

MEALEY'S

# Emerging Toxic Torts

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# Commentary

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## Regulating Greenhouse Gases Emissions Using Existing Clean Air Act Authorities: If All You Have Is A Hammer, Everything Looks Like A Nail

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A chain of events is well underway that could eventually result in the sweeping use of existing Clean Air Act authorities to regulate greenhouse gas emissions such as carbon dioxide. Typically, regulation under the Clean Air Act is triggered by an "endangerment finding." Once an endangerment finding is made in a particular area, the EPA administrator's discretion to avoid regulating is often very limited or non-existent. So, an endangerment finding concerning greenhouse gases in one context — the mobile source context — likely will spur litigation to force regulation under other areas of the Clean Air Act.

In its recently issued Advanced Notice of Proposed Rulemaking, (ANPRM), EPA seeks comment on a possible "endangerment" determination for mobile sources emissions.<sup>1</sup> In this notice, the agency recognizes such a finding could have a cascade effect covering mobile and stationary sources and may trigger a broad, non-discretionary duty on the EPA administrator's part to regulate all significant sources of greenhouse gases utilizing the current Clean Air Act.

Existing Clean Air Act authorities, however, were not designed for and are not well-suited to addressing global pollution problems such as climate change. They are blunt instruments, plainly designed for the different task of regulating local emissions causing local or regional effects. The likely end result as been colorfully described by Energy and Commerce Committee Chairman John Dingell as "a glorious mess."<sup>2</sup>

## **Massachusetts v. EPA And The Mobile Source Endangerment Finding**

Last year, the Supreme Court held in Massachusetts v. EPA greenhouse gases are an “air pollutant” within the meaning of the Clean Air Act, 127 S. Ct. 1438, 1460 (2007), and directed the Agency to determine whether such emissions “endanger” the environment. *Id.* at 1463. As this holding recognizes, EPA must make an endangerment finding before regulation of mobile source greenhouse gas emissions; that is, the agency must determine if greenhouse gas emissions from new motor vehicles “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>3</sup> If EPA finds greenhouse gas emissions from new motor vehicles satisfies this endangerment test, then section 202(a)(1) of the Clean Air Act requires EPA to set standards governing such emissions.

### **Domino Effect**

Pursuant to this mandate in Massachusetts v. EPA, EPA issued an Advanced Notice of Proposed Rulemaking in July 2008. While the notice seeks comment on an “endangerment” determination for mobile source emissions, it also recognizes that, because of the “interconnections” between the various provisions in the Clean Air Act, its regulation of greenhouse gas emissions from mobile sources may trigger an obligation to regulate such emissions from other types of sources as well.<sup>4</sup> This concern may be well-founded. Since the Supreme Court decision, the agency has received a flurry of petitions to regulate greenhouse gas emissions from other mobile sources and stationary sources.<sup>5</sup>

Indeed, following the publication of the ANPRM, a coalition of states sued the agency in an attempt to force regulation of carbon dioxide emissions from petroleum refineries. In a petition filed with the District of Columbia Circuit, 12 states, New York City and the District of Columbia argued EPA’s failure to regulate greenhouse gas emissions in its new source performance standards for petroleum refineries violated Title I of the Clean Air Act. New York v. EPA, No. No. 08-1279 (D.C. Cir. Aug. 25, 2008). As discussed in detail below, these new source performance standards are technology-based emissions limits issued for specific industrial sectors and applied when a new plant is built or an existing plant is reconstructed.<sup>6</sup>

This litigation demonstrates an endangerment finding for mobile sources may force the agency’s hand

with respect to stationary sources. EPA may suddenly find itself in the business of developing a variety of technology-based greenhouse gas emissions limits for multiple industrial sectors without any consideration for overriding climate change strategies or goals, or placing states in the impossible position of having to offset carbon dioxide emissions from China and India before allowing any expansion of industrial facilities within their borders. Put simply, existing Clean Air Act authorities are poorly suited to the job of handling a global strategic problem; rather, they were designed for the different task of regulating local emissions causing local or regional effects.

### **Regulation Under Title I**

While there are many sources of authority for regulating emissions under Title I, this commentary will focus on three prominent — and in the context of greenhouse gases — problematic Clean Air Act programs: the Title I provisions on national ambient air quality standards, new source review, and new source performance standards.

#### **National Ambient Air Quality Standards**

The “heart” of the Clean Air Act is the set of provisions governing the creation and attainment of national ambient air quality standards (NAAQS).<sup>7</sup> One necessary trigger for these provisions to engage is an “endangerment finding” — that is, when the agency determines emissions of an air pollutant “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. §7408(a)(1)(A). This key endangerment finding, in turn, initiates the development of air quality criteria, *id.* § 7408(a)(2), and primary and secondary NAAQS, *id.* § 7409(b). The primary NAAQS set a limit on the concentration of the regulated pollutant in the ambient air at a level adequate to protect the public health (including an adequate margin of safety). *Id.* § 7409(b)(1). The secondary standards protect public welfare and are set at the same or stricter level than the primary standards. *Id.* § 7409(b)(2). These standards, or more stringent standards adopted by the states, are implemented through federally-approved state implementation plans (SIPs).

Unfortunately, this program is not particularly well-suited to the regulation of greenhouse gases. State and regional compliance with NAAQS requirements is judged from the perspective of pollutant *concentra-*

tion in the ambient air. (In other words, the standards governing current criteria pollutants are expressed in parts per million by volume, milligrams per cubic meter of air or micrograms per cubic meter of air).

For traditional criteria pollutants, concentrations generally vary from place to place as a result of differences in local or regional emissions, prevailing air flow conditions and topography. Measuring regional concentrations of these pollutants is a meaningful way of determining how well emissions in the area are being controlled (*i.e.* whether an area is an “attainment” or “nonattainment” area for a particular pollutant). If an area is “nonattainment,” it may be required to implement strict limits on emissions of the nonattainment pollutants in an effort to meet the NAAQS concentrations.

This type of regulation makes little sense in the context of greenhouse gas emissions. Greenhouse gases disperse globally and persist in the atmosphere for many years. EPA would have great difficulty distinguishing “attainment” from “nonattainment” areas for any greenhouse gas NAAQS. If the NAAQS standard for greenhouse gases is set at a level below the current global atmospheric concentration, EPA could be required to list all states as nonattainment areas. Under this scenario, a state could never achieve “attainment” status with its own efforts; rather, the ability of states to reach “attainment” would depend on the willingness not only of other states, but also of nations around the globe, to reduce their greenhouse gas emissions. Alternatively, if EPA set the greenhouse gas NAAQS standard at the current atmospheric concentrations, states would have to offset all new emissions — both from within their own borders as well as far away venues like India and China — in their SIPs. Under either scenario, although states have considerable latitude in the regulatory approach they select to reduce emissions of criteria pollutants, undoubtedly many currently unregulated sources would be swept into a regulatory program to reduce their emissions of carbon dioxide.

Thus, to regulate greenhouse gases effectively under this key provision, EPA either would need to set the NAAQS standard well above current atmospheric levels for greenhouse gases or would need to abandon the core NAAQS concept of using concentration levels to gauge compliance. And it is unclear whether EPA would have the authority to abandon concentration levels under the statute. As these choices demonstrate,

the inability of states to reduce greenhouse gases in the global environment by their own efforts creates tension with the fundamental premise of the NAAQS program — that states mainly reach compliance and, by extension, attainment by ensuring that the emission sources within their borders are controlled.

#### New Source Review

The physical characteristics of greenhouse gases also affect another aspect of the NAAQS program — implementation through the New Source Review (NSR) program. NSR requirements vary based on whether the source is located in an attainment or nonattainment area, but are triggered by regulation of a pollutant under any other section of the act<sup>8</sup> and generally require preconstruction review and permitting for “major stationary sources.” Sources in attainment areas are subject to the “prevention of significant deterioration” or PSD permit program. In these areas, “stationary sources,” which include “any building, structure, facility or installation” which emits or may emit a regulated pollutant, *id.* § 7411(a)(3), are regulated as “major stationary sources” if they have the potential to emit at least 250 tons per year of a regulated pollutant or, if included on the EPA select list of source categories, at least 100 tons per year of a regulated pollutant. 42 U.S.C. § 7479(1) (defining “major emitting facility”).

Although the 100 tons to 250 tons per year levels of traditional pollutants is a threshold that generally limits permit requirements to large stationary sources, such as electric utilities, chemical plants, and refineries, that threshold is not set high enough to capture only “major stationary sources” of the primary greenhouse gas — carbon dioxide. Rather, the application of the definition of major stationary source to greenhouse gases will dramatically expand the number of facilities regulated. Office and apartment buildings, hotels, enclosed shopping malls, large retail stores and warehouses, college buildings, and hospitals could become subject to the Clean Air Act permitting process for the first time.<sup>9</sup>

By way of comparison, the average office building in New York City emits 20 pounds of carbon dioxide per square foot. This average would indicate that any building over 25,000 square feet would be a major stationary source.<sup>10</sup> The expanded universe of regulated sources would greatly complicate both the state efforts in formulating SIPs and the ability of regulators at all levels to enforce those plans.

To combat this explosion of regulated sources, EPA will have limited flexibility. Due to the nature of the requirements — preconstruction review and permitting — the NSR program is source-specific by definition. EPA would be inundated with permit requests, and the costs and delays associated with any construction project would be immense. The notion that a landowner would have to engage climate scientists and emissions experts and develop air emissions studies and models in order to satisfy the requirements of NSR permitting program before being able to build a small office building or medical facility illustrates the inappropriateness of existing Clean Air Act programs to regulate greenhouse gases.

### New Source Performance Standards

As noted above, the New Source Performance Standards (NSPS) is an additional Clean Air Act program that EPA may be compelled to apply to greenhouse gases. Regulation under the NSPS program also is initiated with an endangerment finding, but that finding is focused on sources, not pollutants. The administrator must list “categories of stationary sources ... if in his judgment [those sources cause, or contribute] significantly to air pollution which may reasonably be anticipated to endanger public health or welfare,” *id.* § 7411(b)(1)(A), and must then adopt standards of performance reflecting “the degree of emission reduction achievable through application of the best system of emission reduction” for those sources. 42 U.S.C. § 7411(a)(1). Given the holding in *Massachusetts v. EPA* that carbon dioxide and other greenhouse gases are “air pollutants” under the Clean Air Act, if EPA makes an endangerment finding for those *substances* then the NSPS program may open the door to the regulation of entirely new *categories* of stationary sources.

This NSPS authority might provide EPA more flexibility than the NAAQS program.<sup>11</sup> For example, in setting NSPS, EPA can distinguish among different types of sources in setting standards. Also, unlike NAAQS, EPA can take into consideration cost, non-air impacts, and energy requirements in NSPS standards. *Id.* § 7411(a)(1). In implementation, EPA cannot require the use of a particular technology but the act does provide the flexibility to express the standards as design, equipment, operational or work practice requirements. *Id.* § 7411(h).

In promulgating programs such as the Clean Air Interstate Rule and the Clean Air Mercury Rule, EPA

has interpreted the phrase “standards of performance” to include market solutions like cap-and-trade programs.<sup>12</sup> However, the use of cap-and-trade programs under Section 111 is recent, and early attempts to use cap-and-trade under Section 111 rules have been rejected by the District of Columbia Circuit. The Clean Air Mercury Rule, one of the first cap-and-trade programs under this provision, was overturned in February 2008 by the District of Columbia Circuit — albeit for reasons independent of the use of cap-and-trade under Section 111.<sup>13</sup> More recently, that same court also vacated EPA’s Clean Air Interstate Rule, explaining that, among other things, “EPA’s approach — regionwide caps with no state-specific quantitative contribution determinations or emissions requirements — is fundamentally flawed.”<sup>14</sup> Just as these creative solutions by EPA under Section 111 have invited litigation, we can expect similar expansive uses of existing authorities to address the unique problems presented by using current Clean Air Act authorities to regulate greenhouse gases would generate lawsuits. Prolonged litigation is time consuming for agency staff, delays protection of the environment, and creates uncertainty for the regulated community.

### Conclusion

Proponents of the Clean Air Act as a vehicle for greenhouse gas regulation argue the act was designed to adapt and respond to changing understanding of public health and environmental threats from air pollution, not just specific threats known at enactment. According to these advocates, any solution for global climate change should utilize existing tools to speed action in this regulatory field.

As explained above, the existing provisions of the Clean Air Act are blunt instruments, plainly designed for the different task of regulating local emissions causing local or regional effects. Even if this fundamental problem could be overcome, however, it is worth noting that as EPA stretches the existing Clean Air Act regime to fit the needs of greenhouse gas regulation, it will enter uncharted legal territory. New and creative interpretations of existing statutory authority often are viewed by industry or environmental groups as disrupting long-standing, well-settled expectations concerning the boundaries of agency authority. As such, they invite legal challenge. As demonstrated by the Bush Administration cap-and-trade programs, courts are inherently suspicious of new, novel statu-

tory or regulatory interpretations that are not obvious from the face of the law. These prolonged court challenges, in turn, delay protection of the environment and create uncertainty in business planning for the regulated community.

These problems could be avoided by federal legislation in this field, and, indeed, this approach has been used when Congress has faced similar, transboundary threats. *See* 42 U.S.C. § 7651 et. seq. (addressing acid rain); *id.* § 7671 et. seq. (ozone). New legislation could be tailored to address the unique characteristics of greenhouse gases in a manner that does not result in a cascade of potentially nondiscretionary and wide-reaching consequences.

In the meantime, however, EPA has recognized the regulatory and litigation pandemonium that could ensue if it fails to consider the myriad of far-reaching and potentially devastating down-stream consequences. An endangerment finding for greenhouse gas emissions from automobiles could very well be just the first, innocuous-seeming step into a “glorious mess” of litigation, delay and uncertainty.

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## Endnotes

1. Regulating Greenhouse Gas Emissions under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008).
2. *See* “Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Using Existing Clean Air Act Authorities,” statement during the Subcommittee on Energy and Air Quality, Committee on Energy and Commerce, U.S. House of Representatives, April 10, 2008 (statement by Chairman John D. Dingell).
3. 42 U.S.C. § 7521.
4. 43 Fed. Reg. at 44,397.
5. *Id.* at 44,399.
6. EPA had declined to regulate greenhouse gas emissions from refineries when it issued the final new source performance standards in June, saying a pending rulemaking would address whether greenhouse gas emissions from refineries and other stationary sources should be regulated. Further, the EPA observed that the Clean Air Act does not require it to review air pollutants not covered under previous versions of the new source performance standards for refineries.
7. Train v. Natural Res. Def. Council, 421 U.S. 60, 66 (1975).
8. Sections 112 governing hazardous air pollutants and 211(o) regulating renewable fuel standards are the limited exceptions to this rule.
9. *See Massachusetts v. U.S. EPA* Part II: Implications of the Supreme Court Decision: Hearing Before the H. Select Comm. on Energy Independence and Global Warming, 110 Cong. (2008) (statement of Stephen L. Johnson, Adm’r, U.S. Env’tl. Protect. Agency).
10. For an overview of average office building emissions by region, see [http://www.energystar.gov/index.cfm?c=evaluate\\_performance.bus\\_portfoliomanager\\_carbon](http://www.energystar.gov/index.cfm?c=evaluate_performance.bus_portfoliomanager_carbon).
11. It is important to note that the NSPS program operates as an alternative to the NAAQS program. Section 111(d) of the Clean Air Act prohibits regulation of a NAAQS pollutant under Section 111. Because of this structure, NSPS can be seen as a “regulatory safety net” for pollutants not otherwise subject to major regulatory programs under the Act.
12. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,616 (May 18, 2005) (“The term ‘standard of performance’ is not explicitly defined to include or exclude an emissions cap and allowance trading program. In the final rule, EPA interprets the term ‘standard of performance,’ as applied to existing sources, to include a cap-and-trade program.”).
13. State of New Jersey v. Env’tl. Prot. Agency, 05-1097 (D.C. Cir. Feb. 8, 2008) (vacating Clean Air Mercury Rule).
14. North Carolina v. Env’tl. Prot. Agency, No. 05-1244 (D.C. Cir. July 11, 2008). ■





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