

EPA Moves Closer To GHG Control

By

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On December 7, 2009, the U.S. Environmental Protection Agency (EPA) moved one step closer to imposing the first ever 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 to reduce emissions. As delegates assembled in Copenhagen at the United Nations Climate Change Conference, Administrator Jackson penned her name to two findings under the Clean Air Act (CAA), paving the way for such limits. This column discusses this momentous development and its implications.

The Endangerment Findings

On December 7, 2009, Administrator Jackson signed off on two findings originally proposed in April 2009 regarding GHG emissions under CAA Section 202(a). Under CAA Section 202(a), 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 -- carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), and sulfur hexafluoride (SF₆) -- in the atmosphere threaten the public health and welfare of current and future generations.

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The second finding is that the combined emissions of these well-mixed GHGs from new motor vehicles and new motor vehicle engines contribute to the GHG pollution that threatens public health and welfare.

EPA noted in a press release issued last April that the findings neither “itself impose any requirements on industry or other entities.” EPA must adopt restrictions on emissions of GHGs by new motor vehicles as part of a separate rulemaking. EPA 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 is required to follow the language of CAA Section 202(a). The Court decision was the result of a 1999 petition filed by the International Center for Technology Assessment and 18 other environmental and renewable energy organizations. EPA denied the petition in 2003, concluding that it lacked the authority under the CAA to regulate GHGs for purposes of global climate change, and that

even if it did have the authority to set GHG emission standards for new motor vehicles, it would be unwise to do so at that time.

Implications

While EPA's clear preference is for Congress to enact GHG emission legislation, it is not clear Congress will be able to act in the near term. Partisan politics, already predictably divisive, were fueled greatly in December by the controversy surrounding the release of stolen e-mails from the Climate Research Unit at the University of East Anglia. This new wrinkle has upset the debate ensuring legislative action will be pushed back even further.

Now that EPA has signed off on the findings, EPA is more or less committed to a course of conduct that almost certainly will result in a long and bitter legal battle challenging final agency action that could drag on for years. In the interim, GHG emission opponents are wasting no time and already suing in various jurisdictions, claiming the emissions 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 Climate Change Conference will influence all of the above remains to be seen as of this writing. The United States very much seeks consensus of a framework to advance the debate and to allow time for Congress to pass meaningful legislation in 2010. 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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