

Climate Change: The Race to Regulate EPA vs. Congress

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Massachusetts v. EPA

(127 S.Ct. 1438 (2007))

- In *Massachusetts*, 30 entities (states, cities, environmental organizations and one territory) sought review of EPA's denial of a petition for rulemaking to regulate greenhouse gases (GHGs) — in this case four specific gases, including carbon dioxide — from new motor vehicles under Section 202 of the federal Clean Air Act (CAA) [42 U.S.C. § 7521].

Massachusetts v. EPA

- CAA § 202(a)(1) requires that EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in the administrator’s judgment causes, or contributes to, air pollution . . . which may reasonably be anticipated to endanger public health or welfare.”
- EPA’s basis for denying the petition: It lacked authority under CAA § 202 to regulate new vehicle emissions because carbon dioxide is not an “air pollutant” as that term is defined in Section 302(g) of the Act [42 U.S.C. § 7602].

Massachusetts v. EPA

- The term “air pollutant” means *any* air pollution agent or combination of such agents, including *any* physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term “air pollutant” is used. (emphasis added).

Massachusetts v. EPA

- U.S. Supreme Court concluded that carbon dioxide clearly fell within this definition because it “embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ‘any’”
- “Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt ‘physical and chemical substances which are emitted into the ambient air.’ The statute is unambiguous.”

Massachusetts v. EPA

- The Court held that the CAA requires EPA to regulate GHGs from new motor vehicles if it forms a judgment that such emissions under Section 202(a) “may reasonably be anticipated to endanger public health or welfare.”

Massachusetts v. EPA

- EPA's judgment in the context of an endangerment determination "must relate to whether an air pollutant causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare.
- Under this interpretation of Section 202, the Supreme Court rejected EPA's purported reasons for not making an endangerment determination:

Massachusetts v. EPA

- Current voluntary executive branch programs addressing global warming;
- Negotiations between the President and key developing nations; and
- Regulating in a piece-meal fashion vs. a comprehensive approach to climate change.

Massachusetts v. EPA

- “Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that 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.”

Clean Air Act Actions Related to GHGs

- Result of *Massachusetts v. EPA* decision: Remand of Petition for motor vehicle GHG standards under CAA § 202.
- March 27, 2008 letter from EPA Administrator Stephen Johnson to Senators Boxer and Inhofe.
- EPA to issue Advance Notice of Proposed Rulemaking: “In the advance notice EPA will present and request comment on the best available science including specific and quantifiable effects of greenhouse gases relevant to making an endangerment finding and the implications of this finding with regard to the regulation of both mobile and stationary sources.”

Clean Air Act Actions Related to GHGs

- “EPA has gone beyond the specific mandate of the Court under section 202 of the Clean Air Act and evaluated the broader ramifications of the decision throughout the Clean Air Act. This review has made it clear that implementing the Supreme Court's decision could affect many sources beyond just the cars and trucks considered by the Court, including schools, hospitals, factories, power plants, aircraft and ships. In fact, the Agency currently has many pending petitions, lawsuits, and deadlines that must be viewed in light of the Supreme Court's decision.”

New Source Performance Standards?

- New Source Performance Standards (NSPS) reviews under court deadline or in response to court remand
 - Refineries (April 30, 2008 Final Rule)
 - Utility & Industrial Boilers (Remanded September 24, 2007)
 - Portland Cement (NPRM by May 31, 2008; Final Rule May 31, 2009)
- Challenges to PSD permits.

National Ambient Air Quality Standards?

- CAA § 108: EPA must establish criteria and NAAQS for each air pollutant “emissions of which, in his judgment, 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).
- How can EPA establish an ambient standard that states must meet through their SIPs for a global issue?

Prevention of Significant Deterioration?

- PSD permits are required for construction of a new major source or a modification of such source that causes a significant increase in emissions.
- Must install “Best Available Control Technology”
- Regulatory minefield.

GHG Mandatory Reporting Rule

- Statutory Authority – FY 2008 Consolidated Appropriations Act (H.R. 2764; Public Law 110–161).
- “... not less than \$3,500,000 shall be provided for activities to develop and publish a draft rule not later than 9 months after the date of enactment of this Act, and a final rule not later than 18 months after the date of enactment of this Act, to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy...”

GHG Mandatory Reporting Rule

- Explanatory Statement: The Agency shall “use its existing authority under the Clean Air Act” to develop a mandatory GHG reporting rule. “The Agency is further directed to include in its rule reporting of emissions resulting from upstream production and downstream sources, to the extent that the Administrator deems it appropriate. The Administrator shall determine appropriate thresholds of emissions above which reporting is required, and how frequently reports shall be submitted to EPA. The Administrator shall have discretion to use existing reporting requirements for electric generating units under Section 821 of the Clean Air Act”

GHG Mandatory Reporting Rule

- Scope of Coverage
 - Requires mandatory reporting of greenhouse gas emissions (CO₂, Methane, Nitrous Oxide, Sulfur Hexafluoride, Perfluorocarbons, and Hydrofluorocarbons)
 - Covers upstream and downstream sources – “The Agency is further directed to include in its rule reporting of emissions resulting from upstream production and downstream sources...”
- Proposed Rule – September 2008
- Final Rule – June 2009

America's Climate Security Act of 2007 (Warner-Lieberman)

- Cap and Trade System administered by the EPA
- 5.775 billion allowances in 2012 decreasing annually to 1.732 billion in 2050
- Coverage: 87% of U.S. emissions
- GHGs: CO₂, Methane, Nitrous Oxide, Sulfur Hexafluoride, Perfluorocarbons (Group I), and Hydrofluorocarbons (Group II).
- Targets:
 - 4% reduction of 2005 levels by 2012 (5-13% total)
 - 19% reduction of 2005 levels by 2020 (18-25% total)
 - 71% reduction of 2005 levels by 2050 (62-66% total)

America's Climate Security Act of 2007 (Warner-Lieberman)

- Covered Facilities
 - Coal-using facilities ($> 5,000$ tons/yr)
 - Natural gas processors and importers; natural gas producers in the State of Alaska
 - Petroleum- or coal-based liquid or gaseous fuel producers and importers (assuming no capture and sequestration)
 - Facility/Entity that produces, sells, or imports $>10,000$ tons/yr carbon dioxide equivalents of chemicals (assuming no capture and destruction or sequestration)
 - Hydrofluorocarbons ($> 10,000$ tons/yr carbon dioxide equivalents)

America's Climate Security Act of 2007 (Warner-Lieberman)

- Trading
- Banking
- Borrowing (15% limit per firm, 10% interest)
- Offsets (15% of compliance can come from domestic reductions from sources outside the cap)
- International (15% of compliance can come from international credits from other trading systems)

America's Climate Security Act of 2007 (Warner-Lieberman)

- Carbon Market Efficiency Board: manages price volatility and oversees trading
 - 7 Member Board, Appointed by President, Senate confirmed
 - In first two years, Board can increase borrowing limit if carbon price exceeds CBO forecasts.
 - Subsequently, the Board may, as necessary to avoid “significant harm to economy”
 - increase individual borrowing limit, lower the interest rate on borrowed allowances, and change the payback period
 - increase amount of international credits allowed
 - increase the amount of offsets allowed
 - Deploy “system-wide” borrowing

Other Emerging U.S. Regulations

- Regional Greenhouse Gas Initiative (RGGI)
- California – “AB 32”
- Western Climate Initiative
- RPS and Other Initiatives

RGGI

- Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, New York, and Vermont.
- Establishes regional cap and trade program.
- Applies to fossil fuel fired electric generating units serving a generator of 25 MW.
- Initial compliance period begins January 1, 2009.
- Initial regional cap of 188 MT CO₂ annually.
- Phased approach to reduction: stabilize CO₂ from 2009-2014.
- Emissions declines of 2.5% per year from 2015-2018.

RGGI

- First auction slated for June 2008
- Auction design process underway
 - Original RGGI agreement required that at least 25 percent of emissions allowances be auctioned; several member states have suggested an auction of all allowances.
 - Minimum “reserve” price for CO₂ emissions?
 - Open auction to those outside electric utility sector?
 - How to use unsold allowances?

RGGI

- Offset provisions:
 - CO2 offset allowances for 3.3% of unit's total compliance obligation during control period.
 - May be expanded to 5% and 10% if a stage one or stage two trigger event occurs, respectively.
 - Methodologies for evaluating new categories of offset projects to be developed.
 - Eligible offset projects may be located in any participating state, or any other state or U.S. jurisdiction in which a cooperating regulatory agency has entered into a MOU with the participating states to provide oversight support related to CO2 emissions offset projects in that state or U.S. jurisdiction.

RRGI

Prescriptive standards for specific project categories.

Only five eligible project categories:

- Landfill methane capture and destruction;
- Reduction in emissions of sulfur hexafluoride (SF₆);
- Sequestration of carbon due to afforestation;
- Reduction or avoidance of CO₂ emissions from natural gas, oil, or propane end use; combustion due to end use energy efficiency in the building sector; and
- Avoided methane emissions from agricultural manure management operations.

California – AB 32

- Enacted in 2006.
- Requires California to reduce GHG levels to 1990 levels between 2012-2020.
- California Air Resources Board charged with program design; rulemaking.
- Likely to utilize cap-and-trade system.

Western Climate Initiative

- Members include western states and two Canadian provinces.
- Applicable to all six GHGs, across all sectors.
- Aggregate reduction of 15% below 2005 levels by 2020.
- Design for cap-and-trade plan expected by August; currently considering findings of five option papers.

RPS and Other Initiatives

- State Renewable Portfolio Standards (RPS)
 - More than 20 states, plus DC, have adopted RPS provisions.
- No national standard: RPS provisions stripped from new federal energy law.