GHG Regulation Is Here to Stay

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The first year of President Barack Obama's tenure has been marked by a bevy of activity in the environmental arena across all three branches of government. The year closed with yet another directive from the administration—the impact of which will be far and wide.

More particularly, coincident with the commencement of the international climate change negotiations in Copenhagen on December 7, 2009, the U.S. Environmental Protection Agency (EPA) issued an endangerment finding related to greenhouse gases (GHG) under Section 202(a) of the Clean Air Act (CAA). EPA determined that the current and projected concentrations of six GHGs—carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)—in the atmosphere threaten the public health and welfare of future generations. According to EPA, the combined emissions of these gases from new motor vehicles and new motor vehicle engines contribute to the GHG pollution that threatens public health and welfare. The Agency published its final rule, effective January 14, 2010, in the December 15, 2009, *Federal Register*.

At this writing, the Copenhagen climate talks are in progress, and the Obama administration has lent its support to working with other wealthy nations to raise $100 billion per year over the next decade to assist struggling developing nations combat climate change. Climate change generally, and GHG regulation more particularly, clearly will remain newsworthy for some time to come as each branch of government will have ample opportunity to impact future regulations.

The Agency's endangerment finding followed the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that GHG emissions are air pollutants subject to regulation by the CAA and that U.S. motor vehicle emissions make a meaningful contribution to GHG concentrations and hence to global warming. The Supreme Court's ruling in *Massachusetts* resulted from a petition for rulemaking filed by a collection of environmental, renewable energy, and other organizations requesting that EPA regulate GHG emissions from new motor vehicles and motor vehicle engines under Section 202(a) of the CAA. The decision mandated that EPA decide whether and how it should regulate GHG emissions under the CAA.

The Agency's final action actually contains two distinct findings: (1) an "endangerment" finding relative to the six GHGs and (2) a "cause or contribute" finding regarding new motor vehicles and motor vehicle engines and their contribution to the atmosphere concentrations of the six GHGs. Although EPA's determination does not impose any immediate additional requirements on industry, the finding will require GHG regulation of mobile and stationary sources under the CAA. One such regulation involves the GHG standards proposed early in 2009 for new light-duty vehicles as part of a joint rulemaking with the U.S. Department of Transportation.

EPA expects to issue light-duty motor vehicle GHG regulations during the first quarter of 2010. Once the regulations become effective, GHGs will be considered regulated pollutants under the CAA's Prevention of Significant Deterioration (PSD) Program. Thus, any new "major" stationary sources of GHG emissions or any modifications of existing "major" stationary sources that "significantly" increase their GHG emissions will be required to obtain a permit setting forth Best Available Control Technology (BACT) for those emissions.

EPA's determination accomplishes in a regulatory manner that which the Obama administration had not yet been able to achieve legislatively and will allow the Agency to regulate GHG emissions nation-wide on the theory that global warming is hazardous to human health. Although in early 2009 the U.S. House of Representatives passed "cap and trade" legislation in the form of the American Clean Energy and Security Act of 2009, the U.S. Senate has taken no such similar action and thus the Obama administration could not point in Copenhagen to any meaningful U.S. legislative effort to address expressed climate change and global warming concerns. EPA's finding, albeit administrative, clearly provides momentum for expansive GHG regulation nationally and internationally.

Notwithstanding the endangerment proclamation, to date there has been no cost analysis of new GHG regulations, thus it is difficult to estimate the impact of this finding on the economy. However, there appears to be an industry consensus that further GHG regulation will be very costly and will challenge economic growth. Some frustration has been expressed over EPA releasing its findings so close to a recent disclosure that a British scientist had privately discussed ways to shield climate data from the public. Notably, four U.S. senators sent a letter to Administrator Jackson calling on EPA to withdraw its endangerment finding based on new questions regarding the integrity of the science behind global warming. Administration officials have responded that, electronic communications notwithstanding, the world is warming.

Prior to, but consistent with, its endangerment finding, EPA proposed its "tailoring rule," which would require facilities that release more than 25,000 tons per year (tpy) of GHGs to obtain permits under the CAA's PSD and Title V permitting programs—in effect "tailoring" the existing major source thresholds—to limit application of those permitting programs to innumerable smaller GHG sources that otherwise could be impacted.

Given the administrative burden and cost that would be incurred if smaller sources were covered by these permit programs solely due to emissions of GHGs in excess of the existing statutory thresholds, EPA asserted that the legal doctrines of "absurd results" and "administrative necessity" required higher thresholds for GHGs, which are emitted in substantially greater volumes.

Interestingly, although some environmental groups view these recent actions as a step in the right direction, others believe that EPA has not done enough. Thus, it is possible

that future legal challenges to the Agency's decisions may be forthcoming, with industry on the one hand arguing that the Agency has done too much too soon with too little information and environmental groups on the other hand arguing that the Agency has not done enough. This may result in continuing judicial opinions on EPA's authority to regulate GHGs and whether industry's contribution of GHGs to the atmosphere gives rise to public nuisance claims.

Two recent judicial decisions on the nuisance issue are worthy of note and additional monitoring. In *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2nd Cir. 2009), eight states, three land trusts, and a city sued six electric power companies seeking abatement of the defendants' ongoing contributions to the public nuisance of global warming. The district court originally dismissed the lawsuit on the grounds that it presented nonjusticiable political questions. On appeal, the Second Circuit court vacated and remanded the district court's dismissal, finding that the plaintiffs' had standing and had properly stated a claim under the federal common law of nuisance.

One area still muddy following the Second Circuit's opinion is whether the Court's ruling upon plaintiffs' claims would be rendered moot after EPA commences regulation of mobile and stationary sources. Consequently, industry could be subject to both public nuisance lawsuits and EPA regulation related to GHGs.

A recent federal district court in California took a different view on standing and nuisance claims in *Kivalina v. ExxonMobil Corp.*, 2009 WL 3326113 (N.D. Cal. 2009). In *Kivalina*, the Alaskan Village of Kivalina brought an action against twenty-four oil and energy companies resident in or with sufficient contacts with California, alleging a federal common law nuisance. The nuisance claim asserted that the companies' GHG emissions had contributed to global warming, which caused erosion of Arctic sea ice. Kivalina alleged that as a result of global warming the natural ice barrier that normally protects the village from storms has melted and left the village uninhabitable. The district court dismissed the suit on grounds that the village didn't have standing and that the GHG public nuisance claim was a nonjusticiable political question. The village has appealed the district court's ruling to the Ninth Circuit, which no doubt may consider the Second Circuit's decision in *Connecticut*.

Clearly, nuisance claims involving GHGs will continue to receive judicial attention. Similarly, other forms of regulation are almost certain to follow EPA's endangerment finding. More particularly, now that the endangerment finding has been issued, EPA is likely to begin acting on petitions that seek regulation of a variety of mobile and stationary sources. The Agency projects that about 13,600 coal-burning power stations, crude-oil refineries, metal smelters, and other industrial facilities would be subject to regulation.

There seems little doubt EPA will proceed with GHG regulation without regard to international developments or congressional action. Although conceivably future congressional action would curtail EPA's authority to regulate GHGs under the CAA, no such action is likely before EPA's recent proposals take effect. In fact, with approval ratings at an all-time low, Congress may be delighted at EPA's action, which will allow it to temporarily "punt" on GHG legislation. Judicial review of these actions and future legislation appears imminent. Thus dialogue about the nature and scope of GHG regulation, GHG contribution, and climate change will continue in earnest.

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