



EPA GHG Regulation under the Clean Air Act: How Far Will They Go?

Law Seminars International
Arlington, VA
March 19, 2009

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Endangerment Finding Now Expected April 2009

- Appears that EPA will make proposed Endangerment Finding and ask for public comment
 - does not appear that EPA will propose actual regulations at same time
- But, once EPA makes Endangerment Finding, it will be legally obligated to regulate
- And although Endangerment Finding may be made initially only in context of new motor vehicles (§202(a)), EPA highly unlikely to restrict regulation to those sources only

Can EPA Limit GHG Regulation under CAA to Small Sources Only?

Perhaps most contentious comment issue in ANPR

- in general, industry, with some exceptions, questioned whether EPA could limit GHG regulation
- some environmental groups said EPA couldn't

Issues: NAAQS, PSD/Nonattainment NSR, Title V, HAPs

NAAQS

CAA 108(a)(1) must create a list (followed by NAAQS) of air pollutants:

- “(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
- “(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
- “(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.”

NRDC v. Train

545 F.2d 320 (2d Cir. 1976)

- Court ruled that Factor C only applied to pollutants included on the initial list of pollutants to be regulated under the NAAQS program, which EPA was required to promulgate within thirty days after December 31, 1970. Factor C cannot be used to refuse to promulgate a NAAQS where Factors A and B are met.
- If NRDC v. Train is still good law: endangerment finding for CO₂ means EPA must establish CO₂ NAAQS

NAAQS Issues

- Primary vs. secondary standard: do GHGs endanger public health and welfare or just welfare?
 - Primary standard: 10 years maximum to achieve attainment
 - Secondary standard: as expeditiously as practicable
- Level of NAAQS: Will the entire country be a Nonattainment Area?
 - Nonattainment NSR: LAER/offsets
- How does state maintain attainment or cure nonattainment of globally circulating pollutant?

What Do Environmental Groups Say?

“VII. The EPA Must Designate GHGs as Criteria Air Pollutants, Set National Ambient Air Quality Standards, and Expediently Facilitate the State Implementation Planning Process Pursuant to Sections 108, 109, and 110

* * *

B. The EPA Must Apply the Best Available Scientific Information to the Applicable Legal Standards to Establish Primary and Secondary Air Quality Criteria of No More than 350 ppm CO₂”

-- Center for Biological Diversity ANPR comment

What Do Environmental Groups Say?

“Additionally, EPA should use other provisions in the Clean Air Act – including NAAQS designation of GHG pollutant ... – to begin building the regulatory infrastructure needed to transition the nation to a low carbon economy.

“For example, under the NAAQS program, designation of carbon dioxide and other GHGs as criteria pollutants, establishment of NAAQS at 350 parts of CO₂ (or in the case of other GHGs, CO₂-equivalents) per billion, and designation of a nationwide non-attainment area would set the stage to develop cap and trade system using existing authority.”

-- Conservation Law Foundation ANPR comments

State Comments

“In other words, Section 108(a)(1)(C) does not provide EPA with discretion to decide whether it is appropriate to apply the NAAQS structure to a global air pollution problem like GHGs.” Recommends establishment of secondary NAAQS.

-- ANPR comments of CA AG Brown and CT AG Blumenthal

“A well-designed, new statutory approach surely might be preferable. Until such a bill is enacted, however, we should not allow the perfect be the enemy of the good. The NAAQS program can be made to work effectively.”

- ANPR comments of MA (taking no position on whether GHG NAAQS is legally mandated)

PSD/Nonattainment NSR

- Applies to all pollutants regulated under CAA
- Thresholds: 100 tpy for Nonattainment NSR – 100/250 tpy for PSD
- Very large number of sources emit CO₂ above these thresholds because their heating systems use natural gas or oil
 - ANPR: building of ~ 65,000 sq ft actually emit above 250 tpy CO₂
 - Chamber study: 1.2 million sources

Regulatory Gridlock

- ANPR – permitting burden, at minimum, would increase by order of magnitude – much higher if include PTE, modified as well as new sources, and non-combustion sources
- ANPR: “If the transition were not effectively managed, an overwhelmed permit system would not be able to keep up with the demand for pre-construction permits, and construction could be delayed on a large number of projects under this scenario.”

Can EPA Limit Permit Burden?

- ANPR:
 - EPA can establish higher threshold
 - EPA can prioritize
 - EPA can utilize “general permit” system
 - EPA can utilize “presumptive BACT”
- Industry, with exceptions, skeptical, warns of consequences if EPA is wrong

What Do Environmental Groups Say?

Because the PSD program applies where no NAAQS have yet been set for a regulated pollutant, the EPA should immediately begin regulating GHGs pursuant to the PSD program. The agency should transition to regulation pursuant to the NNSR program once NAAQS and air quality criteria have been established, consistent with our comments on regulation pursuant to sections 108-110, below.

While it is uncontroversial that EPA should prioritize the largest pollution sources first, one of the reasons that the NSR program will be such an effective tool for reducing GHG emissions is that it applies to a wide array of sources that will emit in excess of the applicable statutory thresholds of 250 or 100 tons per year ... EPA and the commenting agency heads instead have vastly exaggerated procedural and administrability issues associated with an increase in permitting ... The EPA asserts, without any support, that regulating smaller sources through the NSR will be inefficient and would create a problematic administrative burden ... Several of the suggestions that the EPA has advanced are outside the scope of its authority. The EPA has no authority to set higher GHG major source cutoffs and significance levels.

- Center for Biological Diversity ANPR comments

Title V and HAPs

- Title V Threshold: 100 tpy
 - “Hollow permit” issue
- HAPs threshold: 10/25 tpy
 - Are GHGs really hazardous pollutants?



EPA's Post-ANPR Response

Administrator Jackson response to follow-up questions from confirmation hearing:

11. On July 11, 2008, the EPA issued an Advanced Notice of Proposed Rulemaking (ANPR) in response to the U.S. Supreme Court's decision in Massachusetts v. EPA, in which the Court found that the Clean Air Act (CAA) authorizes EPA to regulate greenhouse gas (GHG) emissions if EPA determines they cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. The draft Advanced Notice of Proposed Rulemaking for greenhouse gases suggests at times that the regulation of greenhouse gases under programs such as Title V or the Prevention of Significant Deterioration ("PSD") can be managed, even though, as the draft states over 5550,000 sources will be affected by at least one of these programs. Do you think the CAA provides "wiggle room" not to apply these programs to sources that emit more than 100 or 250 tons of greenhouse gases?

Based on my current knowledge, I do believe that the CAA leaves EPA discretion, in the event of regulating greenhouse gas emissions under the Act, to do so in a way that does not necessitate direct regulation of all emissions sources regardless of their size.