

I N S I D E T H E M I N D S

The Legal Impact of Climate Change

*Leading Lawyers on Responding to Climate
Change Developments and Complying with
New Regulations*

2013 EDITION



ASPATORE

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Addressing Climate Change Under the Clean Air Act

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Introduction

Over the last five years, the Clean Air Act (CAA)¹ has become the primary vehicle by which the federal government regulates the emission of greenhouse gases (GHGs) in the United States. Since the Supreme Court clarified in its 2007 decision *Massachusetts v. EPA*² that the Environmental Protection Agency (EPA) has the authority to regulate GHGs under the CAA, the EPA has exercised this authority to regulate GHG emissions from automobiles, light trucks, and large stationary sources. The re-election of President Barack Obama, the administration's stated commitment to addressing climate change, and an expected continuation of congressional inaction on the issue make it likely that the CAA will continue to be the primary means of federal GHG regulation in the coming years. This chapter outlines the legal basis underpinning the EPA's authority to regulate GHG emissions under the CAA, summarizes the GHG regulatory actions taken by the EPA to date, and concludes with an overview and analysis of future regulation of GHGs that will likely be enacted or proposed over the next several years.

Legal Authority to Regulate GHGs Under the CAA

Massachusetts v. EPA

Section 202(a)(1) of the CAA requires the EPA to “prescribe...standards applicable to the emission of any air pollutant from...new motor vehicles...which, in [its] judgment...cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”³ The CAA broadly defines “air pollutant” as “any air pollution agent...including any physical, chemical, biological, or radioactive...substance...emitted into...the ambient air.”⁴

¹ Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (amended 1990) (codified as amended beginning at 42 U.S.C. § 7401).

² *Massachusetts v. EPA* 549 U.S. 497 (2007).

³ 42 U.S.C. § 7521(a)(1) (2013).

⁴ 42 U.S.C. § 7602(g) (2013).

In 1999, a group of private organizations petitioned the EPA to regulate new motor vehicle emissions of four GHGs⁵ as pollutants pursuant to Section 202 of the CAA. The petitioners further argued that, since GHGs were pollutants, the EPA could refrain from regulating GHGs consistent only with the terms of the CAA. In 2003, the EPA denied the petition on multiple textual and policy grounds, including that the CAA, in the EPA's view, did not grant the agency the authority to regulate GHGs for their impact on global climate change and that among other policy reasons, such regulation, even if permitted, would conflict with the Bush administration's approach to addressing climate change.⁶ In 2005, the D.C. Circuit rejected a lawsuit by multiple states (led by Massachusetts), cities, and private organizations challenging the EPA's denial of the petition.⁷ The Supreme Court subsequently granted certiorari.

In a five-to-four decision, the Court held that:

1. The CAA granted the EPA the authority to regulate GHGs by way of its broad definition of "air pollutant"⁸
2. The CAA granted the EPA discretion to regulate or not regulate an air pollutant only insofar as there is a question as to whether it "may reasonably be anticipated to endanger public health or welfare," and not for other policy reasons, such as conflicting with the Executive Branch's policy approach⁹
3. The petitioners had standing to bring their claim¹⁰

The Court remanded the case to the D.C. Circuit for further proceedings consistent with the Court's holding that the "EPA must ground its reasons for action or inaction in the statute."¹¹ Specifically, the "EPA can avoid taking further action only if it determines that

⁵ The four GHGs were CO₂, methane, nitrous oxide, and hydrofluorocarbons.

⁶ EPA, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (Sept. 8, 2003).

⁷ *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007).

⁸ *Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007).

⁹ *Id.* at 532–35.

¹⁰ *Id.* at 516–27.

¹¹ *Id.* at 535.

greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”¹²

EPA Regulatory Actions Regarding GHGs under the CAA

Endangerment Finding

In the aftermath of the Supreme Court’s decision in *Massachusetts v. EPA*, and with the Obama administration supporting enhanced GHG regulation in light of the inability of Congress to pass climate change legislation, the EPA reevaluated its previous refusal to exercise its authority under the CAA to regulate GHG emissions from automobiles. In December 2009, the EPA issued its findings that the concentrations of six GHGs¹³ in the atmosphere endanger the public health and welfare of current and future generations, and that emissions of these GHGs from new automobiles contribute to pollution by these GHGs (collectively, the “Endangerment Finding”). While these findings did not directly impose any requirements related to GHG emissions, they were necessary prerequisites for the promulgation of GHG regulations under the CAA.

*Regulation of GHGs from Automobiles (Tailpipe Rule)*¹⁴

The Endangerment Finding paved the way for the EPA to move forward with the promulgation of GHG emission standards for new automobiles under the CAA. In April 2010, the EPA, in coordination with the Department of Transportation (DOT), issued the first-ever GHG emission standards for cars and light trucks. These standards applied to the 2012–2016 model years and took effect on January 2, 2011. In August 2012, the EPA and the DOT issued GHG emission standards for cars and light trucks for model years 2017–2025.

¹² *Id.* at 533.

¹³ The six GHGs are: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆).

¹⁴ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

Regulation of GHGs from Stationary Sources—Title V Permitting and Prevention of Significant Deterioration

Following the issuance of GHG regulations for cars and light trucks, the EPA turned its regulatory focus to large, stationary sources of GHG emissions. The Title V operating permit and Prevention of Significant Deterioration (PSD) provisions of the CAA are two of the primary mechanisms under the CAA by which the federal government regulates emissions of pollutants from stationary sources. “Major sources”¹⁵ of emissions of “any regulated pollutant”¹⁶ are required to have a Title V permit, which is a comprehensive operating permit that contains all of the operating requirements for the subject facility. These permits generally do not establish new emissions limits, but rather synthesize other applicable requirements under the CAA into a single permit. The PSD program applies to all new and modified major sources of regulated pollutants and requires these sources to utilize the “best available control technology” (BACT) for each pollutant emitted. BACT is not a single standard or requirement applicable to all facilities uniformly, but a top-down, case-by-case determination of which pollution reduction mechanisms should be implemented, depending on the particular facility in question.

Both Title V and PSD apply to major sources of “regulated pollutants.” Prior to the enactment of the Tailpipe Rule, GHGs were not “regulated pollutants” subject to the Title V and PSD provisions. However, once the Tailpipe Rule went into effect in January 2011, the EPA then viewed GHGs as regulated pollutants, thereby subjecting the emission of GHGs from stationary sources to the Title V and PSD programs.

The “Tailoring Rule”¹⁷

Subjecting GHGs to regulation under the Title V and PSD programs raised a potential issue, unique to GHGs among regulated pollutants. For regulated pollutants other than GHGs, the “major source” emissions

¹⁵ The emissions thresholds to qualify as a “major source” subject to regulation for Title V and PSD purposes are 100 and 250 tons per year (tpy), depending on the type of stationary source.

¹⁶ “Regulated pollutants” are those that are subject to regulation under the CAA.

¹⁷ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

thresholds are commensurate with what can reasonably be deemed a “major” source of emissions and, generally, subject only large, industrial emitters to CAA requirements. However, GHGs are emitted in far greater quantities than other pollutants regulated under the CAA. Accordingly, the default major source thresholds would subject a wide range of emitters, such as large office buildings and hotels, to CAA regulations for the first time. Such an unprecedented expansion of sources regulated under the CAA would overwhelm the EPA’s resources. Additionally, regulating these sources would have little practical impact on combating climate change, as they are relatively minor contributors to global GHG emissions. Recognizing the undesirable effects of applying the Title V and PSD thresholds to GHGs, in May 2010, the EPA issued what has become known as the “Tailoring Rule.” In this rule, the EPA created separate, and significantly higher, Title V and PSD thresholds with respect to GHGs so as not to expand the regulated community to encompass relatively small emitters of GHGs.

The Tailoring Rule set forth a phased implementation of GHG regulation under PSD and Title V. In the first phase, beginning in January 2011, all new and modified PSD major sources of non-GHG emissions would become subject to the PSD program for GHG emissions if such sources had the potential to emit or increase emissions by 75,000 tpy of CO₂ equivalent (CO₂e).¹⁸ In the second phase, beginning in July 2011, in addition to the above-described facilities, all new sources with the potential to emit at least 100,000 tpy of CO₂e and all modified sources making changes that would increase emissions by at least 75,000 tpy of CO₂e would be subject to PSD requirements, regardless of non-GHG emissions. Also beginning in July 2011, all sources that emit at least 100,000 tpy of CO₂e were required to have a Title V operating permit. Phase II marked the first time that a facility could be required to comply with CAA Title V and PSD requirements solely based on its GHG

¹⁸ Each GHG has a different global warming potency in the atmosphere. To account for these differences and ensure that GHGs are treated equally from a regulatory standpoint, the EPA uses the concept of “CO₂ equivalency” to quantify the global warming potency of any GHG in the atmosphere in terms of its equivalent volume of CO₂. For example, methane is approximately twenty-five times more powerful than CO₂ in terms of global warming potential. Accordingly, one ton of methane would equal twenty-five tons of CO₂ equivalent.

emissions. As a practical matter, few, if any facilities are subject to Title V and PSD requirements solely based on GHG emissions.

Subjecting GHGs to PSD was of greater concern to the regulated community than Title V permitting because of the requirement in the CAA for the use of BACT for GHGs on projects subject to PSD. As discussed previously, BACT does not require a single technology, but is instead a case-by-case determination. In practice, there are established pollution control technologies, such as selective catalytic reduction systems for the control of NO_x, that make the options for BACT relatively well known for most pollutants. However, no such GHG pollution control technologies currently exist at a commercial level, resulting in uncertainty about what would be required by the EPA to satisfy BACT requirements. Of significant concern to many in the regulated community was that the EPA would require fuel-switching to less carbon-intensive fuels (e.g., determine that the BACT for a proposed coal-fired power plant is to use natural gas as the fuel source—which has comparatively lower GHG emissions—instead).

To clarify the BACT analysis for GHGs, the EPA issued GHG BACT guidance. The GHG BACT guidance laid out the process by which a specific project should be evaluated for compliance with GHG BACT, focusing primarily on BACT options that involved energy efficiency. The guidance emphasized that energy efficiency would satisfy the BACT requirements in most cases; BACT for GHGs did not require a specific technology; and fuel switching would not be required as a means to lower emissions.

Legal Challenges to the EPA’s Regulation of GHGs

The EPA’s whirlwind of regulatory activity surrounding GHGs and climate change did not go unchallenged. In 2012, a coalition of industry groups and several states challenged the suite of regulations outlined above as being “improper constructions of the CAA” and as being “otherwise arbitrary and capricious.”¹⁹ The D.C. Circuit effectively rejected all challenges.

Specifically, the petitioners challenged the EPA’s endangerment finding on the grounds that, among other things, it did not take into account “the

¹⁹ *Coalition for Responsible Regulation Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012).

benefits of activities that require greenhouse gas emissions” or the “potential for societal adaptation to or mitigation of climate change.”²⁰ The court rejected this challenge, characterizing the petitioners’ proffered factors as policy concerns that fall outside the “scientific judgment” of whether GHGs “may reasonably be anticipated to endanger public health or welfare.”²¹ Similarly, in rejecting the petitioners’ challenge to the Tailpipe Rule for, among other things, the EPA’s failure to consider the costs of regulating CO₂, the court emphasized the absence of EPA discretion to regulate a pollutant once it makes the endangerment finding.²² The court rejected the petitioners’ contention that the EPA should have excluded major sources of GHGs from the PSD permitting program on the grounds that, among other things, subjecting GHG emitters to the PSD program is statutorily compelled by the broad meaning of “any air pollutant.”²³

With respect to the Tailoring Rule, the D.C. Circuit concluded that the petitioners did not assert an injury in fact and thus did not have standing to bring the challenge.²⁴ Many have viewed the Tailoring Rule as the most legally suspect of the EPA’s GHG regulatory actions. Thus, the fact that the D.C. Circuit did not substantively address this issue is significant and leaves this issue open to a potential future legal challenge.

Potential Future Regulation Under the CAA

With the EPA’s legal authority to regulate GHGs under the CAA now firmly entrenched, the re-election of President Barack Obama, and expected continued inaction by Congress, it is likely that the EPA will continue to regulate GHG emissions through the CAA. The most likely next step on the EPA’s GHG regulatory agenda is the issuance of New Source Performance Standards (NSPS) for GHGs. As discussed in more detail below, NSPS are a potent regulatory tool under the CAA that gives the EPA broad authority to set emissions limitations for both new and existing stationary pollution sources without Congressional involvement or approval. It is therefore not surprising that the EPA has already started down this path and has indicated its intent to continue to do so.

²⁰ *Id.* at 117–19.

²¹ *Id.* (quoting 42 U.S.C. § 7521(a)(1)).

²² *Id.* at 126–30.

²³ *Id.* at 132–44.

²⁴ *Coalition for Responsible Regulation Inc.*, 684 F.3d at 144–48.

NSPS Overview

Under the CAA § 111,²⁵ the EPA has authority to set standards of performance for new and modified stationary sources of emissions. These NSPS are rate-based emission standards that the EPA is required to establish for any category of stationary sources (e.g., electric power plants, refineries, cement kilns) that cause or significantly contribute to air pollution that endangers public health and welfare. The emissions limits are supposed to be set at a level that “reflects the degree of emission limitation achievable through the application of the best system of emission reduction...[that] has been adequately demonstrated.” This analysis is expressly required to include cost and economic considerations. The emissions standard must be expressed as an acceptable emissions rate, and the EPA cannot require any subject emission source to install or operate a particular technology to meet the standard. Once the emission standard is established for a particular source category, that standard applies to any newly constructed emissions sources or existing sources that are modified in ways that increase their hourly emissions rates.

The emissions standards established through the process described above apply only to new and modified existing sources. A separate provision under the same section of the CAA establishes a federal-state process for establishing emission performance standards for existing sources of emissions. Under this provision, the EPA is required to provide a procedure for states to promulgate emissions standards, implementation plans, and enforcement plans for existing sources of pollution in their respective jurisdictions for which NSPS would apply if the source were a new source. These plans are then reviewed by the EPA and, if deemed not “satisfactory” by the EPA, the EPA has authority to issue emissions standards for existing sources within that state.²⁶

NSPS for Electric Generating Units

In 2006, the EPA issued NSPS for electric utility electric generating units (EGUs) that did not include NSPS for GHGs. Thirteen state and municipal governments and a coalition of environmental organizations sued the EPA,

²⁵ 42 U.S.C. § 7411 (2012).

²⁶ *Id.*

challenging the agency over its failure to issue GHG NSPS for EGUs in its 2006 rulemaking. In December 2010, the EPA settled with the challengers and agreed to propose GHG NSPS for new, modified, and existing EGUs by July 26, 2011, and finalize these standards by May 26, 2012. In June 2011, the EPA negotiated an extension of the deadlines in the settlement agreement until September 30, 2011. The EPA missed the September 30, 2011, deadline but on May 27, 2012, issued the proposed NSPS for EGUs for public comment. (The NSPS has not been finalized as of printing.)

The proposed NSPS was notable in several respects. First, the EPA narrowed the applicability of the NSPS by expressly limiting it to new sources, excluding modified sources from its application. This narrowing seems to go against the statutory language of the CAA and is almost certain to be challenged when these standards are finalized. Second, the EPA set the limit for emissions at 1,000 pounds of CO₂ per MWh, for all EGUs. This standard is achievable for modern natural gas-fired power plants, but is unattainable for coal-fired power plants without carbon capture and sequestration (CCS) technology, which has not yet been commercially demonstrated. Although the NSPS provided for an averaging of emissions over thirty years to allow coal-fired plants to operate in excess of the NSPS now and reduce emissions through CCS later, the proposed NSPS have been characterized by some as a de facto ban on the construction of new coal-fired power plants in the United States. The NSPS for new EGUs is expected to be finalized imminently, and will undoubtedly be subject to legal challenge.

Future Use of NSPS to Regulate GHGs

The EPA's authority to regulate the emissions of GHGs through the use of NSPS is quite broad and is a likely avenue for GHG regulation over the next four years. The CAA requires the EPA to promulgate NSPS for all "categories of sources" that cause or contribute significantly to air pollution. Additionally, the ability to regulate both new and existing sources enables the EPA to regulate entire industrial sectors on a nationwide basis. Accordingly, any industry with substantial GHG emissions is a potential target for regulatory action.

While NSPS for new EGUs (as discussed above) have already been promulgated, there are several different directions the EPA could choose to go, or may be legally compelled to go, in the coming years. In any event, because of the time it takes to finalize NSPS and expected legal challenges, it is unlikely that the EPA will be able to successfully pursue all of the below regulatory options over the next four years.

Existing and Modified Power Plants

The EPA may choose, or be legally compelled, to issue NSPS for modified and existing EGUs, rather than just new sources. Existing EGUs are the largest single source of GHG emissions in the United States, making them an attractive target for GHG regulation. Additionally, the EPA is statutorily required by the CAA to issue NSPS for modified sources and prescribe procedures for states to establish performance standards for existing sources. Furthermore, the EPA is unquestionably committed to undertake these efforts in its 2010 settlement agreement. Thus, if the EPA does not follow through on these commitments, the parties to the settlement agreement could sue to enforce the terms of the agreement and compel the EPA to take these actions. Alternatively, a party not involved in the settlement agreement could sue under the language of the CAA itself to compel the EPA to issue these standards.

Because the EPA is not authorized to issue nationwide emission standards for existing sources, as it is for new and modified sources, it must prescribe instead a procedure for states to follow in developing such emission limits for sources in their respective states. Thus, if the EPA were to proceed to regulate existing EGUs, states would be given the first opportunity to craft these emission limits. However, the emission guidelines issued by the EPA would limit state discretion to a degree.

It is unclear what emission limits for existing EGUs would consist of, since, unlike other pollutants, there is no control technology for the emission of GHGs, making retrofitting existing plants with pollution control technology impossible. It is possible that the emission limits for existing EGUs would be set at a level achievable for most existing EGUs through conservation and efficiency measures. Such an approach would track the EPA's emphasis on efficiency in its BACT guidance, but such

measures would yield very modest reductions in GHG emissions. The EPA may also attempt to add flexibility to any NSPS for existing units by sanctioning alternative emission reductions systems in its guidelines, such as allowing utilities to credit the emissions reductions from retirement of EGUs toward meeting the NSPS.

If the EPA decides to regulate existing EGUs, it would likely be several years before any regulations would take effect. The process of the EPA promulgating the required procedure and emission guidelines for states, followed by a period for states to craft their regulations and the almost certain legal challenges at several junctures throughout the process, would take significant time.

NSPS for Refineries

In June 2008, the EPA issued NSPS for petroleum refineries that, like the 2006 NSPS for EGUs, did not contain GHG standards. As was the case with the NSPS EGU, a group of states and environmental organizations sued, challenging the EPA's failure to issue GHG NSPS for refineries. In December 2010, the EPA settled with the challengers and committed to issuing final GHG NSPS for new and existing refineries by November 10, 2012. To date, these NSPS have not been proposed. Given that the EPA has committed to issue these NSPS, it is likely that these NSPS will be forthcoming.

Regulation of New Industrial Sectors

The EPA could exercise its NSPS authority to regulate new sources of emissions in a host of industrial sectors. The EPA would likely focus any future NSPS efforts on industries with large GHG emission footprints, such as cement manufacturing or the oil and gas industry. Indeed, in August 2012, the EPA issued revised NSPS for the oil and gas industry, including the first-ever NSPS for natural gas wells developed through hydraulic fracturing. Following a now familiar pattern, in December 2012, a coalition of states filed a sixty-day notice of intent to sue the EPA for failure to set an NSPS for GHGs. How the EPA responds to this challenge is yet to be seen. The EPA could choose to resolve this issue through a settlement agreement, as it did for EGUs and refineries, thereby committing the EPA to the issuance of GHG NSPS for yet another industrial sector.

By reviewing the industries that have the highest energy use, we have reached out to clients in those sectors and encouraged them to begin the process by establishing a baseline and identifying high-energy-use processes and alternatives to those processes.

Similarly, we have worked with companies within sectors to begin to build arguments that can be used in the regulatory process to ensure that differences within the industry are considered.

For example, if an oil and gas producer built a cogeneration facility to make steam use more efficiently, it should not be burdened with the obligation to reduce emissions as though it were a standard electric generating unit. Similarly, small and independent refiners have simple refining configurations, meaning they use less energy to manufacture a gallon of gasoline or diesel than a large, complex refinery uses. These differences should be considered in the regulatory process.

Conclusion

The Supreme Court's decision in *Massachusetts v. EPA*,²⁷ coupled with congressional inaction regarding climate change and the Obama administration's aggressive regulatory posture toward the issue, has resulted in the CAA becoming the primary method of federal GHG regulation in the United States today. This is likely to remain the case over the next four years, as Congress seems unlikely to address this issue, and the Obama administration has made clear its intention to continue to prioritize combating climate change in its second term. The NSPS provisions under the CAA are a likely pathway for the expansion of GHG regulation. Accordingly, GHG regulation will likely proceed on an industry-by-industry basis, with the largest emitting sectors, such as the electric power industry and refineries, most likely to see regulatory action first.

The novelty and rapid development of the regulation of GHGs under the CAA poses many potential regulatory hurdles of which even clients experienced with CAA regulation may not be aware. Accordingly, practitioners in this area should keep abreast of the latest regulatory developments, especially regarding GHG NSPS, so that they can advise

²⁷ *Massachusetts v. EPA* 549 U.S. 497 (2007).

clients of GHG regulatory risks surrounding contemplated projects and transactions. Additionally, practitioners should endeavor to alert clients to potential sources of GHG emissions in their operations that may make them subject to PSD or Title V permitting requirements that the client may not think of, such as hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). Because of the tremendous warming potential of these GHGs, even the emission of relatively small amounts of these gases can amount to CO₂e in excess of the Tailoring Rule thresholds.

Key Takeaways

- For any project that could lead to a significant increase in GHG emissions from a stationary source, advise clients to consider the regulatory implications and whether they are subject to PSD.
- Advise clients in the electric power industry and refining industry that NSPS for their respective industries are likely to be promulgated in the near future. Planned construction of new facilities or significant modifications to existing facilities should be evaluated with this in mind.
- Inform clients that the ability to regulate both new and existing sources of GHG emissions enables the EPA to regulate entire industrial sectors nationwide. Accordingly, any industry with substantial GHG emissions is a potential target for regulatory action.
- Advise clients that GHG regulation will likely proceed on an industry-by-industry basis, with the largest emitting sectors most likely to see regulatory action first.

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He has consistently affected rule modifications through litigation and in other ways, enabling clients to take advantage of regulatory changes.

In addition, Mr. Moyer has guided clients through the environmental issues surrounding virtually all types of energy development arrangements. He favors an integrated approach, bringing science and policy together to achieve clients' goals.

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