

GLOBAL WARMING – CAUSES, IMPACTS AND SOLUTIONS

CLIMATE CHANGE AND
U.S. LAW

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Current State of U.S. Law on Climate Change

- As of today, there exists no permanent body of law in the United States governing society's long-term responses to climate change.
- Following the November 2008 elections, momentum seems to be building to move U.S. law in the direction of regulating greenhouse gas (GHG) emissions in some fashion.
- However, far too much uncertainty exists to predict where the law in this area will go.

Climate Change Legislation in 2009?

- **Proposals attributed to Obama Administration:**
 - Economy-wide national **cap-and-trade** program to reduce GHG emissions below 1990 levels by 2050 (market based approach)
 - (Similar proposal – the Lieberman-Warner Climate Security Act – derailed in June 2008)
 - A **carbon tax** imposed on a per unit measurement of emissions (market based approach)
 - (Obama's choice of former Clinton EPA Administrator Carol Browner as energy czar has fueled this idea)

Climate Change Legislation in 2009?

- **Proposals attributed to Obama Administration:**

- Amend the Clean Air Act to give EPA authority to directly regulate GHG emissions (command-and-control approach)
- Direct the EPA to regulate GHG emissions under the existing Clean Air Act (through an administrative “endangerment” finding)

Climate Change Legislation in 2009?

- **Obstacles to enactment of climate change legislation in 2009:**
 - Economic turmoil/prolonged recession
 - Concerns include increases in energy prices in a period where energy prices are already volatile
 - Tens of billions of dollars in new compliance costs at a time companies are struggling to survive
 - Hundreds of thousands of job losses at a time that unemployment is already rising
 - Democrats do not have 60 votes in the Senate

Climate Change Legislation in 2009?

- **Obstacles to enactment of climate change legislation in 2009:**
 - Pressure to wait on outcome of United Nation's Copenhagen climate conference (summer 2009) to negotiate a new international framework (to be agreed to in December 2009) to replace the Kyoto protocol in 2012
 - (Obama Administration has pledged to re-engage the U.S. in these negotiations)

Regulating GHGs Under the Existing Clean Air Act

- Two potential areas under which GHGs might be regulated under the existing Clean Air Act (CAA):
 - **Title I** and **Title V** (I – NAAQS/ SIPs; V – permit program for major stationary sources of air pollutants)
 - **Title II** (mobile source controls; primarily motor vehicles)

Regulating GHGs Under the Existing Clean Air Act

- **CAA §§ 108, 109** – Requires EPA to establish **nationally uniform ambient air quality standards (NAAQS)** for air pollutants satisfying the criteria identified in § 108 and thus are reasonably anticipated to endanger public health or welfare. These pollutants are referred to as “**criteria pollutants.**”
- CAA § 109(b)(1) authorizes the EPA to establish national “ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [established under § 108] and allowing an **adequate margin of safety**, are **requisite to protect the public health.**”

Regulating GHGs Under the Existing Clean Air Act

- NAAQS have been issued for six criteria pollutants:
 - Sulfur dioxide (SO₂)
 - Nitrogen oxide (NO_x)
 - Carbon monoxide (CO)
 - Particulate matter (soot, fly ash, and similar matter)
 - Ozone
 - Lead

Massachusetts v. EPA (U.S. 2007)

- **CAA Title II – Section 202(a)(1):**
 - The EPA shall prescribe “standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles ... which in [its] judgment cause, or contribute to, air pollution which may **reasonably be anticipated to endanger public health or welfare...**”

Massachusetts v. EPA (U.S. 2007)

- **Precautionary Standard:**
 - The Clean Air Act “and common sense ... demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.”

Ethyl Corp v. EPA, 541 F.2d 1, 25
(D.C. Cir. 1976) (en banc)

Massachusetts v. EPA (U.S. 2007)

- **Air Pollutant:**

- **CAA § 302(g)** – “The term ‘**air pollutant**’ means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air.”

Massachusetts v. EPA (U.S. 2007)

- **Welfare:**
 - **CAA § 302(h)** – “All language referring to **effects on welfare** includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and **climate**, damage to and deterioration of property....”

EPA Rationale for Not Regulating GHG Under CAA § 202

- GHGs do not qualify as “air pollutants” under statute
 - Congress declined to adopt a proposed amendment to the CAA establishing binding GHG emissions limitations in 1990
 - CAA was designed to address *local* air pollutants rather than substances that concentrate in the world atmosphere
 - EPA regulations of carbon dioxide would either conflict with mandatory fuel economy (tailpipe emissions) standards (regulated by DOT) or be superfluous
 - In sum, if Congress had intended the EPA to regulate on such an important and politicized issue, it would have said so in so many words

EPA Rationale for Not Regulating GHG Under CAA § 202

- Even if it had authority over GHGs, EPA would exercise discretion not to exercise such authority:
 - Scientific uncertainty exists as to causal nexus between increased concentration of GHGs in the atmosphere and global warming
 - Mandatory regulation would be incompatible with climate change initiatives of Bush administration (voluntary GHG emission controls carried out in the private sector)
 - Mandatory regulation might hamper the President's ability to persuade developing countries to reduce GHG emissions

Mass. v. EPA Majority's Rationale for Rejecting EPA's Position

- Sweeping definition of “air pollutant” under § 302(g) includes **any** physical or chemical substance which can be emitted into the ambient air – GHGs qualify under this flexible definition
- EPA affirmed its statutory authority to regulate GHGs on two occasions (including two weeks) before rulemaking petition at issue was filed
- The fact that DOT regulates vehicle mileage standards under separate statute does not permit EPA to avoid responsibility to regulate under CAA

Mass. v. EPA Majority's Rationale for Rejecting EPA's Position

- EPA's reasons for declining to exercise its authority are not related to the statutory standard
- If EPA makes a finding of endangerment ("air pollution ... reasonably ... anticipated to endanger public health or welfare"), the CAA requires it to regulate
- Thus, "EPA can avoid taking further action only if it determines that [GHGs] 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"
- If this constrains EPA discretion to pursue other priorities of the EPA or the President, this is the congressional design

Judgment of Mass. v. EPA Majority

- EPA's refusal to make endangerment finding under §202(a)(1) is arbitrary and capricious
- Majority remands to the EPA (**in April 2007**) but expresses no view on whether "EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding"
- However, EPA must ground its reasons for action or inaction in the statute

Post-Mass. v. EPA Developments

- EPA asserted it would issue a notice of proposed rulemaking as to whether GHG emissions from motor vehicles pose a danger to public health or welfare by the end of 2007 and a formal rule by the end of October 2008.
- EPA missed the end of 2007 deadline for a notice of proposed rulemaking
- EPA Administrator Johnson told a Senate committee on Jan. 24, 2008 that the EPA would issue a rulemaking notice regarding the GHG emission endangerment finding

Post-Mass. v. EPA Developments

- In March 2008, Administrator Johnson testified at a congressional hearing that a rulemaking could not begin until the EPA considered the effect of passage of an energy bill raising automobile efficiency standards from 27.5 mpg to 35 mpg by 2020
- In July 2008, the EPA issued an “advance notice” of a proposed rulemaking on GHGs, which included a 120-day comment period which was to close after the November 2008 elections. This was perceived as an effort to stall on the issue until after the November 2008 elections.

Post-Mass. v. EPA Developments

- Obama Administration is expected to direct the EPA to move forward with an “endangerment finding” rulemaking process if new federal legislation to regulate GHGs is not enacted
- New EPA Administrator Lisa Jackson indicated in a January 23, 2009 memorandum that the EPA would move forward in response to the Mass. v. EPA decision
- Georgetown law professor Lisa Heinzerling was appointed a special advisor to Administrator Jackson on climate change issues in early February 2009. She was lead author of the states’ brief in Mass. v. EPA. Her position is that EPA should formally find that GHGs endanger public health and welfare within the meaning of the Clean Air Act.

California “Waiver” Request

- California has sought to regulate mobile source GHG emissions pursuant to CAA authority for the state to set its own emissions standards so long as they are “in the aggregate, at least as protective of public health or welfare as applicable federal standards.” The CAA allows California to adopt more stringent rules when necessary to meet “compelling and extraordinary conditions.”
- However, on Dec. 19, 2007, EPA denied California’s request for a preemption waiver to do this under § 209 of the CAA
- California filed suit against the EPA in the Ninth Circuit (California v. EPA) challenging the EPA’s action in denying the waiver

California “Waiver” Request

- On January 26, 2009, President Obama directed the EPA to reconsider California’s waiver request. The EPA is expected to grant the request after completing a formal review process.
- Under the CAA, once California obtains a waiver, other states are free to adopt its regulations as their own. As many as 17 states have indicated their intention to adopt California’s regulation on GHG emissions from mobile sources.
- California’s rule will require automakers to cut emissions by nearly a third by 2016.

Regulation of GHGs under Title I & V

- Following Mass v. EPA, Sierra Club challenged before the EPA's Environmental Appeals Board (EAB) a Title V permit (PSD program – new stationary source) decision on ground that it did not require BACT controls on carbon dioxide (In re Deseret Power Electric Cooperative)
- Sierra Club position was that Mass. v. EPA held that GHGs are pollutants under the CAA and this applies equally to regulation of stationary sources
- EPA position was that the agency has not yet completed the rulemaking as to the endangerment finding required by § 202 (mobile sources) and thus it was premature to consider the effect of Mass. v. EPA on stationary source programs

Regulation of GHGs under Title I & V

- On November 13, 2008, the EAB ruled that the EPA had not adequately justified its position that the agency had historically interpreted the CAA to exclude CO₂ as a regulated pollutant and encouraged the EPA to adopt a binding nationwide interpretation.
- On December 18, 2008, EPA Administrator Johnson issued a memorandum interpreting EPA regulations as establishing that CO₂ is not a regulated pollutant under Title I & V of the CAA.

National Environmental Policy Act (NEPA)

- NEPA requires federal agencies to consider significant environmental impacts during the agency's decision making process when considering whether to undertake proposed "major federal actions." In addition to considering significant environmental impacts of the proposed action, the agency must consider reasonable alternatives to the proposed plan and discuss why it selected the proposal rather than the alternatives.

National Environmental Policy Act (NEPA)

- Court decisions have found that NEPA requires consideration of GHG emissions or climate change issues as potential “significant environmental impacts” of proposed agency actions.
- NEPA is, however, a weak statute for purposes of regulating activity that might contribute to climate change. NEPA has only procedural requirements. Judicial review is limited to determining whether an agency adequately evaluated a proposal’s environmental impacts. A court may not reject an agency decision because it believes the proposal is unwise or does not select the most environmentally appropriate alternative.

Endangered Species Act (ESA)

- ESA requires federal agencies to ensure that any projects they fund, authorize or permit will not jeopardize endangered species or critical habitats.
- Federal courts have ruled that agencies must consider the effects of climate change when assessing risks to endangered species. In a vigorously litigated example, in May 2008 the Department of the Interior listed the polar bear as a species threatened with extinction under the ESA because of shrinking sea ice attributed to climate change.

Endangered Species Act (ESA)

- On December 16, 2008, the Secretary of the Interior issued a new rule under the ESA in direct response to the polar bear listing decision. The rule finds that GHGs and global warming impacts of specific projects need not be considered in ESA reviews because of the difficulty in linking such emissions to impacts on specific listed species.
- A number of environmental groups have challenged the new rule in court and members of Congress have sought to invoke legislative authority to review and overturn administrative agency rules.

Common Law Litigation

- Both private and public (state governments) plaintiffs have attempted to sue emitters of GHGs under common law tort theories – that is, that large producers of GHG emissions (electric power plants, automakers) are contributing to an alleged public nuisance – global warming.
- The two most significant cases have been Connecticut v. American Electric Power (S.D. N.Y. 2005) (suit by 8 states and NYC against U.S. electric power companies emitted 650 million tons of CO₂ annually) and California v. General Motors (N.D. Cal. 2007) (suit by California against six automakers producing vehicles emitting over 289 million metric tons of CO₂).

Common Law Litigation

- Such common law tort suits have been uniformly unsuccessful and most have been dismissed under the “political question doctrine.” That is, the plaintiffs’ tort claims were found to present non-justiciable political questions, because various policy determinations more properly reserved for the political branches of government (legislative, executive) on the subject of global warming would first have to be made before the plaintiffs tort claims could be resolved.
- The California v. General Motors court cited Massachusetts v. EPA as evidence that policy decisions concerning the authority and standards for GHG emissions lie with the political branches of government, and not with the courts.