RECENT DEVELOPMENT

REGULATING GREEN HOUSE GAS EMISSIONS VIA THE CLEAN AIR ACT: DISASTROUS, OUR ONLY VIABLE OPTION, OR BOTH?

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I. INTRODUCTION

The recent changing of the guard in the White House is expected to usher in a new era of climate change legislation. The two terms of the George W. Bush Administration were predominately filled with resistance to mandatory federal programs for addressing the pressing climate change issue. The Bush Administration passed onto the Obama Administration a number of unresolved legislative, regulatory, and litigation issues, on both the federal and state level, all of which could impact regulation of greenhouse gases.

Perhaps the regulatory method that looms most forgendably on the horizon with regards to greenhouse gas (“GHG”) emissions is that of the Clean Air Act (“CAA”). The prospect of this regulation has been present ever since the United States Supreme Court held, in Massachusetts v. EPA, that carbon dioxide (“CO₂”) was a pollutant under the CAA and therefore forcing the Environmental Protection Agency (“EPA”) to grapple with regulating CO₂ under the Act. However, under the Bush Administration, the EPA remained mute. This silence led states, local governments, and environmental groups to file lawsuits, which ultimately induced the EPA to issue an Advanced Notice of Proposed Rulemaking (“ANPR”). On April 17, 2009, the EPA followed the ANPR with an issuance of a proposed endangerment finding.

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2. Id. at 1.
Section II of this Article will discuss the EPA’s ability to promulgate rules for federal regulation of GHG emissions by means of the CAA and the Bush Administration’s reluctance to utilize this mechanism to reduce the effects of climate change. Section III will discuss the potential options for the Obama Administration to use the CAA to regulate GHG emissions and the implications that would arise from exercising those options.

II. THE CLEAN AIR ACT AND THE LEGACY OF THE BUSH ADMINISTRATION

In May, 2007, the decision of Massachusetts v. EPA, the Court ordered the EPA to make a determination as to whether CO2 is an endangerment to the U.S. public health and welfare.\(^7\) The opinion seemed to leave very little room for the EPA to do otherwise. However, the Bush Administration effectively ignored this order, despite significant public support and an agency expert’s research pointing to just such a finding.\(^8\) For the remainder of 2007, there was nothing short of pure regulatory silence.\(^9\) This inaction produced a lawsuit that was filed in April, 2008, by seventeen states, local governments and environmental groups.\(^10\) The parties sought to have the U.S. Court of Appeals for the D.C. Circuit compel the EPA to issue a finding of public endangerment from GHG emissions.\(^11\) Forcing the EPA to make this finding would have generated further regulation of GHG emissions under the CAA.\(^12\) However, in June, 2008, the Court declined to force the EPA to take any action on an endangerment finding.\(^13\)

Despite the amnesty afforded by the Court, the EPA issued an ANPR in July, 2008 regarding an endangerment finding in accordance with the Supreme Court decision in Massachusetts.\(^14\) While the structure of the ANPR seemed to presuppose that regulation under the CAA was undesirable, the ANPR did have a number of groundbreaking components with respect to what regulation under the Act might look like.\(^15\) Additionally, consistent with Bush Administration policies, numerous agencies

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\(^7\) 549 U.S. at 534.

\(^8\) John M. Broder, E.P.A. Expected to Regulate Carbon Dioxide, N.Y. TIMES, Feb. 18, 2009 at A15.

\(^9\) Sigel & Cassel, supra note 1, at 1.

\(^10\) Massachusetts v. EPA, No. 03–1361 (D.C. Cir., filed April 2, 2008). See also Sigel & Cassel, supra note 1, at 1–2.

\(^11\) Massachusetts, No. 03–1361.

\(^12\) Sigel & Cassel, supra note 1, at 1–2.

\(^13\) Massachusetts v. EPA, No. 03–1361 (D.C. Cir, filed June 26, 2008).

\(^14\) Regulating Greenhouse Gas Emissions Under the Clean Air Act,supra note 5..

\(^15\) Id.
had expressed disagreement with the EPA’s proposed draft ANPR, which had been circulated internally to the agencies.\textsuperscript{16} These agencies expressed concerns that the complexity of the CAA would make it an unsuitable tool for regulating GHG emissions.

Under the Obama Administration, EPA administrator, Lisa P. Jackson took little time to move forward with preparation of an endangerment finding that would ultimately position the EPA to use the CAA to regulate GHG emissions.\textsuperscript{17} Similarly, at the beginning of her appointment, she announced a reversal of the Bush Administration’s decision not to regulate CO\textsubscript{2} from new coal-burning power plants and insinuated that the EPA was considering other measures to regulate GHG emissions.\textsuperscript{18} This trend of Bush era policy reversal has continued under President Obama, as discussed below.

Another Bush Administration legacy was the attempt to circumvent aspects of the CAA permitting process for new power plants, particularly when it came to the creation of greenhouse gases.\textsuperscript{19} For example, in the 2008 permit proceeding \textit{In Re: Deseret}, the EPA granted a Prevention of Significant Deterioration (“PSD”) permit without requiring Best Available Control Technology (“BACT”) emissions limits on CO\textsubscript{2}.\textsuperscript{20} As a result, the Sierra Club petitioned the Federal Environmental Appeals Board (“EAB”) to overturn the EPA’s decision.\textsuperscript{21} The Sierra Club argued that CO\textsubscript{2} is subject to regulation under the CAA as a pollutant, and therefore, the EPA erred in issuing a PSD permit without BACT limits.\textsuperscript{22} However, the EAB held that the term “subject to regulation” under the CAA was ambiguous and remanded.\textsuperscript{23} This, in turn, led to the infamous “Johnson memo,” released just before President Obama took office, by Bush Administration EPA chief Stephen Johnson.\textsuperscript{24} Essentially, the memo instructed the EPA staff to disregard regulation of CO\textsubscript{2},

\begin{thebibliography}{9}
\bibitem{16} Id.
\bibitem{17} Broder, \textit{supra} note 10.
\bibitem{18} Id.
\bibitem{19} Sigel & Cassel, \textit{supra} note 1, at 2.
\bibitem{20} In Re: Deseret Power Electric Cooperative, PSD Appeal No. 07–03 (E.A.B. Nov. 13, 2008).
\bibitem{21} Id.
\bibitem{22} Id.
\bibitem{23} Id. \textit{See also} Sigel & Cassel, \textit{supra} note 1, at 2.
\bibitem{24} EPA Memorandum from Stephen L. Johnson, Administrator, to Regional Administrators Re: EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program (Dec. 18, 2008).
\end{thebibliography}
regardless of the Supreme Court’s ruling in *Massachusetts*.

The effect of this instruction was “to exclude CO₂ from the EPA’s definition of regulated NSR [New Source Review] pollutant and, consequently from PSD permitting requirements.” This exclusion resulted in immediate opposition from environmental groups, as well as members of Congress, but the problem was essentially left for the Obama Administration to tackle.

Another issue left by the Bush Administration for President Obama to address was the use of the CAA in regulating GHG emissions from automobiles. For example, former EPA Administrator Johnson announced in December, 2007, that California would be denied a CAA waiver to impose more stringent emission regulations for automobiles. Johnson distinguished California’s use of the CAA to address local air pollution problems from use of the CAA to address global air pollution and climate change issues.

Additionally, pending litigation filed during George W. Bush’s presidency continues to linger into the present. In August, 2008, New York and eleven other states challenged the EPA’s recently updated New Source Performance Standard (NSPS) for oil refineries. They contended that the EPA’s decision not to include GHG emission limits in the NSPS was illegal in light of the Supreme Court’s decision in *Massachusetts*. Further, in October, 2008, environmentalists filed a notice of intent to sue the EPA for breaching its responsibility to review NSPS for nitric acid plants as required by the CAA. The environmentalists called for the inclusion of a GHG emission limit to these standards, which the EPA has not reviewed since 1984. Similarly, in October, 2008, the Environmental Defense Fund filed a notice of intent to sue the EPA for violating the CAA by failing to review NSPS for landfills.

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27. *Id.*


29. *Id.*


specifically with respect to the capture of methane. Whether these, or similar suits from the Bush Administration era continue to proceed under the Obama Administration remains to be seen and will most likely depend on the ultimate direction the President takes on climate change regulation and legislation.

III. USE AND IMPLICATIONS OF USING THE CAA TO REGULATE GHG EMISSIONS

During his tenure, President Obama will be forced to navigate among numerous and often competing interests in approaching climate change policy. The decision to regulate GHG emissions under the CAA would have profound implications on the national economy, including transportation, manufacturing, and power generating utilities. However, the implications of not acting to reduce GHG emissions are arguably just as great.

The Obama Administration has expressed support for the EPA’s proposed endangerment finding in response to the Supreme Court’s decision in Massachusetts. For instance, in January, 2009, President Obama signed a presidential memorandum requiring the EPA to determine whether denial of California’s waiver application was appropriate in light of the CAA. In a notice published in the Federal Register on February 12, 2009, the EPA stated that it “believes there is merit to reconsidering its decision denying California’s waiver” and initiated a reconsideration, as well as a notice of a public hearing and written comment period concerning the request. On June 30, 2009, the EPA granted California’s waiver request, thereby enabling the state to move forward with its proposed enforcement of GHG emissions standards for new motor vehicles.

35. John M. Broder, et. al., Environmental Views, Past and Present, N.Y. TIMES, Feb. 7, 2009 at A12. These include campaigners, lobbyists, lawmakers, and environmentalists whose interests vary from dependency on coal, aversion to power lines, and nuclear power plants, and protection of the environment from climate change. Id.
granting California’s request, Jackson stated, “[t]his waiver is consistent with the Clean Air Act as it’s been used for the last 40 years and . . . reinforces the historic agreement on nationwide emissions standards developed by a broad coalition of industry, government and environmental stakeholders.” \(^{41}\) While President Obama is clearly interested in legislation that addresses climate change, \(^{42}\) his support for the enforcement of *Massachusetts* illustrates that, regardless of how his efforts fare in Congress, he is still willing to take some form of action beyond legislation.

In issuing the proposed endangerment finding, the EPA essentially opened the floodgates to GHG regulations under the CAA. \(^{43}\) Consequently, requiring regulation under the CAA could become “one of the most extensive regulatory rule makings in history.” \(^{44}\) This type of action has the potential to create instantaneous litigation by industry and risks tying up implementation well in to the foreseeable future. Furthermore, even environmentalists who support an aggressive approach to climate change are wary of these implications. \(^{45}\) Notably, while regulation under the CAA would curb emissions from new sources, it would exclude existing sources. \(^{46}\) This is where Congressional action may be necessary in order to fill in the gaps.

While *Massachusetts* dealt specifically with CO\(_2\) emissions, it did not address other GHG emissions that also affect climate change. The endangerment finding goes a step further by focusing not only on CO\(_2\) emissions, but on five other pervasive greenhouse gases: methane (CH\(_4\)), nitrous oxide (N\(_2\)O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF\(_6\)). \(^{47}\) The potential EPA permitting requirements under the CAA that would impose regulations on this wider array of emissions would force new facilities to create more stringent standards and may negate the aforementioned litigation brought by environmentalists. However, while this could possibly avoid such pending litigation, it still leaves existing sources of GHG to proceed under lesser standards.


\(^{42}\) *Broder*, supra note 10.

\(^{43}\) Brigham Daniels, et al., *Regulating Climate: What Role for the Clean Air Act?*, 39 ENVTL. L. INST. 10837, 10837–38 (2009) (discussing the various provisions of the Clean Air Act that are triggered, or could be triggered, once an endangerment finding is made).

\(^{44}\) *Broder*, supra note 10.

\(^{45}\) *Id*.

\(^{46}\) *Id*.

\(^{47}\) Daniels, supra note 43, at 10837.
IV. CONCLUSION

The greater question is whether the Obama Administration is willing and able to utilize the CAA exclusively to implement broader GHG emission regulation. If the EPA promulgates rules to expand its regulation of emissions other than CO$_2$, it could serve to side-step the heated political debate that has, and surely would, tie up any Congressional action. However, the potentially fatal flaw in solely using the CAA is that it would leave existing emitters out of the regulatory scheme. Furthermore, the probable onslaught of litigation would likely prevent timely implementation.

Still, while the U.S. Congress has finally begun to move forward on climate change legislation, it seems unwilling to take the immediate and drastic action necessary to curb GHG emissions and slow the effects of climate change. From the Bush Administration’s “blunt rejection of the Kyoto Protocol” to the apparent lack of political motivation on both sides of the aisle, the U.S. lacks a comprehensive national policy to address GHG emissions. While there have been numerous proposals in Congress, including the Dingell-Boucher economy wide cap-and-trade program and the June, 2009 bill that was narrowly passed by the House, congressional consensus remain elusive.

Ultimately, critics may be justified in espousing the difficulty of addressing climate change solely through the CAA. Despite the EPA’s recent endangerment finding and its potentially broad implications under the CAA, because of the exclusion of regulation of existing emitters, the Obama Administration may likely still need to take a multi-pronged approach in addressing climate change. This could include encouragement of individual state and regional alliances, from legislation like California’s sweeping Global Warming Solutions Act to regional cap-and-trade programs. This could be coupled with the necessary congressional action on established emitters and specific industries. While the CAA would certainly be a useful source of GHG regulation, it will struggle as an all-encompassing solution to climate change. Therefore, while the

49. Broder, supra note 40.
50. Gross, supra note 53.
51. AIChE Environmental Division Newsletter, supra note 41, at 5.
54. Gross, supra note 53, at 207.
Obama Administration has a number of individual methods for addressing this issue, it may be necessary to use a creative combination of approaches to get the job done.