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Regulating GHGs Under The Clean Air Act

Law360, New York (March 03, 2009) -- The debate over whether greenhouse gases (GHGs) should be regulated under the Clean Air Act (CAA or Act) appears to be coming to a head.

With the change in administrations and in control of Congress, the U.S. Environmental Protection Agency (EPA) appears poised to move forward with GHG regulation under the act without waiting for congressional enactment of a cap and trade program or other vehicle for controlling GHG emissions.

History

The debate over possible GHG regulation under the CAA began during the Clinton administration when then EPA Administrator Carol Browner testified at a congressional hearing that EPA had authority to adopt GHG regulations under the CAA if it so chose and did not need new legislative authority.

Although the Browner EPA did not initiate regulatory proceedings, a group of environmental interest groups filed a petition with EPA demanding that EPA utilize the authority EPA said it had and proceed with rulemaking proceedings to adopt GHG regulations.

Although the relief requested in the petition was limited to motor vehicle emission controls, it was widely understood that if EPA regulated motor vehicle GHG emissions, it would likely also adopt regulations for other GHG-emitting sources.

The petition sat dormant through the beginning of the Bush administration. When the original petitioners and other parties eventually filed judicial proceedings to mandamus EPA action on the petition, EPA responded by denying the petition.

EPA found that it did not have authority to regulate GHGs under the CAA, stating that it had changed its view on this point. EPA also stated that, even if it had such authority, it would decline to regulate on the ground that global warming science was too uncertain to justify regulations and because the CAA represented a poor vehicle as a matter of policy for trying to control GHG emissions.

The Bush administration decision was appealed to the U.S. Court of Appeals for the D.C. Circuit by a coalition of environmental interest groups and states in the case of Massachusetts v. EPA. A large number of industry groups, conservative interest groups and other states intervened to oppose the appeal.

The D.C. Circuit, with each of the three panelists expressing different views, refused to overturn EPA's denial of the rulemaking petition. The Supreme Court, however, accepted certiorari of the case and, in a 5-4 decision in April 2007, reversed the D.C. Circuit decision.

The court ruled that GHGs meet the CAA definition of "air pollutant" and that, therefore, EPA had authority to regulate GHGs if the agency made the predicate finding that GHG emissions endanger public health or welfare.

The court gave EPA three choices on remand: (1) make an endangerment finding and regulate; (2) make a finding of non-endangerment and don't regulate; or (3) rule that the agency cannot make either an endangerment or non-endangerment finding at this time because of a reason based in the CAA, such as uncertain climate change science, and defer a regulatory determination.

On Remand in the Bush Administration

Following the Supreme Court's decision, it appeared that the Bush administration EPA would adopt regulations under the CAA controlling motor vehicle GHG emissions.

The Bush administration saw the CAA as providing authority the administration needed for attaining the president's goal, announced in the 2007 State of the Union, of reducing gasoline usage by 20 percent in 10 years.

The administration changed its intention in this regard, however, when Congress in December 2007 adopted the Energy Independence and Security Act (EISA), which mandated increased corporate fuel economy standards and increased use of renewable automotive fuels such as ethanol.

Stating that EISA now provided the framework for attaining the president's "20 in 10" goal, the administration decided to address possible GHG regulation under the CAA by issuing an Advance Notice of Proposed Rulemaking (ANPR) seeking comment on a wide variety of regulatory issues.

Published in the Federal Register in July 2008 with a 120-day comment period, the ANPR resulted in deferral of a decision on actual GHG regulation under the CAA in response to Massachusetts v. EPA until the next administration.

Comments on the ANPR were filed by an extraordinarily large number of entities both opposing and supporting GHG regulation under the CAA.

No further action in direct response to the Massachusetts remand was taken before the Bush administration left office. An action filed by Massachusetts and other parties in the D.C. Circuit to mandamus a more substantive response to the Supreme Court decision failed.

Other Action on GHG Regulation Under the CAA

Apart from the Massachusetts remand, a number of other matters involving potential regulation of GHGs through the CAA are pending before EPA.

Environmental parties maintain that state and federal pre-construction air quality permits issued under the CAA's New Source Review program must contain limits on GHG emissions.

The Sierra Club recently challenged an EPA Region 8 pre-construction permit issued for a new coal-fired unit at Deseret Power Electric Cooperative's Bonanza Power Plant in Utah on the ground that the permit should have but did not include CO2 controls.

The Environmental Appeals Board — EPA's quasi-judicial body — determined that EPA Region 8 had not sufficiently justified its reason for not requiring CO2 emission limits.

EPA responded to the Appeals Board's remand in the Deseret permit appeal by issuing a stand-alone policy memorandum on December 18, 2008.

In the 19-page memorandum issued, then-Administrator Johnson provided legal and policy rationale for not imposing GHG controls in pre-construction air quality permits, at least until EPA decided in response to Massachusetts v. EPA whether it should adopt GHG regulations.

The same issue is under consideration in an appeal regarding the Desert Rock Energy Facility proposed by Sithe Global Power LLC, where EPA Region 9 recently stated that it relies on the Administrator's Dec. 18, 2008, memorandum in refusing to require CO2 controls.

The EAB, however, has chosen not to address the CO2 issues in the Desert Rock appeal at this time, although it likely will do so in the future. Environmental groups have appealed the Dec. 18, 2008, memorandum to court, stating that it represents final, appealable agency action.

Another key area in which potential GHG regulation under the CAA is being played out is in the so-called California "waiver" matter. The CAA authorizes California to adopt motor vehicle regulations that are more stringent than EPA standards if EPA grants a waiver for it to do so.

If EPA grants the waiver, then other states may adopt the California standards. More than a dozen states containing more than half of the country's population have adopted the California standards contingent on California obtaining the waiver.

In December 2007, EPA denied a request by California for a waiver to enable it to adopt its own motor vehicle GHG regulations. That denial has been appealed into court.

The automobile industry has also initiated litigation challenging individual state authority to adopt motor vehicle GHG standards even if EPA were to grant the waiver. So far, those lawsuits have not been successful.

Finally, states and environmental parties have submitted a number of petitions to EPA demanding regulation of GHGs from a variety of sources, including electric generating stations, other large industrial sources, airplanes, ships and a variety of engines.

As the Bush administration came to a close, no action had been taken on any of these petitions, all of which were folded into the ANPR process.

The New Administration

It seems almost certain that the new administration will proceed with regulation of GHGs under the CAA.

President Obama has already signed an executive order directing new EPA Administrator Jackson to reconsider EPA's denial of the California waiver, and on Feb. 6, 2009, the administrator issued notice of her intention to do so.

Although neither the president's executive order nor the administrator's notice stated that the California waiver would now be granted, the Federal Register notice stated that the previous EPA's denial of the waiver represented a "substantial departure" from past precedent.

Signals from the new administration also indicate that the new EPA will move fairly quickly on remand of the Massachusetts case to make an endangerment finding and regulate GHG emissions.

The primary targets for regulation appear to be motor vehicles, electric generating stations and at least some other large stationary sources.

Comments filed on the ANPR by those opposing GHG regulation under the CAA expressed concern that the CAA is inflexible and poorly designed to cost-effectively control GHG emissions, and that EPA might find itself legally obligated under the act to regulate not just large sources of GHG emissions but a variety of small sources as well.

The administration apparently believes these concerns are overblown and that regulation can be limited to only the biggest emitters. The administration may also move quickly to reverse Administrator Johnson's Dec. 18, 2008, memorandum and clear the way for the imposition of GHG controls in pre-construction air permits.

The push for immediate regulation of GHGs under the CAA may be enhanced by the possibility that Congress may not be able to enact a comprehensive GHG-control program this year. Moreover, whenever such a program is enacted, it will likely not become effective for several years.

As a result, many believe that advocates of immediate GHG regulation in the administration believe that the CAA represents the most immediately-available option.

Whether ultimate congressional adoption of a more comprehensive program, such as cap-and-trade, will supersede CAA regulations — or whether the country will end up with two GHG programs, one under the CAA and one adopted by Congress — remains to be seen.

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