

ENVIRONMENTAL LAW

Expert Analysis

Climate Regulation Without Congressional Action

The apogee of congressional support for comprehensive climate change legislation came on June 26, 2009, when the House of Representatives passed the American Clean Energy Security Act (Waxman-Markey) by a vote of 219 to 212. Its Senate counterpart, the American Power Act, known first as Kerry-Lieberman-Graham and then just Kerry-Lieberman, never gained traction, and in July 2010 Senate Majority Leader Harry Reid (D.-Nev.) announced he would not bring it to the floor this year.

Many observers believe Republicans will take control of the House and possibly of the Senate after the Nov. 2, 2010, elections. Republican leadership in both chambers is strongly opposed to climate legislation, and many of the party's likely new Congress-people have proclaimed themselves to be climate skeptics. Thus, (unless action is taken during the lame duck session, which seems unlikely) it appears that the next time climate legislation will be resurrected is 2013, and then only if the Democrats bounce back in the November 2012 elections.

For several years the proponents of climate regulation have pinned their hopes on Congress. Now that those hopes have been dashed for at least two more years, the principal action is shifting to the U.S. Environmental Protection Agency (EPA), the courts and the states, though important questions will still be faced by Congress. This column surveys what is likely to happen over the next two years.

Renewable Electricity

In today's highly partisan atmosphere, one energy bill with climate implications still has a real chance of passage. On Sept. 21, 2010, Senators Jeff Bingaman (D.-N.M.) and Sam Brownback (R.-Kan.) introduced S.3813, the Renewable Electricity Promotion Act. Several other Republican senators have also indicated support. The bill requires that 15 percent of the nation's electricity come from renewable sources by 2021. More than half of the states already have somewhat similar requirements, and in many the standards are much stricter; California has mandated 20 percent renewable electricity by the end of 2010 and 33 percent by 2020. There are also important issues with respect to what counts as renewable, what is included in the baseline, extra credits for certain actions, and the extent to which efficiency is included.

By
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Increased use of renewables and efficiency measures have tremendous potential for addressing climate change; the combustion of fossil fuels is responsible for 81 percent of U.S. greenhouse gas emissions (GHGs).¹ The Bingaman-Brownback bill would make a very small contribution to reducing these emissions, but it would establish a nationwide structure that a subsequent Congress may choose to tighten. Additionally, Congress may authorize substantial incentives for vehicles powered by electricity or natural gas.

In the current political climate, actions that would raise energy prices or impose regulatory burdens on businesses meet ferocious resistance.

EPA Action

In 2007 the U.S. Supreme Court, in *Massachusetts v. EPA*,² held that EPA has the authority to regulate GHGs under the Clean Air Act. As soon as President Barack Obama took office in January 2009, EPA began a vigorous program of issuing GHG regulations. Three EPA actions are of particular importance:

- **Endangerment finding.** As a prerequisite to further regulation, EPA needed to make a formal finding that GHGs pose a threat to human health or welfare. EPA issued this "endangerment finding" on Dec. 7, 2009.

- **Cars/light trucks rule.** On April 1, 2010 EPA and the National Highway Traffic Safety Administration issued regulations tightening the Corporate Average Fuel Economy (CAFE) standards for cars and light trucks.

- **Tailoring rule.** The Clean Air Act provides that once an air pollutant is regulated, any stationary source (like a power plant or factory) requires a permit if it emits more than 250 tons per year. That number is sensible for conventional pollutants such as sulfur dioxide, but it is so small for GHGs that it would sweep in hundreds of thousands or perhaps millions of facilities. Thus EPA, which has no desire to regulate these small sources, on May 13, 2010 adopted the "tailoring" rule to increase the permitting

threshold to 100,000 tons per year of GHGs for most purposes.

As a result of these and other EPA actions, stationary sources will become subject to regulation on Jan. 2, 2011 under the Clean Air Act's Prevention of Significant Deterioration program and Title V permitting program. These programs are mostly implemented by the states. On Aug. 12, 2010, EPA moved toward a finding that 13 states are not in a position to carry out these new rules,³ and thus toward a possible temporary federal takeover of GHG regulation in these jurisdictions. A practical effect could be to inhibit the construction or modification of stationary sources in these places.

Stationary sources subject to these new rules must apply Best Available Control Technology (BACT) on a phased-in basis. In the next several weeks EPA is expected to issue draft guidance on BACT for several industries. EPA is also considering new source performance standards under a different Clean Air Act program.

At the same time, EPA is moving forward with more vigorous regulation of conventional air pollutants. Most notably, on July 6, 2010, EPA issued a Notice of Proposed Rulemaking for the "Transport Rule," which would require a significant reduction in sulfur dioxide and nitrogen oxide from power plants in the eastern half of the United States. On Sept. 10, 2010, EPA issued National Emission Standards for Hazardous Air Pollutants for the Portland Cement industry. Also expected in the coming months are proposed Maximum Available Control Technology standards for mercury and other hazardous air pollutants from coal-fired electric power plants. These rules, while not directed at GHGs, will affect—and possibly lead to the closure of—some facilities that are also major GHG emitters.

Attacks on EPA Action

All of the final EPA actions on GHGs are currently being challenged by various industry associations in the D.C. Circuit. Motion practice is pending or imminent on consolidation of some or all of the suits, and on stays of implementation.

Parties and amici curiae are piling on to both sides of these cases. States that oppose GHG regulation (led mostly by Republican governors) and industry groups are filing on the side of the plaintiffs; states that favor GHG regulation (led mostly by Democratic governors) and environmental groups are filing on the side of EPA. Separately, the state of Texas is aggressively litigating against EPA's efforts to force it to implement GHG regulation or to impose federal control.

Meanwhile, congressional opponents of GHG

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regulation are continuing their efforts in Congress to block these rules. A resolution offered by Senator Lisa Murkowski (R-Alaska) to annul the endangerment finding was defeated on June 10, 2010. Senator Jay Rockefeller (D-WV) is offering a narrower resolution that would delay most GHG regulations. With both the House and the Senate controlled by Democrats, final passage of such a resolution is currently unlikely, at least absent some kind of novel parliamentary maneuver, and a veto by President Obama appears likely. However, the outcome in the next Congress is harder to call, especially if the measure is attached to an appropriations bill or other measure that President Obama would have difficulty vetoing. Battles over attempts to strip EPA of its powers over GHGs are likely to be a major element of congressional climate activity over the next two years.

State and Regional Action

Most of the states that favor GHG regulation are proceeding with their own programs, most of which are modest in scope and, so far, lack regulatory teeth. As usual, the clear leader thus far has been California, whose A.B. 32 law of 2006 has led to a wide-ranging set of planned rules. However, climate opponents have placed a proposition on the ballot for November that would freeze implementation of A.B. 32. The campaigns for and against this proposition, together with campaigns for governor and senator in California where this is also an issue, have taken on national significance.

A cap-and-trade program for carbon dioxide from power plants took effect in January 2009 under the Regional Greenhouse Gas Initiative (encompassing ten northeastern and mid-Atlantic states). Similar programs are being developed under the Western Climate Initiative and the Midwestern Greenhouse Gas Reduction Accord.

Many municipalities, including New York City, have undertaken important actions to reduce GHG emissions through requirements for green buildings and many other measures.

Litigation

In addition to the challenges to EPA rulemakings, a considerable volume of litigation has been brought against proposed energy projects and other initiatives.⁴ These cases fall into several categories. Among them:

• **Coal-Fired Power Plants.** These are the largest source of GHG emissions in the United States. The Sierra Club is leading a concerted effort by the U.S. environmental community to fight every proposed coal-fired power plant. These campaigns utilize administrative procedures and litigation to challenge a broad range of matters related to these facilities—GHG emissions, conventional air pollutants, cooling water discharges, ash disposal, land acquisition, rail lines to carry fuel, public utility commission approvals, and others. At the same time, the environmental community is also litigating against mountaintop removal and other aspects of coal mining. These challenges, together with the uncertainty over future GHG regulation, have created a major cloud of uncertainty over these projects.

• **Public Nuisance Litigation.** Four lawsuits have been filed in federal courts claiming that GHGs are a common law public nuisance. All four were dismissed at the trial court level on the grounds that they pose political questions that are more

appropriate for the executive and legislative branches. The appeal of one of the cases was dropped,⁵ but the other three are pending on appeal.

State of Connecticut v. American Electric Power was brought by several states, cities and land trusts seeking an injunction requiring the five power company defendants to reduce their GHG emissions. The U.S. Court of Appeals for the Second Circuit ruled in September 2009 that the case could proceed. On Aug. 2, 2010, as expected, a petition for certiorari was filed by four of the electric utilities. Later that month came a major surprise in this case. To the dismay of environmentalists, the Solicitor General, acting for the fifth defendant, the Tennessee Valley Authority, filed a brief supporting the electric utilities, saying that the issues are more appropriately addressed by Congress and the executive branch, and that any federal common-law claims have been displaced by EPA actions. Thus the Solicitor General asked the Supreme Court to vacate and remand the Second Circuit decision.

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The second pending case⁶ is *Comer v. Murphy Oil USA*,⁷ which was brought by Mississippi landowners against numerous industrial companies alleging that their property was damaged by Hurricane Katrina, that the hurricane had been intensified by global warming, and that GHG emitters should be held liable for these damages. The U.S. District Court in Mississippi dismissed the case on standing and political question grounds; the U.S. Court of Appeals for the Fifth Circuit reversed; the full Fifth Circuit vacated that decision and granted en banc review; and then the Fifth Circuit found it had lost a quorum due to recusals and cancelled the en banc review, but left the panel decision vacated. That reinstated the district court decision dismissing the case. In the face of this bizarre sequence of events, on Aug. 26, 2010, the *Comer* plaintiffs petitioned the Supreme Court for a mandamus ordering the Fifth Circuit to reinstate the appeal.

The final pending climate change public nuisance cases is *Native Village of Kivalina v. ExxonMobil*,⁸ which was brought by an Alaskan village claiming it is eroding into the sea as a result of climate change, and asking for relocation expenses from various GHG emitters. That suit was dismissed by the U.S. District Court in San Francisco, and is being appealed to the U.S. Court of Appeals for the Ninth Circuit.

International

The signatories to the United Nations Framework Convention on Climate Change of 1992 hold an annual Conference of Parties (COP). There were high expectations for a binding global agreement at the 15th COP held in December 2009 in Copenhagen,

Denmark. That effort failed, in large part because neither the United States nor China—the world's two largest GHG emitters—was willing to bind itself. The 16th COP will be Nov. 29-Dec. 10, 2010, in Cancun, Mexico, and expectations for it are quite low.

Other international climate negotiations are taking place on a regular basis, some under the auspices of the United Nations and some among smaller groupings. Progress is being made on various technical issues, but few expect any comprehensive agreement before the United States adopts a clear policy.

Meanwhile, the end of 2012 will see the lapse of many of the commitments made as part of the Kyoto Protocol of 1997. The United States is the only major industrialized nation that did not ratify it. A great deal of activity has been occurring under the Kyoto Protocol, including the Clean Development Mechanism, under which developed countries pay for renewable energy and other GHG-reducing measures in the developing countries in exchange for emissions credits. Many discussions are ongoing with respect to what becomes of these programs after 2012. A temporary extension of the Kyoto Protocol may be one option.

Conclusion

The federal government and the states have additional authorities that could be deployed to improve energy efficiency, foster the use of renewable energy, and otherwise reduce GHG emissions.⁹ However, in the current political climate, actions that would raise energy prices or impose regulatory burdens on businesses meet ferocious resistance.

Meanwhile, many of the other major countries that have adopted clear climate policies are experiencing a tremendous growth in their renewable energy industries, with the U.S. falling behind in many ways; and worldwide GHG emissions continue to rise at an alarming rate.

On Oct. 11, 2010, from 7-9 p.m., Columbia Law School will host a program, "U.S. Climate Policy in the Context of Congressional Paralysis," at which many of the issues discussed in this column will be discussed.¹⁰

1. U.S. Energy Information Admin., Emissions of Greenhouse Gases Report (Dec. 8, 2009).

2. 549 U.S. 497 (2007).

3. The states are Alaska, Arizona (excluding Maricopa County, Pima County, and Indian Country), Arkansas, California (Sacramento Air Quality Management District only), Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada (Clark County only), Oregon, and Texas.

4. For a collection of these cases, see Arnold & Porter, U.S. Climate Change Litigation Chart, www.climatecasechart.com.

5. *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), appeal dismissed, No. 07-16908 (9th Cir. June 24, 2009).

6. Arnold & Porter, the author's firm, represents one of the defendants in *Comer* and one of the defendants in *Kivalina*.

7. 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), rev'd, 585 F.3d 855 (5th Cir. 2009), reh'g granted, 598 F.3d 208 (5th Cir. 2010), appeal dismissed, 607 F.3d 1049 (5th Cir. 2010).

8. 663 F.Supp.2d 863 (N.D. Cal. 2009), appeal pending, No. 09-17490 (9th Cir. Nov. 5, 2009).

9. See Nicholas M. Bianco & Frantz T. Litz, Reducing Greenhouse Gas Emissions in the United States: Using Existing Federal Authorities and State Action (World Resources Institute 2010); Presidential Action Climate Project, Plan B: Near-Term Presidential Actions for Energy & Environmental Leadership (August 2010); Constantine Samaras et al., Cap and Trade Is Not Enough: Improving U.S. Climate Policy (Carnegie Mellon University, Department of Engineering and Public Policy, March 2009).

10. Further details about this conference and registration information are available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=541293.