

July 15, 2008

EPA Issues Advance Notice of Climate Change Rulemaking

On July 11, 2008, the U.S. Environmental Protection Agency ("EPA") released an advanced notice of proposed rulemaking ("ANPR") to regulate greenhouse gases ("GHG") under the Clean Air Act. The ANPR is in response to the April 2007 Supreme Court ruling in *Massachusetts v. EPA*, which required EPA to determine if GHGs endanger public health or welfare and, if so, to regulate them. This rulemaking has been mired in behind-the-scenes politics and was initially expected to be issued in December 2007. Unlike typical rulemakings, there is no definitive proposal of what a GHG-reductions program would look like; instead, EPA is presenting its analyses and policy alternatives for consideration. The rulemaking will not be finalized under the current administration, but instead will fall to the next EPA administrator.

In the ANPR, EPA concludes that the Clean Air Act ("CAA") is a very ill-suited vehicle for effectuating a climate change program. EPA Administrator Stephen L. Johnson said that promulgating a program under the CAA would take years to issue, and the rule would then be litigated for years to come. For example, the CAA regulates traditional air pollutants that typically remain airborne for days to weeks and are localized, while GHGs remain in the atmosphere for such long periods of time that long-term distribution of GHG concentrations is not dependent on local emission sources. This is one reason why, according to EPA, the CAA's framework is not an effective way to regulate GHGs. Instead of regulating under the CAA, Johnson called on Congress to pass legislation creating a new legal framework for regulating greenhouse gases. Other agencies, such as Department of Energy, Department of Transportation, and Department of Commerce, also expressed serious concerns about using the CAA to regulate GHGs.

Significantly, while *Massachusetts* required EPA to consider GHG emissions from mobile sources, the agency expressed its concern that regulation in this context could trigger stationary source requirements that would reach even the smallest emission sources, including apartment buildings, large homes, schools and hospitals. In particular, regulation under the mobile source section of the CAA could implicate the prevention of significant deterioration ("PSD") program, which could require case-by-case permitting. The Administrator made clear that "the potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land."

The ANPR also examines many of the industries that would be impacted by regulation under the CAA. Potential requirements could include regulations of U.S. manufacturing plants' design to increase energy efficiency. New technologies may be needed to achieve GHG reductions in the trucking industry, including devices to limit vehicle speed. The shipping industry would need to consider ship design and marine operations, including redesigning ship hulls, limiting ship speed and regulating route planning and port management. International efforts are underway to address many of these shipping concerns already, confirming EPA's contention that GHG regulation under the CAA would result in layers of regulatory oversight in this and many other sectors.

While EPA has not gone as far as some would have liked it to go, it is significant that EPA and the other agencies are now clearly calling for a new legal framework for the regulation of GHGs. This puts the onus on Congress, which has not been able to gather enough votes this year to move cap-and-trade legislation. Climate change issues are expected to remain in the forefront under a new president and congress, though the health of the economy will play a large role in the success, or lack thereof, in passing GHG reduction legislation in 2009. In the meantime, this EPA rulemaking will move forward. EPA is requesting stakeholders to provide comments on the issues within 120 days of publication (i.e., mid-November).

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