

Legal Lookout: EPA Moves Closer to GHG Control

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EPA has put itself on the path toward greenhouse gas regulation, but in Congress, the courts, and the international community, the debate rages on.

On Dec. 7, 2009, EPA moved one step closer to imposing the first ever set of enforceable greenhouse gas (GHG) standards on tailpipe emissions from vehicles, and a requirement that large power plants and industrial emitters install best available control technology (BACT) to reduce emissions.

The endangerment findings

On Dec. 7, 2009, Administrator Jackson signed off on two findings originally proposed in April 2009 regarding GHG emissions under CAA Section 202(a). Under that section, the Administrator must exercise her judgment and make two separate determinations: (1) whether air pollution may reasonably be anticipated to endanger public health or welfare; and (2) whether emissions of any air pollutant from new motor vehicles or engines cause or contribute to this air pollution.

The first finding is that the current and projected concentrations of the six key, well-mixed GHGs – CO₂, methane, N₂O, HFC, PFC, and SF₆ – in the atmosphere threaten the public health and welfare of current and future generations. The second finding is that the combined emissions of these well-mixed GHGs from new motor vehicle engines contribute to the GHG pollution that threatens public health and welfare.

EPA must adopt restrictions on emissions of GHGs by new motor vehicles as part of a separate rulemaking. The agency acknowledged that "before taking any steps to reduce greenhouse gases under the Clean Air Act, EPA would conduct an appropriate process and consider stakeholder input. Notwithstanding this required regulatory process, both President Obama and Administrator Jackson have repeatedly indicated their preference for comprehensive legislation to address this issue and create the framework for a clean energy economy."

The key legal development paving the way for EPA to issue enforceable limits was on April 2, 2007, the day the U.S. Supreme Court issued its decision in *Massachusetts v. EPA*. The court found that GHGs are air pollutants under CAA Section 202 and held that EPA must determine whether GHG emissions from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. In making these decisions, EPA was required to follow the language of CAA Section 202(a).

Implications

While EPA's clear preference is for Congress to enact GHG emission legislation, it is not clear legislators will be able to act in the near term. Partisan politics, already predictably divisive, were greatly fueled in December by the controversy surrounding the release of stolen e-mails from the Climate Research Unit at the University of East Anglia in the U.K. This new wrinkle, though miniscule from a scientific standpoint, has upset the apparent debate.

Now that EPA has signed off on the findings, the agency is more or less committed to a course of conduct that almost certainly will result in a long and bitter legal battle over final agency. In the interim, GHG control opponents are wasting no time, already suing in various jurisdictions, claiming the regulations are a nuisance. Two federal Circuit Courts of Appeals, the Second and Fifth, have allowed suits to proceed to trial in the face of motions to dismiss them. How the unresolved Climate Change Conference will influence all of the above remains to be seen as of this writing. With all of the other legislative and political challenges facing the Obama Administration on the Hill, EPA may find itself in a tough position in the months ahead.

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