The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2022
PHILADELPHIA, FRIDAY, SEPTEMBER 9, 2022 VOL 266 • NO. 49 ALM.

ENVIRONMENTAL LAW

The Uphill Battle to Regulating Greenhouse Gas Emissions

BY MICHAEL DILLON AND JESSICA D. HUNT
Special to the Legal

For more than three decades, climate change has been a focal point for science, media and politics. While the contributions of greenhouse gas (GHG) emissions to climate change are well understood, the Environmental Protection Agency (EPA) has been unable to widely regulate them. This article discusses some of the impediments to the EPA's regulation of GHG emissions.

More than 15 years ago, the U.S. Supreme Court in *Massachusetts v. Environmental Protection Agency,* 549 U.S. 497, 528 (2007), held that the definition of "air pollutant" in the federal Clean Air Act (CAA) was broad enough to authorize the EPA to regulate GHG emissions from new motor vehicles if the EPA found that such emissions may reasonably be anticipated to endanger public health or welfare. Seizing on this newfound authority, the EPA quickly issued a finding that GHG emissions (a combination of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) threatened public health and welfare of current and future generations. This finding is commonly known as the "Endangerment Finding." Since issuing the Endangerment Finding in 2009, the EPA has made numerous attempts to regulate GHG emissions pursuant to its existing CAA authority, with varying degrees of success.

DILLON

HUNT

MICHAEL DILLON *and* **JESSICA D. HUNT** *are attorneys with the environmental, energy, safety and land use law and litigation firm Manko, Gold, Katcher & Fox, located in suburban Philadelphia. They can be reached at 484-430-5700 or mdillon@mankogold.com and jhunt@mankogold.com.*

> *"The EPA is expected to continue pushing the boundary of its authority to address climate change and regulate greenhouse gas emissions under its Section 111 authority."*

While the EPA has successfully promulgated GHG emission standards for new motor vehicles pursuant to Section 202(a) of the CAA, the EPA has had difficulty regulating GHG emissions from many other sources of air pollution. The EPA's trouble stems, in part, from the fact that GHGs are not criteria pollutants or hazardous air pollutants that are subject to regulation under the PSD, Nonattainment New Source Review, and Title V programs, or the National Emission Standards for Hazardous Air Pollutants. The EPA's efforts have also been limited by the Supreme Court who has been reluctant to broadly interpret the definition of "air pollutant" to include GHGs outside of the mobile source context, absent express congressional delegation.

For instance, the EPA promulgated the tailoring rule in 2010, which sought to expand the scope of the PSD and Title V permitting programs to cover major sources of GHG emissions, which would have pulled in millions of additional sources into the CAA's regulatory reach. The EPA relied on the *Massachusetts v. EPA* decision to support its interpretation that GHGs are "air pollutants" under the CAA and therefore can be regulated under the PSD and Title V programs. The Supreme Court, in *Utility Air Regulatory Group v. EPA,* 134 S.

Ct. 2427 (2014), disagreed and held that the EPA could not require major sources of GHGs to obtain PSD or Title V permits based solely on potential to emit GHGs, but could regulate GHG emissions for those sources that were already subject to the PSD and Title V programs for other pollutants. In deciding the case, the court expressed an unwillingness to construe the term "air pollutant" so broadly as to allow the EPA to regulate a substantial portion of the American economy under the CAA for the very first time. Instead, only those "air pollutants" that are compatible with the regulatory structure of each substantive program under the CAA can be regulated.

Following *Utility Air Regulatory Group*, the EPA focused its attention on Section 111 of the CAA, which authorizes the agency to develop new source performance standards (NSPS) for new sources and emission guidelines for existing sources. In October 2015, the EPA, for the first time, regulated GHG emissions as an "air pollutant" under Section 111 of the CAA through promulgation of NSPS for new and modified electric generating units under Section 111(b) of the act, and emission guidelines for existing electric generating units pursuant to Section 111(d) of the act in the form of the "Clean Power Plan." Although the EPA replaced the Clean Power Plan with the Affordable Clean Energy (ACE) Rule in 2019, The EPA's original rule established emission ceilings that would have required existing electric generating units to reduce emissions by shifting electricity production from existing coal-fired power plants to natural gas-fired power plants, and ultimately to new low- or zero-carbon generating capacity. The ACE Rule was vacated by the U.S. Court of Appeals for the D.C. Circuit and remanded it to the EPA for further proceedings.

Despite the fact that the Clean Power Plan was rescinded, earlier this summer, the Supreme Court, invalidated the agency's approach to regulating GHGs embodied in the Clean Power Plan. In *West Virginia v. EPA*, the court did not focus on the preliminary question of whether the EPA has the authority to regulate carbon dioxide and GHGs as an "air pollutant" under Section 111, but on the methodology that the EPA used to regulate them. Specifically, the court took issue with the carbon dioxide emission limits imposed by the Clean Power Plan that, unlike other emission standards promulgated under the EPA's Section 111 authority, could not be achieved through the installation of controls, but would require improvements to the overall power system by shifting the power grid from coal to natural gas and renewables. The court reasoned that such an important shift in the EPA's interpretation of its authority, essentially creating a cap-and-trade program for carbon under Section 111(d), was inappropriate absent some express delegation of Congress.

Following the *West Virginia* decision, two important questions remain: does the EPA have the authority to regulate GHG emissions as an "air pollutant" under Section 111 of the CAA? and if so, can EPA use its authority under Section 111 to impose measures outside of the fenceline of a regulated facility? Congress sought to address the first question through its recent enactment of the Inflation Reduction Act of 2022 (IRA). The IRA, in relevant part, amends the CAA to incentivize the voluntary reduction of GHG emissions, primarily through the issuance of grants. The IRA, through the implementation of these grant programs, also defines several greenhouse gases, such as carbon dioxide, as air pollutants. The IRA, however, does not grant the EPA new authority nor clarify the scope of the EPA's existing authority, as it was already well understood that EPA can regulate greenhouse gas emissions in certain regulatory programs, such as mobile sources, under the CAA. Congress, in passing the IRA, did not address the concerns raised by the U.S. Supreme Court in *Utility Air Regulatory Group* and *West Virginia*, namely that the regulation of GHGs is incompatible with the PSD and Title V regulatory structure and that Congress has not expressly authorized the EPA to impose measures outside of the fenceline of a facility.

The EPA's path to widely regulate GHG emissions will remain a challenging one until Congress amends the CAA to address the concerns raised by the Supreme Court. For now, the EPA is expected to continue pushing the boundary of its authority to address climate change and regulate greenhouse gas emissions under its Section 111 authority—the EPA has proposed new source performance standards for methane emissions from crude oil and natural gas source categories, expected to be finalized later this year, and is expected to publish a proposed rule to replace the Clean Power Plan by March 2023—and by imposing limitations on GHG emissions for facilities that are otherwise subject to its PSD regulations. •

MANKO | GOLD
KATCHER | FOX LLP
AN ENVIRONMENTAL AND ENERGY LAW PRACTICE