



GREENHOUSE GAS UPDATE: TRANSPORTATION

JUNE 2009

The following is an Update on the latest legal developments related to the regulation of greenhouse gas (GHG) emissions from motor vehicles and fuels in the United States. This update addresses the Obama Administration's plan for a joint rulemaking by the Environmental Protection Agency and the Department of Transportation to develop unified regulations for GHG emissions from light-duty trucks and vehicles

Previous Updates on GHG legal developments can be obtained from the Wallace King website, www.wallaceking.com, or by contacting us at the number provided below.

EPA/DOT Announce Joint Rulemaking on GHG Emissions from Light-Duty Vehicles

In an effort to harmonize state and federal efforts to regulate GHG emissions from light-duty vehicles, and resolve pending litigation over California GHG standards for cars and trucks, the Obama Administration formally announced May 22 its intent to establish new fuel economy and GHG emissions standards for light-duty vehicles. *74 Fed. Reg.* 24007 (May 22, 2009).

In a "Notice of Intent to Conduct a Joint Rulemaking", EPA announced its intent to propose new CO₂ emissions standards that would be phased in beginning with model year 2012, and would culminate in a CO₂ standard of 250 grams/mile in 2016. EPA would coordinate development of these standards with efforts by the National Highway Traffic Safety Administration (NHTSA) to develop new, more stringent CAFE standards for the period from 2012 – 2016.

The Notice is a product of negotiations between the Obama Administration, California and automakers over industry challenges to GHG standards adopted by California in 2004. In 2008, EPA denied California's request for a waiver of Clean Air Act preemption for these standards, which is necessary for the state to enforce the regulations. The Obama Administration has since instructed EPA to reconsider California's petition. At the same time, auto manufacturers have mounted legal challenges to California's standards, and likely would challenge any decision to grant California a waiver in the absence of the agreement. The standards at issue have been adopted in the intervening years by at least 14 states and the District of Columbia,¹ which would result in non-uniform requirements nationwide if a waiver is granted.

Proposal would establish an average CO₂ emission standard of 250 grams/mile.

Nine auto manufacturers, the Alliance for Automobile Manufacturers, and California agreed to request a stay of the pending litigation to allow for the potential adoption of national regulations by EPA and DOT. In addition, manufacturers agreed not to challenge a decision by EPA to grant a preemption waiver to California allowing it to adopt GHG standards for mobile sources. To fulfill the

¹ The states that have adopted California GHG standards include Arizona, Connecticut, Florida, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.



agreement, the parties anticipate that EPA would render a final decision on California's waiver request and issue a proposed rulemaking in coordination with DOT. California would then revise its regulations to bring them into conformity with the proposed national rules. The companies would dismiss the litigation upon final adoption of the California regulations. In coordination with this, or thereafter, EPA would finalize its regulations.

EPA identified a number of technologies that it believes will enable industry to meet the new CO₂ emission standard, mostly based on increased efficiency. These include engine improvements (direct injection, advanced transmissions, use of smaller engines with turbo chargers); increased use of start-stop technology, increased use of hybrid technologies, and commercialization of electric and plug-in hybrid vehicles. The notice proposes "attribute-based" standards, which would vary based on vehicle size. Vehicle size, meanwhile, would be determined by "vehicle footprint" or wheelbase multiplied by track width. The Agency also expects to propose credit programs, such as the averaging, banking and trading program currently in use for other pollutants, although these mechanisms would not be available for purposes of meeting CAFE standards, as -- unlike the Clean Air Act -- there is no authority for their use in the underlying statute that authorizes NHTSA to establish fuel economy standards. In addition, EPA expects to use existing mechanisms, such as certification, testing and reporting programs, for purposes of enforcing the standards.

California Waiver Could Have Broader Implications

In the event that California is granted a preemption waiver, and that waiver withstands challenge, this could open the door to regulation of GHG emissions from a broader scope of sources. The California Air Resources Board (CARB), for instance, likely would move to regulate GHG emissions from heavy-duty and non-road vehicles and marine vessels. CARB likely would argue that

regulation of these sources falls within the scope of the existing waiver. Even if a new waiver ultimately is deemed necessary, it is unlikely EPA would deny such a waiver after approving a waiver in the light-duty context.

EPA Endangerment Finding Not Final

EPA announced its intention to regulate GHG emissions from mobile sources under the Clean Air Act, notwithstanding the fact that it has not yet made a final determination that these emissions constitute an endangerment under Section 202(a) of the statute. Earlier this year, EPA proposed making such a finding with respect to emissions of a "mix" of six greenhouse gases: CO₂, methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆) (*see* May 2009 GHG Update). In its proposed finding, EPA concluded: "It is the Administrator's judgment that the total body of scientific evidence compellingly supports a positive endangerment finding for both public health and welfare." 74 *Fed. Reg.* 18886, 18888.

The Agency's latest Notice signals its intent to finalize this proposed finding. The final finding is likely to be challenged in court by a number of entities. In fact, an internal analysis leaked from the Office of Management and Budget (OMB) raised some questions regarding the defensibility of the proposed endangerment finding, noting, for instance, that it includes GHGs that are not emitted from mobile sources. In the event the finding is not finalized, or reversed, EPA would lack the authority to promulgate GHG regulations under the CAA, thus undermining the agreement reached with California, industry and DOT.

If you have additional questions regarding the topics covered in this Update, or any additional issues related to GHG and climate change regulations and legal developments, please contact Alec Zacaroli at 202.204.1000.