

Key EPA Actions Lay Foundation for Regulation of GHG Emissions Under the Clean Air Act

INTRODUCTION

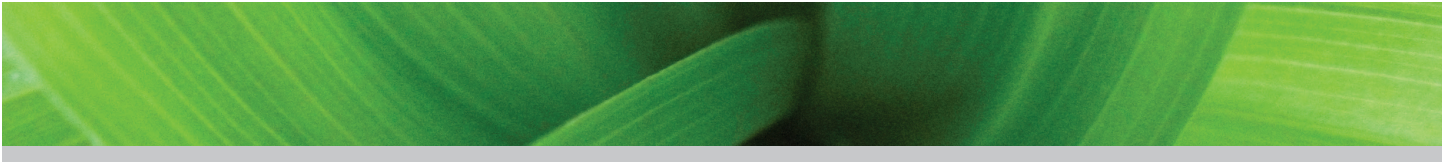
During the week of March 29, 2010, the Environmental Protection Agency (EPA) concluded two groundbreaking proceedings that initiated the regulation of greenhouse gas (GHG) emissions under the Clean Air Act (CAA). One of these actions is a joint rulemaking with the National Highway Traffic Safety Administration (NHTSA) that sets GHG emission standards and Corporate Average Fuel Economy (CAFE) standards for passenger cars and light-duty trucks in model years 2012 through 2016. The first CAA regulation to mandate GHG emission controls also represents a significant shift in federal vehicle regulation, in that it creates a harmonized framework for federal GHG and fuel economy programs that supersedes California's own vehicle GHG standards.

The second action is a reconsideration of previous EPA guidance governing the starting date for regulation of GHG emissions from stationary sources (such as power plants and factories) under the Prevention of Significant Deterioration (PSD) and Title V programs. As a result of language in the CAA requiring limits under the PSD and Title V programs for all "regulated pollutants", EPA's regulation of vehicle GHG emissions triggers GHG regulation for stationary sources. EPA's new interpretation will require certain new and modified facilities to install "best available control technology" for GHG emissions and obtain operating permits once the vehicle GHG standards become enforceable on January 2, 2011.

NEW GHG AND FUEL ECONOMY STANDARDS FOR MOTOR VEHICLES

The vehicle GHG and fuel economy standards originate with two seminal legal developments. The first was the Supreme Court's 2007 decision in *Massachusetts v. EPA*, in which the Court ordered EPA to make a science-based finding as to whether GHG pollution from motor vehicles contributes to an endangerment of public health and welfare (or find that any such determination was impossible). EPA responded to the Court's mandate in December 2009, finding that mobile source GHG emissions contribute to climate change that endangers public health and welfare—a decision that, under Section 202 of the CAA, triggered an obligation for EPA to establish GHG emission standards for motor vehicles.

The second key development was California's protracted effort to implement its own vehicle GHG emission standards. The CAA generally prohibits states from establishing their own vehicle standards. However, Section 209 of the CAA allows California to apply for a waiver of this rule; Section 177 of the CAA allows other states to adopt California vehicle standards in lieu of federal standards. When EPA denied California's petition for a waiver for its GHG emission standards in March 2008, California quickly appealed the decision. These actions raised the possibility that automakers could be subject to three overlapping and potentially inconsistent regulatory programs—the California GHG standards, federal GHG standards resulting from the *Massachusetts* decision, and federal CAFE standards. To avoid this outcome, the Obama Administration, the state of California, and major



automakers negotiated a landmark agreement in May 2009, calling for a national framework that would harmonize these three major regulatory programs and resolve pending and future litigation over vehicle emission standards.

The joint EPA/NHTSA standards released last week fulfill that agreement, reflecting an unprecedented degree of coordination between EPA's Section 202 vehicle GHG standards and NHTSA's CAFE standards.¹ Under the new regulation, both agencies have adopted separate "attribute curves" for passenger cars and light trucks in model years 2012 through 2016, establishing a unique GHG emissions standard—and a corresponding fuel economy standard—for each vehicle with a particular "footprint" (a measure of vehicle size). Manufacturers can comply simultaneously with both the Section 202 and CAFE standards by ensuring that their production fleets meet or exceed the sales-weighted average of standards derived from these attribute curves.

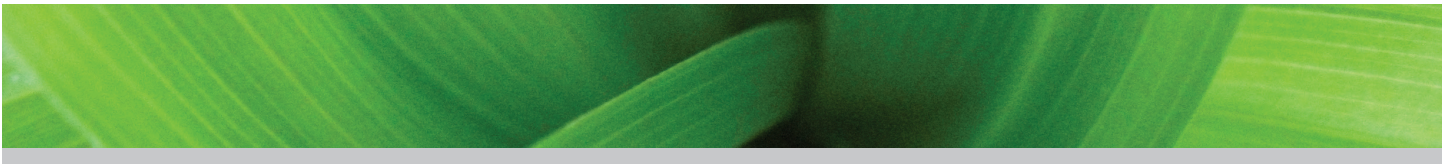
The joint standards also allow manufacturers to comply through a variety of flexible mechanisms. Manufacturers that exceed the GHG or fuel economy standards will be awarded credits that can be: (1) "carried back" to offset compliance shortfalls in up to three prior model years; (2) "banked" to ensure compliance in future model years; (3) transferred between the passenger car and light truck fleets of a single manufacturer (subject to some limits under the CAFE program); or (4) sold to other manufacturers. Credits can also be earned towards the GHG standards (but not the CAFE standards) by improving air conditioner efficiency and reducing refrigerant leakage. Consistent with the existing CAFE program, manufacturers can earn additional credits toward one or both programs by selling alternative fuel vehicles or electric drive vehicles; such credits for flex-fuel vehicles will be revisited for model year 2016.

Under the agencies' vehicle sales forecasts, the standards will cause the national vehicle fleet to achieve an average fuel economy of 34.1 miles per gallon in model year 2016, and average GHG emissions of 250 grams CO₂-equivalent per mile. Over the lifetime of these vehicles, EPA expects the standards to save 77.7 billion gallons of gasoline and avert 962 million metric tons CO₂-equivalent emissions, at an average cost of approximately \$950 per vehicle by model year 2016 (which the agency expects will be exceeded by total fuel cost savings of approximately \$4,000 per vehicle in model year 2016).

RECONSIDERATION OF THE "JOHNSON MEMORANDUM"

Because of the structure of the CAA, EPA's promulgation of GHG standards for motor vehicles triggers regulatory consequences for stationary sources under the PSD and Title V programs—consequences that EPA sought to address through its second major action last week, which determined the timing of GHG regulation under PSD and Title V. Under the CAA and EPA's PSD regulations, new or modified stationary sources with the potential to emit 100 or 250 tons per year of any pollutant "subject to regulation" under the CAA must obtain preconstruction permits and install "best available control technology." Title V requires stationary sources to obtain operating permits if they emit at least 100 tons per year of any pollutant "subject to regulation."

¹ The state of California is currently implementing its obligations under the agreement by amending its GHG standards to recognize compliance with the new federal standards as a compliance option for the California standards.



Until last week, EPA's interpretation of the phrase "subject to regulation" would have caused PSD and Title V requirements to apply to GHGs as soon as the new motor vehicle GHG standards were promulgated. That interpretation originated with challenges to PSD permits brought by environmental organizations in 2007 and 2008, which advanced the theory that EPA regulations requiring monitoring of CO₂ emissions from major stationary sources made CO₂ "subject to regulation" for purposes of PSD. Consequently, then-EPA Administrator Stephen Johnson signed a memorandum in December 2008 (known as the "Johnson Memorandum") concluding that GHGs only would become "subject to regulation" once EPA promulgated regulations requiring "actual control" of these pollutants. Under the Johnson Memorandum, the motor vehicle GHG standards promulgated by EPA last week would have satisfied this "actual control" criterion and triggered immediate regulation of GHGs under both PSD and Title V.

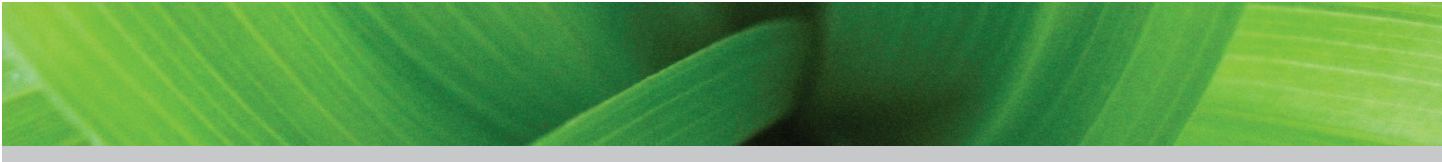
Instead, EPA's reconsideration of the Johnson Memorandum defers the applicability of these programs to GHGs. The document reaffirms the basic reasoning and conclusions of the Johnson Memorandum, after considering various alternative interpretations of the phrase "subject to regulation." However, EPA departs significantly from the Johnson Memorandum in determining that "actual control" of GHG emissions takes place when actual compliance with the vehicle GHG standards is first required, not when the standards are promulgated. Because vehicles that comply with EPA standards for model year 2012 cannot be introduced into commerce until January 2, 2011, the reconsideration defers PSD and Title V regulation of GHG emissions until that date. This interpretation will afford EPA additional time to produce guidance on the implementation of these programs and allow state permitting authorities to prepare for the additional responsibilities of regulating GHG emissions.

The reconsideration also determined that non-GHG PSD and Title V permit applications that are pending when GHGs become "subject to regulation" would not be permitted to omit requirements applicable to GHG emissions; that is, there will be no grandfathering of permit applications that are already under consideration once GHG limits are required under PSD and Title V programs. This issue was not discussed in the proposed reconsideration, but was raised by stakeholders during the public comment phase.

EVALUATION AND ANTICIPATED FUTURE ACTIONS

Together, these interlocking decisions represent significant milestones in EPA's ongoing effort to use the CAA to regulate GHG emissions—a process set in motion in 1999 when environmental organizations (later joined by the state of Massachusetts and other parties) first petitioned EPA to regulate vehicle GHG emissions. Barring intervention by Congress, EPA's reconsideration of the Johnson Memorandum removes any doubt that CAA regulation of GHG emissions from stationary sources will take place early next year. Because there will be no grandfathering of PSD or Title V permit applications, sources that do not anticipate completing the permitting process by January 2, 2011 will need to be prepared to revise or resubmit their permit applications to include "best available control technology" (and meet other applicable requirements) for GHGs.

EPA's next major action in this area is expected to be a "Tailoring Rule" (proposed in September 2009) that will establish a timetable for phasing in PSD and Title V regulation of GHG emissions in 2011. On February 22, 2010, EPA Administrator Lisa Jackson wrote a letter to Sen. Jay Rockefeller (D-WV) in which she said she expected that the Tailoring Rule would limit the initial coverage of the PSD and Title V programs to facilities



with emissions “substantially higher” than 25,000 tons CO₂-equivalent per year. In addition, she said that the final rule likely would provide that, for the first half of 2011, only facilities that already must apply for PSD and Title V permits as a result of their non-GHG emissions would need to address their GHG emissions in their permit applications. Separate from the Tailoring Rule, EPA is also expected to release administrative guidance over the coming year that will aid state permitting authorities in applying PSD requirements to GHG emissions, particularly the requirement that sources apply “best available control technology.”

Potential developments in Congress could also have an important impact on PSD, Title V, and other CAA requirements for GHG emissions from stationary sources. For example, Sen. Lisa Murkowski (R-AK) has introduced a Congressional resolution that would disapprove EPA’s December 2009 “endangerment finding” for GHGs. Were such a resolution to pass, it would effectively remove EPA’s authority to regulate GHGs and would scuttle the agreement with California and the automakers. Also, Sen. Rockefeller has said he may introduce a bill suspending any exercise of EPA’s authority to regulate stationary source GHG emissions for two years; the Rockefeller bill includes an explicit exclusion for motor vehicle regulation.

Lastly, EPA’s vehicle GHG standards may be challenged by some of the same parties who have filed petitions for review of EPA’s “endangerment finding.” If successful, such challenges would also eliminate EPA’s authority to regulate GHGs and vitiate the Administration’s agreement with California and the automakers.

FOR ADDITIONAL INFORMATION

Van Ness Feldman closely monitors congressional and executive branch developments on climate change and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation and regulatory activity, the surrounding policy and political debate, and the implications for your organization. If you would like more information about these latest EPA actions or other matters relating to EPA regulation of GHG emissions, please contact Richard Penna, Kyle Danish, Stephen Fotis, or any member of the firm’s Climate Change practice at (202) 298-1800. Those interested in on-going coverage of climate change policy developments may wish to subscribe to the weekly Climate Change Policy Update at <http://www.vnf.com/news-signup.html>.

© 2010 Van Ness Feldman, P.C.
All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.