

EPA's Obligations

On the basis of the U.S. Supreme Court's decision in *Massachusetts v. EPA*, the structure of the Clean Air Act, petitions currently before EPA, and its responsibilities to implement the law in a reasonable fashion, EPA can no longer delay creating new greenhouse gas regulations in many areas.

Legal Urgency to Act

In April 2007, the Supreme Court issued its landmark ruling in *Massachusetts v. EPA*, thus beginning a series of steps that, barring congressional intervention, will lead inevitably to regulation of greenhouse gases under the Clean Air Act. The Court made three key holdings that will trigger a mandatory response from EPA: (1) that the definition of "air pollutant" in the Clean Air Act included greenhouse gases; (2) that any justification not to regulate must "conform to the authorizing statute"; and (3) that "[t]he harms associated with climate change are serious and well recognized." Together, these holdings give EPA very little wiggle room to avoid regulation.

Following through on its obligations under the Supreme Court's ruling, EPA has now made a proposed finding under the Clean Air Act that greenhouse gases pose a danger to public health and welfare. EPA has also found that emissions from motor vehicles contribute to greenhouse gas pollution, setting the stage for motor vehicle regulations in the near term.

Finally, several petitions currently pending before the agency are very similar to the petition that led to the Supreme Court's decision. Given the Court's findings in that case, EPA is constrained in how it can respond to these petitions—while EPA has some discretion in how it ultimately regulates, it is likely that the petitions will require regulation. Because many of the petitions have been pending for several years, EPA must move quickly to respond within a reasonable timeframe.

Greenhouse Gas Standards for New Motor Vehicles

The proposed finding that greenhouse gas emissions from motor vehicles are a threat to public health and welfare will ultimately require EPA to establish greenhouse gas emissions standards for new motor vehicles. Because the Supreme Court specifically addressed the issue of greenhouse gases from motor vehicles, EPA must move quickly to adopt regulations or else risks future confrontations with the courts.

Aircraft Engines

Public petitions have already been filed that will require the agency to issue a positive finding that emissions from aircraft engines contribute to greenhouse gas pollution that endangers public health or welfare. Once the positive endangerment finding is made, EPA will be required to issue emissions standards for aircraft engines.

Marine Vessels

There are also pending petitions before EPA to regulate emissions from marine vessels, and EPA will have to issue a positive finding that marine vessel emissions of greenhouse gases endanger public health or welfare. To avoid regulating marine vessel emissions, EPA will be required to articulate a reasoned explanation for its failure to act, which will be difficult or impossible given the threat posed by greenhouse gas emissions from marine vessels and the numerous potential regulatory options available to the agency.

Fuels

Petitions will also constrain EPA's discretion in the area of marine fuels. Pending petitions place EPA on a course to issue a positive endangerment finding that marine fuels contribute to greenhouse gas pollution that endangers public health or welfare. On the basis of that finding, EPA will likely be required to act to regulate marine fuels, but will have the option to integrate marine fuels regulation into a broader regulatory approach for fuels for all mobile sources.

EPA May Be Obligated to Issue Nationwide Standards for Greenhouse Gases

Current legal precedent suggests that EPA may be forced to issue national air quality standards for greenhouse gases. While it may be possible to use these standards in a creative way to construct a cap-and-trade program, command-and-control regulations would be costly and potentially unworkable. However, more recent changes to the Clean Air Act make the relevance of older case law unclear, and it may be within EPA's discretion to delay issuing "air quality" standards, especially if it is moving forward with regulations on other fronts.

Consider Climate Change Effects for Existing Pollutants

While EPA may be able to avoid listing greenhouse gases as "criteria" pollutants and creating national air quality standards, where currently listed pollutants—like particulate matter—have climate change effects, EPA will be required to consider climate change costs when revising standards for those pollutants.

New Source Review

While there may be some delay, EPA will eventually be required to list greenhouse gases as "regulated pollutants" under the New Source Review program, meaning that all new or modified major sources will be required to install "best available control technology" for their greenhouse gas emissions. EPA will be required to treat many greenhouse gas sources as "major emitting facilities" under the New Source Review program, meaning that preconstruction permits will be required for many facilities, including many relatively small sources of pollution. Finally, whenever issuing permits under the New Source Review program, EPA will be required to consider the environmental costs of climate change