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EPA Climate Policy: Waist-Deep In The Big Muddy

Law360, New York (June 21, 2010) -- The U.S. Environmental Protection Agency is poised to begin regulating greenhouse gases under the Clean Air Act at the beginning of next year, yet recent actions by the agency have unintentionally shown why the CAA is such a poor vehicle for regulating those gases.

To borrow from a Vietnam War era protest song, the EPA's regulatory rationale has led it waist-deep into a legal quagmire, with businesses and consumers across the economy the potential victims.

Unfortunately, on June 10, the U.S. Senate voted down a bill that would have prevented EPA from regulating. Although other congressional attempts may be made to preempt or delay EPA regulation, we now appear set to begin regulating GHGs under a statute that was not designed for that purpose.

Background

The EPA's GHG regulatory efforts stem from Massachusetts v. EPA, 549 U.S. 497 (2007), in which the U.S. Supreme Court determined that GHGs are "air pollutants" under the CAA that the EPA must regulate if it determines that GHGs pose a danger to public health or welfare.

The high court, however, did not order the EPA to make an endangerment finding, and said that, even if EPA found endangerment, it did not have to begin regulating immediately.

Because of its concern that the EPA regulation of GHGs under the CAA could lead to a regulatory cascade potentially affecting businesses that emit only small amounts of GHGs, the Bush administration did not immediately make specific regulatory proposals in response to the Supreme Court decision and instead issued an advance notice of proposed rulemaking seeking comment on how the agency should proceed.

This decision was excoriated by the environmental community, which downplayed the regulatory cascade problem, and the criticism intensified as it became clear that the administration was not going to make an endangerment finding or adopt regulations in its remaining time in office.

The Obama administration took office determined to rectify this situation, and on April 17, 2009, just three months after taking office, issued a proposed endangerment finding.

Despite requests from numerous parties for an extension of the 60-day comment period, a very short period given the complexity of the issues, the EPA refused and proceeded to finalize the endangerment finding on Dec. 7. The EPA's first GHG regulation was issued soon thereafter when, on April 1, it required new cars and light duty trucks to reduce GHG emissions beginning with model year 2012.

Who Wants to Regulate Mom and Pop?

The motor vehicle regulations in and of themselves are relatively (although not completely) uncontroversial, as the automakers supported the rule. As counterintuitive as it may seem, however, the effect of the motor vehicle regulations is not limited to motor vehicles but instead directly affects stationary facilities such as factories and buildings.

According to the EPA, the motor vehicle regulations cause GHG emissions from stationary facilities to become "subject to regulation" under two CAA permit programs. Under these programs, stationary sources that have the potential to emit more than 100 or 250 tons per year of an air pollutant that is "subject to regulation" (depending on the type of facility) must obtain permits and undertake best available retrofit technology to control emissions.

The problem for the EPA is that the agency's own analysis shows that millions of buildings and facilities in the United States have the potential to emit GHGs above the 100- or 250-ton threshold because they combust natural gas or oil for heating.

These include midsize to large apartment and office buildings and hotels, large houses of worship, sports arenas, hospitals and assisted living facilities, many school buildings, indoor malls, big-box stores, warehouses, large heated agricultural facilities, many restaurants and food processing facilities, breweries and wineries, and a variety of mom-and-pop stores and others.

The EPA itself characterizes the prospect of regulating all of these facilities as an "absurd

result," because the permit issuance system would be overwhelmed by applications and would grind to a halt. The EPA also correctly realizes there is little environmental gain from regulating these small sources.

The current EPA knew about this small-source problem when it took office and attempted to deal with it by issuing a proposed tailoring rule in October under which regulation would be restricted initially to sources potentially emitting more than 25,000 tons per year and regulation of lower emitting sources would be delayed for six years.

The proposal, however, drew extreme skepticism from legal observers, since a government agency does not have authority to change a statute, in this case by changing the 100- or 250-ton statutory threshold to 25,000.

Perhaps of more significance, and seemingly taking the EPA by surprise, the proposal was also widely criticized by state environmental regulators from both red and blue states on the grounds that even at the 25,000-ton level, far too many sources would become subject to regulation.

California even told the EPA that the proposal would interfere with the state's highly ambitious efforts to develop renewable resources, as those resources needed to be backed up by new natural gas-fired electric generation that would have difficulty getting permitted in a timely fashion under the EPA's requirements.

Moreover, the states told the EPA something that the agency already knew but had buried on page 291 of the tailoring rule proposal: States administer the permit programs under both federal and state law, and most states have codified the 100- or 250-ton per year thresholds in state law. As a result, the tailoring rule notwithstanding, the states needed to change these state laws to prevent the millions of small facilities from being regulated, and the EPA had not allowed sufficient (or any) time for this to happen.

Fixes to the Rule Make It Worse Legally

Given the incoming fire, the final tailoring rule, issued May 13, delayed the commencement of regulation, increased the initial threshold to 100,000 or 75,000 tons, established a schedule for phasing in lower thresholds but stated that no source potentially emitting less than 50,000 tons would be regulated before 2016, and said that sources potentially emitting below 50,000 tons might never be regulated.

Plainly, the EPA had substantially underestimated the impact of regulating GHGs and was now scrambling to come up with a more suitable program.

Yet the final rule drags the EPA even deeper into legal trouble. At least in the proposal, EPA had offered the justification that it was not rewriting the statutory 100- or 250-ton threshold, it was only delaying its implementation because of the need to prioritize regulation in order to prevent the system from being overwhelmed.

Now, with the final rule, that justification may be harder to sustain because the EPA says it may never implement the statutory 100- or 250-ton thresholds.

Even more problematic from a legal perspective is the manner in which the EPA addressed the need for states to change their laws so that the 100- or 250-ton thresholds are not applicable as a matter of state law.

In the final rule, while disclaiming that it was making any substantive change from its proposal, the EPA offered a rationale under which states could now "interpret" their regulations to mean that the 100- or 250-ton thresholds really mean the much higher thresholds set forth in the final tailoring rule.

The EPA, however, admitted that this legal maneuver might not work. It therefore asked states to notify it if they could not "interpret" their regulations to get around their statutory thresholds so that the agency could figure out what to do.

The most the EPA could say about this approach was that "[e]ven with some remaining state law problem, the tailoring rule ameliorates administrative burdens resulting from federal law requirements and shows promise to ameliorate at least a meaningful amount of administrative burden under state law."

In other words, at least the agency is trying to get around the state law problem, even if it can't ensure that its approach will be effective in preventing numerous small sources from becoming subject to immediate GHG regulation.

Is 'No One Will Sue' Really a Valid Legal Justification?

Given the shaky legal foundation on which EPA regulation is built, there has been much speculation as to whether anyone will bring a legal challenge that the tailoring rule thresholds violate the statute. After all, it might be argued, small sources benefit from the rule because they are exempt from regulation, and large sources, which are not exempt, also benefit

because they would not be able to get needed permits if small-source permit applications overwhelmed the system.

Moreover, environmental parties may be willing to tolerate the rule because they mainly only care about the large sources of GHG emissions. Indeed, a representative of one environmental organization defended the rule and hypothesized that no business would have legal standing to challenge it because the rule helped business rather than hurting it.

But assumptions that no one will challenge the thresholds in a direct appeal of the rule may be overly optimistic and in any event miss the point that the rule will be vulnerable to collateral attack if a not-in-my-back-yard plaintiff wants to stop construction of a facility — for instance, an unwanted big box store — that emits above the statutory threshold but has not obtained a permit in reliance on the rule.

Multiple scenarios can be imagined where a NIMBY plaintiff would argue that the tailoring rule is legally deficient and does not excuse the facility from failing to receive the necessary CAA permits.

Thus, the legal uncertainty caused by tailoring rule does not go away if the thresholds are not challenged in a direct appeal; instead, the uncertainty will continue and cast a pall on development activity across the economy indefinitely.

Is EPA Motor Vehicle Regulation Really Necessary Anyway?

With all of the negatives hovering over the tailoring rule, it is distressing to realize that the EPA's regulation of motor vehicle GHG emissions is unnecessary. Remember, it is the EPA's issuance of the motor vehicle rule that makes GHGs "subject to regulation" under the Clean Air Act and triggers the permit consequences for stationary facilities that EPA is now struggling with.

But those EPA vehicle rules are virtually duplicative of the new Corporate Average Fuel Economy Standards that the U.S. Department of Transportation adopted at the same time as the EPA's vehicle rules. The only way for the automakers to materially reduce GHG emissions in response to EPA's regulations is to improve vehicle fuel economy, but they are required to do that anyway under the DOT regulations.

To make matters worse, the actual climate effect of the EPA's vehicle rule is vanishingly small: hundredths to thousandths of a degree of temperature increase avoided by 2100,

according to EPA's own calculations.

Moreover, although the tailoring rule exempts small GHG emitters, it does not exempt large GHG emitters that constitute much of the nation's industrial capacity. Yet despite the fact that the motor vehicle rule triggers large-source GHG regulation and subjects them to BACT requirements, the EPA has continuously refused requests from a cross-section of the regulated community that it perform a study of the economic, employment and competitive effects of these requirements.

As a result, the EPA does not know whether the benefits of GHG regulation of stationary facilities will exceed the costs nor does it know the extent to which its regulation will cause economic activity and jobs to move to countries that do not impose GHG emission requirements.

Congress Refuses to Ride to the Rescue ... So Far

Because of widespread concern on Capitol Hill at the prospect of EPA regulation, Sen. Lisa Murkowski, R-Alaska, introduced a resolution with 40 co-sponsors that would have barred the EPA from regulating.

The senator's resolution invoked the Congressional Review Act to disapprove EPA's endangerment finding, a procedure that requires only 51 votes to pass in the Senate. If the resolution became law, EPA's entire program of regulation to date would be null and void.

On June 10, however, that resolution was voted down by a vote of 53-47, with all 41 Republicans and 6 Democrats voting for the resolution.

According to reports, a number of possible supporters of the resolution decided to oppose it based on reports that Senate Majority Leader Harry Reid, D-Nev., had promised a vote on a bill sponsored by Sen. Jay Rockefeller, D-W.Va. Rockefeller's bill would not prohibit EPA regulation as would the Murkowski resolution, but would delay such regulation for a period of two years.

Also in the wings is possible legislation by Sens. Thomas Carper, D-Del., and Bob Casey, D-Pa., that may not yet have been drafted, but would, at least reportedly, delay regulation for one year and also codify the tailoring rule.

Thus, the door has not closed on possible congressional action on EPA regulation, although at this time no action on the Rockefeller bill has been scheduled.

Conclusion

In the end, the EPA cannot get around the fact that the CAA — an inflexible, antiquated, command-and-control statute first enacted in 1970 and last comprehensively amended 20 years ago — is not suited to regulate GHGs, and any effort to squeeze sensible regulation within its confines makes little sense.

The sensible course would be for Congress, not the EPA, to determine national GHG policy.

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