

US EPA to open discussion on regulating GHG emissions

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Amid a conflict with the White House, the Environmental Protection Agency will release as early as Thursday a document that raises questions about the legal and economic implications of regulating greenhouse gas emissions through existing federal legislation.

The EPA is set to release its “advanced notice of proposed rulemaking” (ANPR), which seeks public input on whether the agency should regulate greenhouse gas emissions at both large and small installations through the federal Clean Air Act.

That legislation, which was first passed by Congress in 1963 and last amended in 1990, regulates acid rain, ozone depletion and air pollution.

Last April, the Supreme Court ruled that the Clean Air Act gives the EPA authority to regulate greenhouse gas emissions, but said the agency must first determine whether greenhouse gases endanger public health or the environment. That so-called endangerment finding would require the agency to regulate greenhouse gas emissions in order to protect public welfare.

The EPA filed its ANPR with the White House’s Office of Management and Budget on 18 June. Since then, the White House has sent the draft back to the EPA, instructing it to omit sections that show that greenhouse gas emissions present a danger to public health and that illustrate some economic benefits of regulating them, according to sources close to the issue.

“The Bush administration is clearly reluctant to use this kind of authority,” said Kyle Danish, an environmental lawyer at Van Ness Feldman, referring to the White House’s hesitation to expand the use of the existing legislation to greenhouse gases.

The White House has said that it does not believe the clean air act is the appropriate vehicle from which to regulate greenhouse gas emissions.

'Foot dragging'

Meanwhile, congressional committees and environmental groups have been pressuring EPA Administrator Stephen Johnson to issue the agency’s endangerment finding as soon

as possible, accusing him and the Bush administration of “foot dragging” on the decision.

Johnson has argued that a lot of time and public consultation is needed before the agency can decide whether the clean air act can be used to regulate greenhouse gas emissions because it would affect so many potential sources of emissions.

An EPA spokesman rebuffed complaints deliberate delays, and said the agency is preparing for a major rollout of its ANPR.

“There is always interagency review and that’s the portion that’s ongoing now. The administration has talked about wanting to have a robust discussion. I truly think this will be one of the more transparent rollouts (of EPA rulemaking),” said Jonathan Shradar, EPA spokesman.

Shradar said the document will be nearly 200 pages long, and filled with questions about how EPA staff should deal with greenhouse gas emissions under the Clean Air Act framework.

Frank Maisano, of energy law firm Bracewell and Guiliani, said that while legislators and environmentalists have created a sense of urgency for the EPA to issue its decision on whether to regulate greenhouse gas emissions, the pressure should fall on Congress instead to draft comprehensive legislation that addresses climate change.

“We are dealing with a process (EPA rulemaking) that is not made for CO₂,” Maisano said. “It’s probably not designed to (regulate greenhouse gas emissions) and not the most efficient way to do that. That still has to be considered and remembered.”

Pressure on Congress

According to some experts, the EPA may have the authority to create greenhouse gas regulations by the time the next president takes office in 2009, which will put pressure on the US Congress to pass its own comprehensive climate change legislation.

“The next president will have to use this authority in some way and may want to create further leverage on Congress to take action,” said the lawyer at Van Ness Feldman.

The idea of implementing a very complicated and expensive regulatory programme out of the EPA could give impetus to lawmakers to pass a climate change bill that features a cap-and-trade system as a means to achieve lower-cost emissions reductions, Danish added.

“It’s more likely the EPA would come up with (emission) control standards. That’s what the Clean Air Act is likely to force the EPA to do,” he said. “It becomes the new reason to give greater consideration to a new cap-and-trade programme that Congress can create.”

Others said that the process that the EPA is taking to develop regulations for greenhouse gas emissions could help guide Congress as it attempts to draft and pass comprehensive climate change legislation.

“I think that what is significant about this ANPR is that it could set in motion a regulatory process where the EPA could do a lot of the complex work for Congress and tee up the issues for which congress is appropriately positioned,” said Robert Wyman, a partner specialising in the Clean Air Act at law firm Latham and Watkins.

Precedence

Wyman said that the current process taking place to create regulations for greenhouse gas emissions mimics what happened between 1987 and 1990, when the EPA undertook a comprehensive rulemaking process for ozone depletion.

The EPA then began a nearly two-year process to write ozone regulations under the Clean Air Act, which both houses of Congress approved in 1990 as an amendment.

Some of the EPA’s proposals could serve as a reference point for Congress, which they could change, he said. The rulemaking process could extend to the middle or end of 2009, which “would dovetail pretty well with Congressional action,” Wyman said.

He added with the EPA creating a set of national greenhouse gas regulation, it could be one way of moving away from the “patchwork” of legislation that has been developing, with states adopting their own different greenhouse gas programmes, toward a national framework.

“It would be a beneficial process for business as well. With states developing their own programmes, it risks creating a patchwork,” Wyman said. “This would be one more way of making that unlikely and more likely we have a harmonised national programme.”

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