 519).

Concluding, the Court made clear that, where scientific judgments are involved, its role is extremely limited:

In the end, Petitioners are asking us to re-weigh the scientific evidence before EPA and reach our own conclusion. This is not our role. As with other reviews of administrative proceedings, we do not determine the convincing force of evidence, nor the conclusion it should support, but only whether the conclusion reached by EPA is supported by substantial evidence when considered on the record as a whole. When EPA evaluates scientific evidence in its bailiwick, we ask only that it take the scientific record into account in a rational manner.

Id. at 32 (citations and quotations omitted).

Implications of the Decision in *Coalition For Responsible Regulation*

Assuming no modification or rehearing in the Court of Appeals and no Supreme Court review, the D.C. Circuit's decision in *Coalition for Responsible Regulation* marks a significant departure from prior law. Under its reasoning, persons with an interest in agency science-based rulemaking may find it difficult or impossible to protect their interests when outside parties deemed credible by the agency have reached an adverse conclusion. Instead, as the decision illustrates, rulemaking participants may face critical scientific determinations that have been made outside the rulemaking by organizations that cannot be held accountable; increased risks of distorted scientific evidence; and misplaced judicial deference to scientific conclusions that were adopted by the rulemaking agency without any meaningful exercise of the agency's own scientific expertise.

Unaccountable Organizations. The three organizations upon which EPA relied have no statutory role under the relevant terms of the CAA, and had no obligation to provide notice to persons interested in the potential regulation of greenhouse gases, to proceed by notice and comment rulemaking, or indeed to accept any participation or input from interested parties. The IPCC is a United Nations (UN) agency established by the UN Environment Programme and the World Meteorological Organization; the NRC and its affiliates "are private, nonprofit institutions that provide expert advice on some of the most pressing challenges facing the nation and the world;" and USGCRP is an interagency group that includes thirteen federal agencies and departments. None of these organizations is subject to any of the safeguards that apply to agency rulemaking under the Administrative Procedure Act (APA).

Potential for Distortion of Scientific Evidence. Uncritical reliance on analyses and syntheses prepared by outside organizations introduces a potential for scientific distortion. Regrettably, that potential is illustrated in the greenhouse gases context by public information suggesting that some climate scientists, over a period of years, systematically sought to skew scientific reports to support favored positions, and to marginalize scientific researchers who disagreed with global warming orthodoxy. Whether this affected aspects of the IPCC, USGCRP and NRC analyses relied upon by EPA is unknown, but the potential now exists for agency decisions to be influenced unreliably by policy-driven scientific assessments prepared by private or other organizations.

Court Deference To Agency Findings. Upon the premise that a rulemaking agency brings its scientific expertise to bear in exercising its authority, reviewing courts "give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." Slip Op. at 28, quoting *Am Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009). But that deference is not warranted in cases in which the agency did not, in fact, apply its own scientific expertise, but rather adopted the analysis and conclusions of another entity. In that event, parties with an interest in the rulemaking will be relegated to conclusions reached by an unaccountable third-party organization, with none of the protections afforded by notice and comment rulemaking under the APA, and no application of scientific expertise by the agency to which the

Court is deferring. The Court of Appeals may have been too quick to brush aside the serious questions raised by EPA's reliance upon the scientific assessments of other organizations.