

# Under- standing Climate Change Legislation

An energy bill designed to reduce CO<sub>2</sub> emissions is working its way through Congress, and will likely be signed into law next year. If Congress fails to act, the EPA will, and the resulting statutes and regulations will affect the entire economy. This Executive Counsel special section examines the proposed legislation, how it might change, and what regulations will fill the gap if it doesn't pass.

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# Another Path to Greenhouse Gas Regulation

## Clean Air Act Has Teeth

**F. William Brownell, Norman W. Fichthorn  
and Allison D. Wood**

**In 2007, the Supreme Court held in *Massachusetts v. EPA* that the federal Clean Air Act gives the U.S. Environmental Protection Agency authority to regulate greenhouse gas emissions to address climate change. Although a consensus exists that this statute does not provide the most efficient and least expensive means of regulation, the Obama Administration is using the threat of Clean Air Act regulation to pressure Congress to enact climate legislation.**

This threat is real. EPA has set in motion a series of rulemakings to address climate concerns. Once rulemaking begins, it may be difficult to stop it even if Congress enacts legislation.

If EPA adopts Clean Air Act rules, what will climate change regulation look like? Will Congress coordinate new and existing statutory authorities for climate regulation? How this situation plays out over the next year will have extraordinary impacts on U.S. businesses, even those unaccustomed to dealing with environmental issues.

### NEW SOURCE REVIEW

This April, EPA proposed a finding that emissions of carbon dioxide and other greenhouse gases contribute to air pollution that endangers public health and welfare due to their effects on climate. This is the first step toward regulation of greenhouse gases under the Clean Air Act. These gases are emitted in large quantities from numerous sources including automobiles, manufacturing facilities, power plants, and agricultural operations. EPA expects to make its “endangerment” finding final by spring 2010.

A final finding would obligate EPA to regulate greenhouse gas emissions from automobiles. It appears this finding would be limited to motor vehicles, but it could ultimately lead to regulation of many other sources. EPA has indicated it plans to issue final automobile greenhouse gas regulations by spring 2010. Once greenhouse gases emitted by vehicles are regulated under the Clean Air Act, hundreds of thousands of facilities throughout the country could suddenly find themselves caught in the web of EPA’s “new source review.”

The Clean Air Act specifies emission thresholds that an individual source must meet before new source review applies. These restrict coverage to very large sources of non-greenhouse-gas pollutants, but the same cannot be said with regard to greenhouse gases. The U.S. Chamber of Commerce estimates that over one million mid-sized to large commercial buildings would have to comply, including, for example, 20 percent of all food service businesses and 50 percent of the lodging industry, as well as 10 percent of buildings used as houses of worship. In addition, an estimated 200,000 manufacturing operations and 20,000 large farms would be brought into the program.

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In short, broad sectors of the economy face the imminent prospect of regulation under the existing Clean Air Act, apart from any legislation Congress may enact. Countless new facilities and modified existing facilities will be required to meet “best available control technology” limits. The Act defines best available control technology broadly enough that facilities subject to new source review might be required to improve efficiency, to use alternative fuels or raw materials, or to install pollution controls.

## **APPLICATION OF THE NEW SOURCE REVIEW PROGRAM TO GREENHOUSE GASES WOULD HAVE SWEEPING IMPLICATIONS FOR ALL U.S. BUSINESS.**

Equally important, a project that triggers best technology review cannot proceed until the owner or developer receives a Clean Air Act preconstruction permit. The permitting process can take several months to over a year, so permitting delays could be even more challenging than the pollution controls themselves.

Recognizing that permitting offices lack the resources to handle the flood of permit applications that would flow from Clean Air Act regulation of greenhouse gases, EPA plans to propose at least a temporary increase in emission thresholds. EPA's intent is to exempt, for an initial, phase-in period, apartment and office buildings, shopping malls, sports complexes and entertainment venues, and other relatively small facilities. Environmental interest groups have questioned EPA's legal authority to set such limits because Congress wrote lower thresholds into the Act itself. Some of these groups may challenge EPA's approach in court. Thus, any relief EPA attempts to provide may be illusory.

### **PLANNING FOR CLIMATE CHANGE REGULATION**

New source review is not the only existing Clean Air Act program that could force greenhouse gas reductions on U.S. businesses. EPA ultimately may choose (or be forced) to regulate greenhouse gases under other provisions of the Act, including provisions for setting air quality standards, controlling hazardous air pollutants, or addressing international pollution. Environmental groups and others have argued that such provisions require EPA to regulate if it finds that air pollutant emissions “endanger” public health or welfare.

Thus, if EPA makes final its April 2009 proposed greenhouse gas endangerment finding for automobiles, it will have set the stage for attempts to regulate greenhouse gases under other provisions of the Act.

Congressman John Dingell (D-MI) has called Clean

Air Act regulation of climate a “glorious mess,” and Congress has taken tentative steps to explore how to coordinate existing authority with new legislation. For example, the proposed American Clean Energy and Security Act, passed by the House of Representatives in June 2009, purports to preempt regulation of greenhouse gases under some provisions of the existing Clean Air Act.

These provisions, however, provide incomplete relief. Businesses need to understand that climate legislation as now drafted will not resolve problems posed by the prospect of Clean Air Act regulation. If Congress enacts this legislation in its current form, businesses will continue to face the specter of dual and inconsistent regulatory programs, one specifically designed by Congress to address climate change and another constructed by EPA from pieces of the Clean Air Act. The legislation, moreover, fails to address other potential sources of climate change regulation in statutes such as the Clean Water Act and the Endangered Species Act.

As the legislative debate continues, EPA is moving quickly toward climate regulation under existing statutory programs. Nothing being considered in Congress so far solves this problem. Regulatory initiatives could impact many sectors of the economy in ways that are more far-reaching than climate legislation. Thus, any company concerned about the effects on its bottom line must not only monitor congressional action but also be alert to the impending threat posed by laws already on the books.



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