



REGULATING GREENHOUSE GASES UNDER THE CLEAN AIR ACT

On April 17, 2009, the U.S. Environmental Protection Agency (EPA) issued a finding that greenhouse gas (GHG) emissions pose a threat to public health and welfare, opening the door to GHG regulation under the Clean Air Act. The following answers some common questions about how GHGs could be regulated, what outcomes could result from the EPA's process, and how regulations could impact business.

HOW CAN THE EPA REGULATE GHGS? DOESN'T THE CLEAN AIR ACT ONLY APPLY TO AIR POLLUTANTS?

An April 2007 Supreme Court decision (*Massachusetts v. EPA*) ruled that GHGs are air pollutants under the Clean Air Act. The court instructed the EPA to decide whether GHG emissions endanger public health and/or welfare, or if current science is too uncertain to make a reasonable judgment. In response to the Supreme Court decision, the EPA found in April 2009 that GHG emissions do indeed endanger public health and welfare. This "endangerment finding" was made under section 202 of the Clean Air Act, which applies to motor vehicles. The EPA also made a "cause or contribute finding" that GHG emissions from motor vehicles contribute to the problem of climate change. This cause or contribute finding is the next step towards regulating GHG emissions from motor vehicles after the endangerment finding. If both findings are finalized, the EPA is required to move forward with regulatory rulemaking procedures.

WHAT WERE THE EPA'S OPTIONS IN CHOOSING TO REGULATE OR NOT REGULATE GHGS?

Based on the Supreme Court decision, the EPA was required to come to one of three conclusions regarding GHG emissions from motor vehicles:

1. GHGs endanger public health and/or welfare and should be regulated.
2. GHGs do not endanger public health and/or welfare and should not be regulated.
3. The science is too uncertain to make a reasonable judgment.

IF THE ENDANGERMENT FINDING APPLIES TO GHG EMISSIONS UNDER THE SECTION THAT REGULATES MOTOR VEHICLES, WOULD THE EPA BE REQUIRED TO REGULATE OTHER SOURCES?

Probably. If the endangerment finding is finalized, the EPA could initially regulate emissions from motor vehicles. However, it is likely that the EPA would consider including GHGs in existing Clean Air Act regulations that currently cover stationary emitters such as power plants and factories. Also, citizens

can petition the EPA to consider issuing new rules for sources of pollution that are not currently regulated. EPA has received seven such petitions regarding GHG emissions to date. EPA will be required to determine whether or not it should respond to these petitions in a way that would lead to new regulations.

NOW THAT THE EPA HAS MADE AN ENDANGERMENT FINDING, WHAT REGULATORY APPROACHES COULD IT USE?

The EPA's regulatory options are constrained based on the language in various sections of the Clean Air Act. The Act was designed to deal with local and interstate air pollutants that are very different than the long lifetimes and global nature of GHGs. For example, under the section that applies to mobile sources, the EPA may generally only issue emission performance standards for motor vehicles. An emission performance standard sets a limit on the maximum amount of pollutants that may be emitted over a period of time, distance or some other metric (e.g. grams of CO₂/mile). The potential exists for the EPA to interpret its regulatory authority over mobile sources in a novel manner that goes beyond setting emission standards, but it is uncertain how this would develop.

If the EPA were to regulate stationary sources, it could do so via performance or technology standards. Performance standards could be applied to new and/or existing sources in specific categories. Technology standards could require certain source types to install specific control technologies. Another approach the EPA may be able to undertake is a cap-and-trade program for GHG emissions from certain stationary sources such as power plants. It is unclear whether such a program could be as broad as many of the proposals under consideration in Congress due to the constraints inherent in the Clean Air Act framework. This may prevent the agency from pursuing a single cap-and-trade program that covers multiple, diverse types of sources at different points of regulation (e.g. power plants, factories and the carbon content of fuels sold by petroleum refiners and importers). Refer to *The Bottom Line on Cap-and-Trade* for more information on cap-and-trade design.

WHAT COULD EPA REGULATION OF GHGS UNDER THE CLEAN AIR ACT MEAN FOR BUSINESS?

EPA regulations under the Clean Air Act would follow a framework previously used to regulate other pollutants and therefore would not be a new and foreign process to most large industrial companies. However, the regulation of GHGs has varying impacts across different types of businesses. Manufacturers of products that could be subject to standards (such as vehicles and possibly other devices) would need to meet whatever standards the EPA puts forward. This could increase the cost of production for some businesses and therefore affect the prices that consumers must pay. However, the cost of using such products may be substantially lower because they will use less fuel or electricity.

If a company has a facility that is subject to performance or technology standards or a cap-and-trade program established under the Clean Air Act, that facility may face some amount of compliance costs. Companies that manufacture or use products with superior GHG performance may have a competitive advantage under new regulations. Regardless of the approach, it is difficult to assess the costs and benefits of potential regulations before they are proposed.

WHEN WOULD POTENTIAL EPA RULES TAKE EFFECT?

Generally, EPA rules under the Clean Air Act take several years to take effect. If the EPA finalizes the endangerment and cause or contribute findings after the public comment period, rulemaking efforts that apply to motor vehicles could begin at that time. Regulations to address GHG emissions from other sources could follow. Depending on the regulatory approach taken, new requirements might be incorporated into existing air permitting cycles. Public comment periods and cost and benefit studies would all influence how long it would take for rules to take effect.

WOULD EPA ACTION BE REDUNDANT WITH POTENTIAL FUTURE LEGISLATION TO REGULATE GHG EMISSIONS?

Any future act of Congress to regulate GHG emissions through a cap-and-trade program or other approach could be redundant or conflict with potential EPA regulations under the Clean Air Act. The only way to avoid such conflicts is to clarify in legislation where current Clean Air Act authority remains and where new statutory authority prevails. Many current legislative proposals take an approach that would issue a series of amendments to the Clean Air Act rather than a new, stand-alone act of Congress.

HOW WOULD EPA RULES INTERACT WITH STATE GHG REGULATIONS?

Generally, states have been allowed to enact stricter standards than those issued by the EPA for air pollutants regulated under the Clean Air Act—though this dynamic is still in flux. It is unlikely that the current conventions governing state and federal roles in regulating air pollutants under the Clean Air Act would change if GHG emissions are incorporated. However, new legislation could include provisions that alter the current relationship between the states and the federal government in terms of regulating GHG emissions (refer to *The Bottom Line on State and Federal Policy Roles* for more information).

ADDITIONAL REFERENCES

- WRI's US Climate Policy Resources:
<http://www.wri.org/climate/usclimate>
- WRI's The Bottom Line Series:
<http://www.wri.org/publication/bottom-line-series>
- Environmental Protection Agency Endangerment and Cause or Contribute Findings website:
<http://www.epa.gov/climatechange/endangerment.html>
- Environmental Protection Agency Greenhouse Gas Advanced Notice of Proposed Rulemaking website:
<http://www.epa.gov/climatechange/anpr.html>
- Nordhaus, R. 2007. New Wine into Old Bottles: The Feasibility of Greenhouse Gas Regulation Under the Clean Air Act. *New York University Journal of Environmental Law* vol. 15. <http://www.l.law.nyu.edu/journals/envtllaw/issues/vol15/1/Nordhaus.pdf>