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The Obama Administration's First Environmental Policy Changes

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Hot Issues Alert – Organizations

The Obama Administration's First Environmental Policy Changes

Michael Gerrard is Professor of Professional Practice and Director of the Center for Climate Change Law at Columbia Law School. These comments were condensed by editor Julia R. Dillon from the PLI panel Environmental Actions: The Obama Administration's First Policy Changes 2009 on April 22, 2009. For the full panel, visit www.pli.edu.

Editor: Please give us some background on the Obama administration's very significant proposed endangerment finding issued on April 16.

Gerrard: Under President Clinton the U.S. EPA took the position that it had the authority to regulate greenhouse gases (GHGs) from motor vehicles under the Clean Air Act as written, but the Clinton administration did not take affirmative steps to actually employ that authority. When President Bush took office, the General Counsel of EPA took the opposite position, stating that it would need special authorizing legislation in order to architect that regulation. A petition was filed with the EPA by the International Council for Technology Assessment and other organizations asking EPA to impose such regulations. EPA denied the petition. This led to *Massachusetts v. EPA*, in which 12 states along with many municipalities and non-government organizations joined together and challenged the EPA determination. On April 1, 2007 the Supreme Court issued a 5-to-4 ruling that EPA does indeed have the authority to regulate GHGs. The decision from the Supreme Court indicated that the next step would be for EPA to decide whether or not greenhouse gases posed an endangerment to public health or welfare, which is the test under the Clean Air Act for regulation of a particular air pollutant.

The matter was remanded to EPA to take action based on the decision. Little happened until July 30, 2008 when the U.S. EPA issued an advanced notice of proposed rulemaking. This very long document detailed the adverse effects of GHGs and the various methods available under the Clean Air Act for regulating them. However, the EPA leadership prefaced this with documents that basically disavowed the notion that it was sensible to regulate GHGs under the Clean Air Act.

The Obama administration's 138-page proposed endangerment finding contains an exhaustive discussion of the adverse health and public welfare implications of various pollutants – carbon dioxide, methane, nitrous oxide, hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride – which were also regulated as GHGs under the Kyoto Protocol. Furthermore, the document states that the combined effect of these six pollutants has significant impact on climate change. While not the first time that an official Federal Register notice has talked about the perils of these pollutants, it is certainly the most adamant on the danger to public health and the adverse effects on the environment.

Most likely, the endangerment finding will become final and these pollutants will be regulated under the Clean Air Act. The most immediate impact of all of this will be on the regulation of motor vehicles, because the finding allows EPA to go forward with issuing GHG emissions standards for new motor vehicles.

Editor: What about stationary sources of air pollution?

Gerrard: The Clean Air Act speaks very similarly about endangerment from stationary sources but it is basically the same text, and so it is expected that the same conclusions will apply to those named pollutants.

One of the issues is the extent to which the Clean Air Act's GHG controls are relevant to the permitting of new stationary sources of air pollution. There is an important matter pending for the Desert Power plant, a proposed coal plant in Utah. In November 2008, the Environmental Appeals Board (an administrative body within EPA) issued a decision on a proposed prevention of significant deterioration permit under the Clean Air Act for that power plant. The principal question in that case was whether GHGs are pollutants "subject to regulation" under the Clean Air Act, because if they are, then they need to impose the best available control technology. However, there is a real question about just what the best available control technology for GHG pollutants is. The Environmental Appeals Board issued a decision basically saying that is an important – and open – question. That decision had a chilling effect on permitting applications for many other facilities around the country because it cast a lot of questions about what the Clean Air Act's requirements would be. In December 2008, the administrator of EPA, Stephen Johnson issued a memorandum stating that GHGs are not pollutants "subject to regulation," but two months later, the new EPA administrator, Lisa Jackson, sent out a letter to the Sierra Club stating that the new administration will take another look at the decision.

Desert Rock is another appeal that is raising largely the same issue. These cases arise in states where EPA has primacy and continues to implement relevant provisions of the Clean Air Act. Some states have delegated authority under the Clean Air Act, and in those states it is up to the state environmental agencies and courts how to apply the law. The EPA by issuing this proposed endangerment has finally begun the march down the road of GHG regulation. One of the questions is how long can or must they take. In most instances, there are a number of intermediate rulemaking steps that have to be followed and these can take several months before they are finished.

Editor: How much GHG is enough to trigger the requirement for a permit?

Gerrard: Under the text of the Clean Air Act you need a permit if you are generating at least 250 tons per year of any regulated pollutant – which is a considerable amount for those chemicals, but not very much in terms of GHGs. While 250 tons per year of SO₂ would apply to a reasonably sized industrial facility, 250 tons per year of CO₂ would also apply to a very small facility – an apartment building, for instance – for GHGs. EPA has clearly indicated that they do not have an appetite for regulating every small facility that generates 250 tpy of GHG.

Editor: What is happening in Congress regarding GHGs?

Gerrard: In April, Congressmen Henry Waxman and Edward Markey introduced a major bill in the House that would set up a national cap-and-trade system, energy efficiency measures and many other actions. This is moving quickly through the House, but it remains unclear whether it will get through the Senate this year. The EPA's march toward regulation under the Clean Air Act seems to be impelling Congress toward action, in part because most people (including EPA) would much rather have legislation than administrative action. EPA has signaled that overall they approve of the Waxman-Markey bill. Lisa Jackson commented, "The American Clean Energy and Security Act ... is a serious effort at constructing comprehensive energy and climate legislation." She also notes that the Waxman-Markey draft

draws very heavily on the recommendations from the U.S. Climate Action Partnership, a coalition that included major American companies including Alcoa, John Deere, Caterpillar, Dow, Ford, General Motors and General Electric as well as several environmental organizations such as the NRDC. The effort to create a consensus viewpoint seems to be paying off.

Editor: What about EPA's proposed mandatory greenhouse gas reporting rule?

Gerrard: Under the 2008 Appropriations Act EPA was required to release this rule, which requires covered entities to quantify and file reports with EPA about GHGs. The rule covers the same pollutants that the Kyoto Protocol and the Waxman-Markey bill do, and it very importantly has basically the same thresholds of that applicability, covering facilities with 25,000 tpy of GHG submissions (about 13,000 facilities in the United States). As the precursor to actual regulation, the rule will force facilities to get their feet wet by quantifying and reporting their emissions. If the legislation goes forward, these facilities will need to get permits to continue to emit, and if it does not, they will need permits under the existing Clean Air Act under the actions of EPA.

These reporting rules also apply to the industrial facilities of upstream suppliers of fossil fuels and industrial greenhouse gases as well as to manufacturers of vehicles and engines.

Editor: What about automobiles?

Gerrard: The next kind of activity under climate change has been under the California Vehicle waiver. Under the federal Clean Air Act and associated energy laws there are to be uniform federal standards for motor vehicle emissions, except that California can promulgate its own if EPA grants them a waiver to do so. If so, other states can opt to follow the California standard rather than the uniform national standard; a maximum of two different kinds of cars would have to be manufactured for the U.S. market. For many years, California has routinely sought these waivers in order to set its own more stringent standards. In March 2008 EPA denied the California waiver request. The requests of the 14 other states that had signed onto the California standard were also essentially denied. Taken together, those 14 states plus California comprise close to half the U.S. vehicle market.

Within days of taking office, President Obama issued a memorandum asking EPA to determine whether the denial was appropriate. In addition, we have the issue of overall national GHG standards and Corporate Average Fuel Economy (CAFE) standards, which are issued by the U.S. Department of Transportation. In May 2009, President Obama announced that his administration was adopting such a consolidated approach.

Editor: Renewable fuel standards have been coming under some scrutiny, haven't they?

Gerrard: The Energy Policy Act of 2005 indicated that at least 7.5 billion of gallons of motor fuel by 2012 had to come from renewable sources, which mostly means corn-based ethanol. The Energy Independence and Security Act of 2007 greatly increased that, but there is now a great deal of concern about whether this very widespread use of corn-based ethanol makes any sense. When you add up the energy costs of growing the corn, turning it into ethanol and transporting it, GHG emissions are not reduced overall. Indeed, some calculations indicate it has a

net-negative impact. In addition the manufacture of ethanol has also been implicated in the rise of food prices worldwide.

Editor: What about carbon capture and storage (sequestration)?

Gerrard: This is the idea that you can capture the carbon dioxide emitted by large industrial facilities – primarily coal-fired power plants – and then inject that CO₂ into deep geological formations so that it doesn't escape into the atmosphere. While I would not say there is consensus on its efficacy, most people feel that coal is part of our energy future one way or the other and that it is therefore absolutely essential that we figure out a way to make carbon capture and storage work.

The Bush administration first proposed regulation on this practice and the Obama administration favors carbon capture and storage, so we can expect regulation.

Editor: What petitions or lawsuits are in the works today?

Gerrard: The Center For Biological Diversity filed a lawsuit in federal court in California saying that the most recent round of fuel economy standards promulgated by the National Highway Traffic Safety Administration were too weak.

There is also an action on the side of energy efficiency standards pursuant to a number of federal energy statutes. Under Federal Energy Law when the Federal government had set an efficiency standard for a particular kind of appliance, states and localities are preempted from adopting their own more stringent standards. The city of Albuquerque had enacted a Green Buildings Law that was found by the federal district court in New Mexico to have run afoul of this preemption provision. It will be interesting to see what happens going forward.

EPA has received petitions in the wake of *Massachusetts v. EPA* to regulate GHG emissions not only from cars and trucks, but also from aircraft, ships and off-road vehicles – all of which are also significant GHG emitters. The Council on Environmental Quality (CEQ), which is a unit within the Executive Office of the President, has been petitioned to promulgate guidelines under the National Environmental Policy Act (NEPA) saying that environmental impact statements and assessments under NEPA should consider GHGs. There is already a substantial body of case law that that kind of consideration ought to be done.

Significantly, shortly after the Obama administration took office a settlement was announced in one of the pending NEPA cases, which was brought by the Friends of the Earth against the Export-Import Bank (EX-IM) and the Overseas Private Investment Corporation (OPIC) saying that they needed to consider GHG issues in their foreign lending activities. The case was brought into the California federal court, which denied a motion to dismiss. Since then OPIC and EX-IM not only agreed to undertake this analysis going forward but also to take certain substantive measures to try to reduce the climate impacts of their lending activities.

In September 2007 a petition was filed with the Securities and Exchange Commission asking it to promulgate guidelines on how climate issues should be considered as part of the securities disclosure process. The SEC has not acted on that, but in New York State Attorney General Andrew Cuomo issued subpoenas to half a dozen electric utilities for information about their disclosures, which led to settlements with two companies that agreed to certain disclosures and affirmative actions; they will likely provide the template for climate-issue disclosures.