

EPA Issues Greenhouse Gas Endangerment Finding

On December 7, 2009, the Environmental Protection Agency announced that six greenhouse gases taken in combination endanger both public health and welfare. The Agency also found that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution that endangers public health and welfare. The Agency's endangerment finding does not by itself impose greenhouse gas regulations, but sets the stage for future regulation under the Clean Air Act, including finalizing the light-duty vehicle rule proposed earlier this year.

The EPA's endangerment finding is in response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, which found that EPA had the statutory authority to regulate emissions of greenhouse gases under the Act and required the Agency to determine whether or not emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. In the endangerment finding, the Agency states that the decision limited EPA "to consideration of science" when undertaking the endangerment analysis and that the Agency could not "delay issuing a finding due to policy concerns if the science is sufficiently certain." The Agency concluded that the body of scientific evidence compellingly supports a finding that the mix of the following six long-lived and directly emitted greenhouse gases are "air pollution" under section 202(a) of the Act: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆) (collectively referred to as "well-mixed greenhouses gases").

The endangerment finding considered both public health and welfare effects associated with elevated concentrations of well-mixed greenhouse gases and associated climate change. With respect to public health, the Agency evaluated the risks associated with changes in air quality, increases in temperature, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens. The Agency's Administrator placed weight on the fact that certain groups, such as children and the poor, are most vulnerable to climate-related health effects. With respect to public welfare, the Agency evaluated the risks to food production and agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure and settlements, ecosystems, and wildlife. The Agency found that evidence concerning adverse impacts in the areas of water resources and sea level rise and coastal areas provided the "clearest and strongest" support for an endangerment finding.

The Agency also found that emissions of well-mixed greenhouse gases from the transportation sources covered under section 202(a) of the Act contribute to the total greenhouse gas air pollution, and thus to its associated climate change, which is anticipated to endanger public health and welfare. In order to establish the contribution to greenhouse gas air pollution, the Administrator compared the emissions from the covered transportation sources to total global and total U.S. greenhouse gas emissions, and found that the transportation sources are responsible for about 4% of total global well-mixed greenhouse gas emissions and just over 23% of total U.S. well-mixed greenhouse gas emissions.

While the endangerment finding does not by itself impose any regulations on well-mixed greenhouse gas emissions, it will allow the Agency to finalize

the greenhouse gas standards proposed earlier this year for new light-duty vehicles as part of a joint rulemaking with the Department of Transportation. It is important to note that EPA has taken the position that the regulation of greenhouse gas emissions from light-duty vehicles would subject stationary sources that emit those greenhouse gases to the Act's PSD and Title V permitting programs. This is because the PSD and Title V programs apply to facilities that are major sources of emissions of any air pollutant otherwise regulated under the Act. Earlier this fall, EPA proposed a rule to tailor or limit the applicability of the PSD and Title V requirements to larger emitters of greenhouse gases.

The endangerment finding becomes effective January 14, 2010. Challenges seeking judicial review of the endangerment finding must be filed in the U.S. Court of Appeals for the District of Columbia Circuit by February 16, 2010.

EPA Issues Final Title V Flexible Air Permitting Rule

On October 6, 2009, EPA's final rule addressing its proposal to promote flexible air permitting approaches was published in the Federal Register. The rule was released in January, but could not be published until it was approved by an Obama EPA appointee. The published rule does not differ in any substantive way from the rule originally released.

In general, the rule finalizes only a few of the regulatory language changes EPA proposed and, in particular, does not finalize a number of proposed changes of concern to industrial sources. The one aspect of the proposal that potentially would be of benefit to some sources, the proposed Green Group authorization, was withdrawn due to environmental group and state agency objections. In addition to explaining the proposal and action being taken in depth, the preamble to the final rule sets out an extensive review of the history of EPA's consideration of

flexible permitting approaches and actions that have been taken in the past.

A brief summary of the final rule is set out below.

Advance Approval of Minor NSR

As reflected in the proposal, EPA concludes that permitting authorities generally already have sufficient authority to issue advance approval of minor NSR to authorize future facility changes. EPA makes only one very minor revision to the Title V permit regulations to clarify that, where emissions units are subject to an annual emissions cap, the Title V permit application may report the units' emissions as part of the aggregate emissions associated with the cap, except where the permitting authority determines that more specific information is needed.

Alternative Operating Scenarios

In the September 12, 2007 proposal, EPA proposed to add and revise a number of provisions related to Title V alternative operating scenarios (AOSs). Industry representatives found those proposed revisions almost uniformly to be either unnecessary or, in a number of instances, burdensome and potentially harmful for making changes under already-authorized compliance options. In response, EPA concluded that the proposed revisions, which included a more onerous and detailed set of requirements for maintaining logs under the Title V regulations, might be "counterproductive" and decided not to impose any additional requirements "onto an already working approach."

EPA did adopt a definition of "alternative operating scenarios" which does retain some ambiguity as to whether compliance options contained in MACT and other standards might be treated as AOSs. However, the preamble makes clear that such compliance options are not AOSs unless the source itself chooses to have the compliance options included as AOSs. As EPA states, "sources and permitting authorities are unlikely to establish alternative MACT compliance

options as one or more AOSs, since the extensive monitoring and recordkeeping requirements typically found in MACT standards can themselves authorize shifts in compliance options after being incorporated into a title V permit.” EPA also adopts three other minor, inconsequential revisions relating to AOSs.

Approved Replicable Methodologies

EPA’s final rule adopts specific language to authorize “approved replicable methodologies” (ARMs). Notwithstanding industrial commenter suggestions that such provisions are not necessary, EPA decided to include a definition of ARMs and make other minor related changes. However, as EPA notes, the final rules with respect to ARMs “do not affect any specific minima for part 70 programs and, due to their clarifying nature, [EPA does] not expect many States to opt to revise their operating permit programs.”

Green Groups

EPA proposed the Green Group authorization to allow a number of emissions activities to be treated as a single emissions unit (to be called a “Green Group”) where the emissions from these activities would be routed to a common emissions control device meeting BACT/LAER, and allow future emissions increases and other changes within the Green Group for a 10-year period without further approval pursuant to a major NSR permit. Despite substantial industry support for establishing a Green Group authorization, EPA withdrew the proposal in response to environmental group and state permitting authority opposition.

Industry Groups Appeal 2008 SSM Rule Vacatur to Supreme Court

On October 22, 2009, the American Chemistry Council (ACC), American Forest

and Paper Association (AF&PA), American Petroleum Institute (API) and the National Petrochemical & Refiners Association (NPRO) filed a Petition for Certiorari to the Supreme Court to review the decision in *Sierra Club v. United States*, 551 F.3d 1019 (D.C. Cir. 2008). The December 19, 2008 *Sierra Club* decision vacated the 1994 rule exempting “excess” emissions from air pollution limits during startup, shutdown and malfunction (SSM). The D.C. Circuit ruled that the general duty that applies during SSM events is inconsistent with section 112 of the Clean Air Act (*see* WR-681). The Court said that the various revisions of the SSM requirements since adoption of the 1994 rule had “created a different construct as to the means of measuring compliance with a general duty,” and found that the revisions had removed the safeguards necessary to prevent the SSM exemption from becoming a “blanket” exemption. Those changes, the D.C. Circuit said, “constructively reopened consideration of the exemption from section 112 standards during SSM events,” and therefore the petitioner’s challenges to the exemption were timely.

The D.C. Circuit denied industry intervenors’ petition for rehearing on September 23, 2009, but granted an EPA petition to stay the mandate until October 6. However, on October 16 the court issued the mandate, formally vacating the rule and opening the door to the Supreme Court petition, *American Chemistry Council v. Sierra Club*, No. 09-495 (October 22, 2009).

In their petition to the Supreme Court, the industry groups argue that the D.C. Circuit’s decision raises a conflict among the circuits because “the consensus of the Fifth, Eighth, Ninth and Eleventh Circuits is that, in these circumstances, *Sierra Club* should have first” petitioned EPA to rescind the rule, and if unsuccessful could have challenged the denial in federal court. The petition states that the ruling

“defies the plain text of the Clean Air Act [§ 307(b)(1)],” in that the Sierra Club waited eight D.C. Circuit instead of filing within 60 days of promulgation of the SSM rule. In addition, the decision “unravels the normal procedure for administrative rulemaking” by holding that the rule had been constructively reopened. The constructive reopening doctrine “undercuts and bypasses” the normal Administrative Procedure Act process of notice-and-comment rulemaking and judicial review by allowing parties to challenge a regulation any time the “context of the regulation changes.” The petitioners argue that this allows “rais[ing] a new challenge in court, without notice to other stakeholders or comments from them, without a record, without agency consideration of the views of all interested parties, and without a reasoned agency decision made in a nonlitigation context.”

Further, the D.C. Circuit “severely compounded the problem . . . by invalidating the rule on the basis that EPA had supposedly admitted that it did not comply with statutory requirements” The court “relied on a supposed agency admission that the general duty to follow ‘good air pollution practices for minimizing emissions’ . . . is ‘not a section 112-compliant standard.’” This reasoning “means that EPA may reverse a well-settled rule without any administrative process or notice to interested parties,” and is inconsistent with the Supreme Court’s holdings on rescinding regulations.

Finally, the petitioners argue that implementing the D.C. Circuit’s decision would permit the government to “prosecute sources that unavoidably fail to comply with MACT limits,” and allow citizen suits. “Any party seeking to punish an emission source for any reason . . . can sue . . . and claim a violation of section 112 that was never contemplated when the 1994 rule was adopted,” and thus the decision “threatens

years to file a petition for review with the industry with substantial unavoidable liability and irreparable harm.”

On July 22, 2009, EPA issued a letter interpreting the effect of the D.C. Circuit ruling on the SSM exemption in MACT rules. It stated that “[t]he vacatur will immediately and directly affect only the subset of Section (d) rules that incorporate 40 C.F.R. sections 63.6(f)(1) and (h)(1) by reference, and that contain no other regulatory text exempting or excusing compliance during SSM events.” On October 29, EPA issued a final rule governing air toxics limits on “upset” emissions covering nine area source categories in the chemical manufacturing sector (74 Fed. Reg. 56,008), which states, “[w]e have also added language making clear that, to the extent this rule incorporates by reference emission standards from other CAA section 112(d) rules, and those rules contain an exemption from the applicable emission standard during periods of SSM, that exemption does not apply for purposes of this rule.” EPA is expected to issue similar new air toxics rules over the coming months, including one applicable to boilers and incinerators.

Save the Date! Network 2010 Conference: May 12-13

The annual conference of the Clean Air Act Information Network will be held on May 12-13, 2010 in the Conference Center at Morgan, Lewis & Bockius LLP at 1111 Pennsylvania Avenue, N.W., Washington, D.C. The conference will present speakers on climate change, new source review, air toxics, enforcement and other important clean air issues. As usual, the conference will feature key EPA leaders on each of the topics covered at the conference. Details will be mailed to Network members in late March or early April.

Please mark your calendars and make plans to attend!