

ARTICLES

Recent Clean Air Act Developments—2007

by Ari G. Altman and Jessica M. Lewis

Editors' Summary: Last year saw many exciting developments in CAA law and policy, including implications and fallout from the U.S. Supreme Court decision in Massachusetts v. EPA. In this Article, Ari G. Altman and Jessica M. Lewis look at a number of cases involving carbon dioxide emissions from both mobile and stationary sources. They address the momentum toward passing climate change legislation in Congress and moving to implement cap-and-trade systems at the regional level, as well as several potential options for regulating greenhouse gases under the existing CAA. Further, they examine a pivotal decision related to the ozone air quality standard, as well as key cases and EPA rulemakings relating to the control of hazardous air pollutants. A recent decision overturning the Clean Air Mercury Rule receives special attention. Finally, they highlight developments in new source review policy and provide a forecast of certain upcoming EPA rulemakings under the CAA.

I. Climate Change

In a year of significant attention to Clean Air Act (CAA) issues in the federal courts, the most notable development in CAA law for 2007 was the U.S. Supreme Court's decision in *Massachusetts v. U.S. Environmental Protection Agency* (*Massachusetts v. EPA*).¹ In addition to reviewing the new laws and regulations that have been considered in response to this case, this Article also explores in detail the degree to which the Supreme Court's holding could support the use of the existing CAA to regulate greenhouse gases (GHGs). The Article will discuss the ensuing legislative efforts targeting climate change directly, both in Congress and in the states, focusing in particular on California's active attempts to develop state law in this area.

A. Massachusetts v. EPA

1. Summary of the Supreme Court Decision

In a 5-4 decision, the Supreme Court held that the U.S. Environmental Protection Agency (EPA) has authority under the CAA to regulate GHGs from new motor vehicles. The April 2007 ruling, the year's most significant development in climate change law, reversed and remanded a 2005 ruling by

the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit. In its seminal decision, the Supreme Court held that carbon dioxide (CO₂) and other GHGs are air pollutants under the CAA, thereby placing them definitively—and statutorily—within the scope of EPA's regulatory jurisdiction.

The decision, written by Justice John Paul Stevens, addressed three key issues: (1) states' standing to bring the case; (2) EPA's authority to regulate GHG emissions under §202 of the CAA; and (3) EPA's discretionary authority to issue (or not issue) GHG emissions standards in line with §202.

The question of standing occupied the bulk of Justice Stevens' opinion. Emphasizing Massachusetts' status as a sovereign state, the Court affirmed petitioners' standing to sue based on "a particular injury" to Massachusetts "in its capacity as a landowner."² Massachusetts had alleged a loss of coastline incurred as a result of rising sea levels associated with global warming. Along with other petitioners, Massachusetts sought EPA regulation of GHGs from new motor vehicles due to their contribution to climate change. The Court held that EPA's failure to regulate GHG emissions "presents a risk of harm to Massachusetts that is both 'actual' and 'imminent'"³ and justified Massachusetts' standing on grounds that "the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."⁴ EPA had claimed that emissions from new motor vehicles contribute insignificantly to the alleged injuries and that regulating those emissions would have a

Ari G. Altman is an associate at Willkie Farr & Gallagher LLP. Jessica M. Lewis is a Legal Assistant at Willkie Farr & Gallagher LLP. A draft of this paper was originally distributed at the February 2008 ALI-ABA Course of Study on Environmental Law. The authors gratefully acknowledge the guidance provided by their colleagues E. Donald Elliott and Bret C. Cohen of Willkie Farr & Gallagher LLP throughout the writing of this Article. The opinions expressed in the Article are solely those of the authors.

1. 127 S. Ct. 1438, 37 ELR 20075 (2007).

2. *Id.* at 1456.

3. *Id.* at 1442.

4. *Id.* at 1454 (internal quotations omitted).

negligible remedial impact. Justice Stevens opined that EPA's argument rested on an "erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."⁵ Importantly, the Court's favorable ruling on standing in *Massachusetts v. EPA* established the special status of states to file lawsuits based on the effects of climate change, setting a precedent that may influence the course of future climate change litigation, as well as environmental litigation more broadly.

Regarding EPA authority to regulate GHG emissions under the CAA, the Court ruled that CO₂ and other GHGs fall under the Act's "capacious definition" of "air pollutant": "[A]ny air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air."⁶ Under this definition, EPA possesses authority to regulate GHGs as air pollutants emitted from new motor vehicles per §202 of the CAA. The Court rejected EPA's allegation that regulating GHGs from new motor vehicles would pose an interagency administrative conflict with the U.S. Department of Transportation (DOT) by forcing EPA to set fuel economy standards—a task delegated to the DOT.⁷ "[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities," wrote Justice Stevens. "EPA has been charged with protecting the public's 'health' and 'welfare' . . . there is no reason to think the two agencies cannot both administer their obligation and yet avoid inconsistency."⁸

In spite of the Court's decisive affirmation of EPA's authority to regulate GHG emissions from new motor vehicles, the Court did not go so far as to require EPA to set emissions standards under §202. Rather, the decision left open to EPA a number of options, among them the following: (1) find that GHG emissions from new motor vehicles pose a threat to public health or welfare and issue emissions standards accordingly; (2) find that GHG emissions do not pose a threat to public health or welfare and avoid issuing emissions standards; or (3) find that evidence linking GHG emissions to climate change is not sufficient to issue an endangerment finding.⁹

2. Effect on Automobile Emissions Standards

a. Federal EPA Rulemaking

In May 2007, just one month after the decision in *Massachusetts v. EPA*, the George W. Bush Administration directed EPA to set GHG emissions standards for new motor vehicles.¹⁰ It remains to be seen, however, whether EPA will actually make the necessary endangerment finding, implicating GHGs as threats to public welfare, to public health, or to both. EPA agreed to a timetable to issue proposed regulations by the end of 2007 and to complete final rules in

2008.¹¹ In the wake of Congress' passing a major energy bill¹² in late December 2007, these EPA rulemakings appear to have been delayed, and no definite target date has been announced as of this writing.¹³

A finding that GHG emissions pose a danger not only to welfare but also to public health would likely result in more stringent regulations. Either way, EPA retains considerable latitude in setting emissions standards, especially vis-à-vis other pollutants regulated under the CAA; whereas §202 stipulates stringent quantitative criteria for emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen, it does not specify similar standards for GHG emissions. Thus, the tangible impact of the Court's ruling in *Massachusetts v. EPA* remains uncertain, although it has already fueled considerable momentum for policy action in the area of climate change.

b. California's Initiatives on Emissions Standards

In 2007, California continued efforts to regulate climate change at the state level, with a number of other states across the country choosing to adopt California's emissions standards over federal standards. Several court cases ensued:

□ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*.¹⁴ In September 2007, a federal district judge in Vermont upheld the state's rule regulating GHG emissions from new motor vehicles. Vermont is one of more than a dozen states that have adopted California's rules regulating emissions from new motor vehicles, and it is one of three states, along with California and Rhode Island, to face lawsuits filed by automobile manufacturers and retailers seeking to overturn the rule. The decision rejected industry's claims that the regulations at issue constitute fuel economy standards and therefore conflict with federal law, which gives the National Highway Traffic Safety Administration (NHTSA) authority to set fuel economy standards.¹⁵

□ *California v. General Motors Corp.*¹⁶ Also in September 2007, a federal court dismissed California's claim that emissions from vehicles manufactured by six major automakers pose a public nuisance under both state and federal common law. California based its allegation on grounds that emissions from vehicles manufactured by the defendants accounted for over 30% of statewide CO₂ emissions, which create a public nuisance in the form of coastal erosion, increased wildfire risks, and melting snow pack resulting from climate change. The court dismissed the case, holding that it could not reasonably determine the extent to which automobile emissions contribute to climate change. The judge also expressed concern for the implications a decision

5. *Id.* at 1457.

6. *Id.* at 1455 (quoting CAA §302(g)).

7. *Id.* at 1450-51.

8. *Id.* at 1462.

9. Robert Meltz, CRS Report for Congress, *The Supreme Court's Climate Change Decision: Massachusetts v. EPA*, May 18, 2007.

10. Steven D. Cook, *Bush Orders Agencies to Write Rules to Limit Car Emissions, Cut Gasoline Use*, Daily Env't Rep. (BNA), May 15, 2007.

11. *Johnson Says EPA Will Meet Deadline for Issuing Final Emissions Rule in 2008*, InsideEPA.com, Oct. 5, 2007.

12. H.R. 6, 110th Cong. (2007).

13. Steven D. Cook, *EPA Refuses to Provide Time Frame for Complying With Massachusetts Decision*, Daily Env't Rep. (BNA), Feb. 29, 2008.

14. No. 2:05-cv-302, 37 ELR 20232 (D. Vt. Sept. 12, 2007).

15. Tony Perriello & Carolyn Whetzel, *Court Backs Vermont Emissions Rules Against Challenge Brought by Auto Industry*, Daily Env't Rep. (BNA), Sept. 13, 2007.

16. No. 3:06 CV 5755, 2007 WL 2726871, 37 ELR 20239 (N.D. Cal. Sept. 17, 2007).

in California's favor might have on interstate commerce by exposing various industries to "damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce" ¹⁷ California may re-file the case in state court or appeal the decision to the U.S. Court of Appeals for the Ninth Circuit. ¹⁸

□ *Central Valley Chrysler-Jeep, Inc. v. Goldstone*. ¹⁹ In December 2007, a California federal court ruled that California's efforts to regulate GHG emissions from automobiles do not interfere with the NHTSA's authority to establish Corporate Average Fuel Economy (CAFE) standards. This decision's effects may be limited by the ongoing waiver dispute described below.

□ *California v. U.S. Environmental Protection Agency Filings*. In November 2007, California filed a lawsuit against EPA for failing to act on California's request for a CAA waiver that would permit California, and by extension other states, to regulate GHG emissions from new motor vehicles. ²⁰ California adopted regulations to tighten automobile emissions in 2004, and issued its request for a waiver from EPA in December 2005. Hoping to accelerate EPA's decision, California filed suit in the U.S. District Court for the District of Columbia. ²¹ On December 19, 2007, EPA announced that it would decline California's request for a waiver, the first time in 40 years that it had denied the state's request to set emissions rules. EPA claimed that the rules were preempted by federal authority and made moot by the federal energy bill signed into law on the same day. ²² On January 2, 2008, California filed a lawsuit challenging the decision. ²³

3. Extending the Decision to Stationary Sources

The holding in *Massachusetts v. EPA* on the regulation of carbon emissions from automobiles raises a corollary question about whether GHG emissions from stationary sources may be similarly subject to CAA regulation. While the authority to regulate GHGs under the CAA was not a new idea, the mood of the judiciary shifted dramatically in 2007, giving the concept additional momentum. This shift can be seen in Justice Stephens' assertion in the introduction to *Massachusetts v. EPA* that the petitioners' arguments were based on the "respected scientific opinion that a well-documented rise in global temperatures and attendant climatological and environmental changes have resulted from a significant in-

crease in the atmospheric concentration of 'greenhouse gases'" ²⁴ This frankness sent a message to EPA: while the Court did not hold that the Agency had to regulate GHGs, it made clear that the scientific underpinnings of climate change and the significance of the threats posed by climate change are supported by a broad consensus of experts. In response, EPA has begun to address the ruling's implications for several programs governing stationary source emissions, including new source review (NSR), prevention of significant deterioration (PSD), and new source performance standards (NSPS).

a. GHG Regulation Using National Ambient Air Quality Standards

Climate regulation under the existing CAA is not a new concept; in 1992, President George H. W. Bush signed the Rio climate treaty, ²⁵ which included the aspirational goal of stabilizing U.S. carbon emissions at 1990 levels. ²⁶ One of the first steps EPA took in response to this commitment was to reduce methane emissions from landfills. ²⁷ In 1999, the EPA General Counsel testified before Congress that EPA could regulate CO₂ under the CAA. ²⁸ Specifically, EPA claimed that §109 of the CAA provided EPA authority to establish national ambient air quality standards (NAAQS) for any air pollutant for which the Administrator had established air quality criteria under §108. ²⁹ Additionally, addressing the question of whether the Act was intended to regulate chemicals that occur naturally, EPA noted that it had already regulated similar compounds under §109, such as sulfur dioxide (SO₂) and volatile organic compounds. ³⁰ Thus, the question of regulating GHGs under NAAQS had been contemplated prior to *Massachusetts v. EPA*, even if little action was taken toward that end.

Now, with the prospect of developing an air quality standard for CO₂ receiving greater attention, another question arises about the appropriate basis for such a standard. Up to this point, air quality standards have been promulgated based on the concentration per hour or year; nothing in the CAA, however, mandates a concentration-based standard. GHGs could instead be regulated according to other standards, for example, setting a target to reduce emissions to 20% below a designated baseline, such as 1990 levels.

Alternatively, the standard could be a global concentration, such as 450 parts per million (ppm) CO₂ in the year 2030, which could be enforced using an emissions cap-and-trade program. One final concern in regard to using

17. *Id.*

18. Peter Glasser & Lynne Rhode, *Three Federal Courts Reject Public Nuisance as Climate Change Control Tool*, WASH. LEGAL FOUND., Nov. 16, 2007.

19. No. 04-6663, 37 ELR 20309 (E.D. Cal. Dec. 11, 2007).

20. No. 07-cv-02024 (D.D.C. filed Nov. 5, 2007) (complaint for declaratory and injunctive relief).

21. Carolyn Whetzel, *California Sues EPA Over Inaction on Waiver to Allow State to Regulate Vehicle Emissions*, Daily Env't Rep. (BNA), Nov. 9, 2007.

22. John M. Broder & Felicity Barringer, *EPA Says 17 States Can't Set Emission Rules for Cars*, N.Y. TIMES, Dec. 20, 2007, available at <http://www.nytimes.com/2007/12/20/washington/20epa.html>.

23. Felicity Barringer, *California Sues EPA Over Denial of Waiver*, N.Y. TIMES, Jan. 3, 2008, available at <http://www.nytimes.com/2008/01/03/us/03suit.html>.

24. 127 S. Ct. at 1440.

25. Climate Institute, *Treaties and Negotiations: United Nations Framework Convention on Climate Change*, http://unfccc.int/essential_background/convention/background/items/1362.php (last visited Apr. 18, 2008).

26. United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, S. TREATY DOC. NO. 102-38 (1992), reprinted in 31 I.L.M. 849 (1992) (entered into force Mar. 21, 1994), art. 4; Commitments, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

27. See U.S. EPA, *Benefits of LFG Energy*, <http://www.epa.gov/lmop/benefits.htm>.

28. Testimony of Gary S. Guzy, General Counsel, U.S. EPA (Oct. 6, 1999), available at http://www.epa.gov/ocir/hearings/testimony/106_1999_2000/100699gg.htm.

29. *Id.*

30. *Id.*

NAAQS to regulate GHGs might be whether it can be effectively used for pollutants dispersed regionally or in this case worldwide. Given the success of the acid rain program, which primarily targeted the long-range dispersal of SO₂, there is at least some precedent suggesting that the regulation of gases such as CO₂ could be effective.

b. NSR and PSD

NSR applies to new and modified facilities located in polluted areas and requires those facilities to install controls to meet lowest achievable emission rates (LAER). PSD, by contrast, applies to new and modified facilities located in areas that already comply with NAAQS and requires those facilities to install best available control technology (BACT).³¹ Both programs, which regulate pollutant emissions limits, have become subjects of debate with respect to EPA's authority or duty to establish limits on CO₂ emissions from stationary sources. EPA has announced its intent to issue a rule regulating CO₂ under NSR, but the Agency's reluctance to regulate GHGs under stationary source permits prior to finalizing the new rule has elicited several challenges from environmental groups as well as Congress.³² Environmental groups have charged that because the Supreme Court established CO₂ as a pollutant under the CAA, EPA must regulate GHGs when it issues new NSR and PSD permits. EPA, in turn, has countered that the Supreme Court decision applies only to mobile sources and, moreover, does not mandate regulation by EPA but simply authorizes it. If and when EPA begins to regulate CO₂ under NSR and PSD, the Agency will have to determine a threshold of emissions that would trigger the programs and designate control technologies that could be implemented to meet LAER and BACT requirements.³³ A critical issue in setting these requirements would be determining exactly what BACT currently is, given that the standard must be enforced by all states once it is set. While it could be argued that carbon sequestration is the current BACT, critics would counter that due to its unproven status, sequestration is beyond BACT and in fact not an "available" technology at this time, despite the significant attention it has recently received.

In an initial test of the potential for CO₂ regulation under NSR, EPA issued a final PSD construction permit on August 30, 2007, for a Deseret Power Electric Cooperative power plant in Bonanza, Utah, without regulating CO₂ under the permit. In response, Rep. Henry Waxman (D-Cal.), chair of the House Oversight and Government Reform Committee, submitted a letter to EPA urging the Agency to reconsider its decision, and launched an investigation into EPA's decision-making process. Furthermore, on October 1, 2007, the Sierra Club filed a petition with EPA's Environmental Appeals Board (EAB) to review the final permit, alleging EPA's omission of CO₂ regulations constituted neglect of duty in light of the Court's finding in *Massachusetts v. EPA*.³⁴ The case is currently pending before the EAB.

31. Anthony Lacey, *EPA Eyes NSR Rules for Greenhouse Gas Emissions From Stationary Sources*, InsideEPA.com, Aug. 13, 2007.

32. *Activists Challenge EPA Permit for Utah Plant Over Lack of CO₂ Controls*, InsideEPA.com, Oct. 2, 2007.

33. Lacey, *supra* note 31.

34. *Activists Challenge EPA Permit for Utah Plant Over Lack of CO₂ Controls*, *supra* note 32.

c. NSPS

In addition to the controversy surrounding NSR, EPA is currently engaged in litigation over how *Massachusetts v. EPA* applies to NSPS under §111 of the CAA, which regulates emissions limits for power plants and other new facilities. In *New York v. U.S. Environmental Protection Agency*,³⁵ states and environmental groups are challenging EPA's failure to regulate CO₂ from power plants and other stationary sources under NSPS. Plaintiffs called on the D.C. Circuit to reverse EPA's decision not to regulate GHG emissions under an NSPS rule issued in February 2006. The rule under scrutiny tightened limits for nitrogen oxide (NO_x), SO₂, and particulate matter (PM) emitted by new electric utility steam-generating facilities, but did not address CO₂. After a stay pending the outcome in *Massachusetts v. EPA*, the petitioners and EPA agreed to a voluntary remand.³⁶ One current hurdle for an NSPS-based system of GHG regulation, however, is the recent decision striking down the Clean Air Mercury Rule's (CAMR's) trading program, discussed in Part III of this Article.³⁷ It is therefore unlikely that a trading system for GHGs will be approved within the NSPS framework.

4. Potential to Apply the Endangered Species Act to Climate Change

Several academics and environmental advocates have recently proposed that climate change could also potentially fall within the scope of the Endangered Species Act (ESA). A petition filed on February 1, 2007, by an environmental coalition asked EPA along with the U.S. Departments of the Interior (DOI), Commerce, Energy (DOE), Agriculture, Defense, and the DOT to assess global warming when making decisions affecting endangered species, and to develop regulations requiring mitigation of federal actions that could worsen global warming to the detriment of endangered species.³⁸ Separately, members of a U.S. House of Representatives' appropriations panel urged officials at the DOI to conduct additional assessments of how climate change may affect a variety of species, specifically noting the recent threat to polar bears due to melting sea ice.³⁹ Finally, in *Natural Resources Defense Council, Inc. v. Kempthorne*,⁴⁰ a federal district court ruled that the U.S. Fish and Wildlife Service should have considered the effects of climate change in its biological opinion on the Delta smelt. As in *Massachusetts v. EPA*, the court did not go so far as to say that the Agency had to make a certain decision regarding climate change, but rather that it must simply consider climate change.

One potential difficulty in applying the ESA to climate change is that any mitigation steps would necessarily occur

35. No. 06-1322 (D.C. Cir. filed Sept. 13, 2006).

36. *New York v. EPA*, No. 06-1322 (D.C. Cir. filed June 17, 2007) (remand order).

37. See Steven D. Cook, *Court Rules EPA Must Set Strict Limits on Mercury Emissions From Power Plants*, Daily Env't Rep. (BNA), Feb. 11, 2008.

38. See *Environmental Groups Seek Federal Action With Rules on Effects of Global Warming*, Daily Env't Rep. (BNA), Feb. 2, 2007.

39. Dean Scott, *Appropriators Urge Interior to Deepen Review of How Global Warming Is Affecting Species*, Daily Env't Rep. (BNA), Apr. 27, 2007.

40. No. 1:05-CV-01207, 2007 WL 1577896 (E.D. Cal. May 25, 2007).

on a macro level, while harm to species may take place at the micro level. For this reason, along with the fact that significant attention is being directed toward new legislation, detailed below, it is unlikely that the ESA will be utilized as a major tool to combat climate change.

B. Bills and Regulations

The change in leadership in both houses of Congress following mid-term elections in 2006 brought an increase in legislative attention directed toward climate change. Currently, proposals for cap-and-trade programs overshadow those for carbon taxes, which have failed to gain political traction.

1. Cap-and-Trade

a. Lieberman-Warner⁴¹

The U.S. Senate Environment and Public Works Committee approved a bill on December 5, 2007, that would cap GHG emissions at 70% below 2005 levels by 2050. The bill, sponsored by Sens. Joseph Lieberman (I-Conn.) and John Warner (R-Va.), would establish a system of tradable emissions allowances to meet target reductions. It would also create a low-carbon fuel standard, designed as an incentive for biofuels development. The committee rejected an amendment to establish nuclear energy incentives; others have claimed, however, that a cap-and-trade system would create inherent incentives for nuclear power generation, which would not be restricted by emissions allowances.⁴²

b. Bingaman-Specter⁴³

Sen. Jeff Bingaman (D-N.M.) introduced a cap-and-trade bill in July 2007 that would gradually reduce GHG emissions to 1990 levels by 2030. The bill, co-sponsored by Sen. Arlen Specter (R-Pa.), would create a cap on carbon prices, which critics denounce as undermining investment incentives in clean energy. The proposed price cap would start at \$12 per ton of carbon in 2012 and would rise to \$23 per ton in 2025. The bill would also provide financial support to various industries in transition, including a measure to raise \$35 billion for carbon capture and sequestration in the coal industry by 2020. Viewed as compromise legislation that would cushion the impact on industry, the bill received support from labor unions, including the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), as well as several Republican senators.⁴⁴

c. Boxer-Sanders⁴⁵

Sen. Bernie Sanders (D-Vt.) introduced a bill in January 2007 that would reduce GHG emissions to 80% below 1990 levels by 2050. The measure would also endow EPA with

authority to undertake further regulatory action if global GHG emissions exceed 450 ppm or if global temperatures rise more than 2 degrees Celsius above pre-industrial averages. The bill, which proposes tighter emissions targets than competing legislation, is co-sponsored by Sens. Barbara Boxer (D-Cal.) and Edward Kennedy (D-Mass.), among others.⁴⁶

2. Tax Proposals

a. Dingell

Rep. John D. Dingell (D-Mich.) proposed a carbon tax in September 2007, inviting feedback on the idea before formally introducing a bill to the House. Although economists have long noted that a carbon tax would be a more efficient method of reducing carbon emissions than a cap-and-trade program, the prospect of a tax faces significant political hurdles. Representative Dingell's plan received immediate criticism, and he pulled the proposal in mid-April 2008.⁴⁷ As proposed, Representative Dingell's plan would have set a \$50 per ton tax on carbon emissions and would have added a 50 cent per gallon tax to the existing 18.4 cent per gallon tax on gasoline and other transportation fuels. In addition, the plan would have phased out mortgage interest deductions on homes larger than 4,200 square feet. Revenue raised from the tax would have gone toward the Earned Income Tax Credit, the highway trust fund, mass transit programs, and other welfare programs.

b. Stark⁴⁸

Rep. Pete Stark (D-Cal.) introduced a carbon tax bill in April. The bill would establish a starting tax of \$10 per ton of carbon content in fossil fuels upon initial extraction from the ground or importation into the United States. The tax would increase \$10 per ton each year until total domestic CO₂ emissions decline to 80% below 1990 levels.⁴⁹

3. The Energy Bill⁵⁰

Congress passed compromise energy legislation in the form of the Energy Independence and Security Act⁵¹ on December 18, 2007, which the president signed into law the following day. As passed, the energy bill raises CAFE standards for the first time since 1975 and mandates an increase in renewable fuels. Specifically, the bill requires automakers to raise the fuel economy of cars and light-duty trucks by 40%

41. America's Climate Security Act of 2007, S. 2191, 110th Cong. (2007).

42. Steven D. Cook, *Senate Environment Committee Backs Emissions Cap-and-Trade Legislation*, Daily Env't Rep. (BNA), Dec. 6, 2007.

43. Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007).

44. Dean Scott, *AFL-CIO, Republican Senators Back Bingaman's Modest Cap-and-Trade Bill*, Daily Env't Rep. (BNA), July 12, 2007.

45. Global Warming Pollution Reduction Act, S. 309, 110th Cong. (2007).

46. Dean Scott, *Sanders, Boxer Offer Bill to Cut Emissions by 80 Percent by 2050 Across U.S. Economy*, Daily Env't Rep. (BNA), Jan. 17, 2007.

47. Press Release, Dingell Takes Carbon & Gas Tax Proposals Off the Table: Congressman Declares Policies Too Burdensome on Working Families During Economic Downturn (Apr. 15, 2008), available at http://www.house.gov/apps/list/press/ml5_dingell/080415carbontax.shtml.

48. Save Our Climate Act of 2007, H.R. 2069, 110th Cong. (2007).

49. Press Release, Stark Introduces a Carbon Tax to Combat Climate Change (Apr. 26, 2007), available at http://www.house.gov/stark/news/110th/pressreleases/20070426_carbontax.htm.

50. Energy Independence and Security Act of 2007, H.R. 6, 110th Cong. (2007) (enacted).

51. *Id.*

to an industry average of 35 miles per gallon by 2020. It also requires an increase in the renewable fuels supply to 36 billion gallons by 2022. In addition, the bill contains provisions to expand carbon capture and sequestration programs and to phase out most incandescent light bulbs.⁵²

4. Carbon Sequestration

Working separately from Congress, EPA announced its intent to develop regulations governing underground injection controls of CO₂ in mid-October 2007. Regulations will create a permit system for carbon sequestration under the Safe Drinking Water Act.⁵³ Also in October, DOE designated \$197 million over 10 years to fund three test projects intended to store at least one million tons of CO₂.⁵⁴ Carbon sequestration has been touted for its potential to achieve significant carbon reductions with the nation's current energy supply mix. Questions persist, however, regarding the practical implementation of carbon sequestration programs. These include concerns over long-term environmental liability, as well as the cost of transporting CO₂ to storage sites, a task that would require the construction of a new network of pipelines. In addition, officials continue to examine the potential for groundwater contamination associated with underground injection of CO₂.

C. State and Regional Developments

Following the formation of the Regional Greenhouse Gas Initiative (RGGI) by northeastern and mid-Atlantic states in 2005, clusters of states in both the West and Midwest have established their own strategic partnerships to cut GHG emissions. Market-based cap-and-trade programs constitute critical components of each of the agreements, setting in motion the development of regional cap-and-trade systems even as the federal government weighs prospects for a nationwide program.

1. RGGI

Massachusetts and Rhode Island joined RGGI in February 2007, and Maryland followed in April, joining Delaware and six northeastern states. The 10 member states have agreed to cap CO₂ emissions in 2009 and to reduce CO₂ emissions by 10% between 2009 and 2015. In addition, RGGI announced in November its intent to host the first auction of CO₂ emissions allowances in June 2008, at which time it will also implement an emissions tracking system. The original RGGI agreement stipulates that at least 25% of emissions allowances will be sold at auction, although several states have proposed auctioning up to 100% of allowances.⁵⁵

2. Western Climate Initiative

The Western Climate Initiative was created in February 2007 as a regional alliance among five states—Arizona, California, New Mexico, Oregon, and Washington—to curb GHG emissions. Utah has since joined the alliance, as have the Canadian provinces of British Columbia and Manitoba. The initiative calls for a load-based cap-and-trade system that would bar members from importing electricity generated at high-polluting coal plants. In August 2007, members established a target to reduce GHG emissions to 15% below 2005 levels by 2020.⁵⁶

3. Midwestern GHG Reduction Accord

Nine midwestern states and the Canadian province of Manitoba entered into the Midwestern GHG Reduction Accord on November 15, 2007. The accord commits members to establish GHG reduction targets and to develop mechanisms to collectively meet those targets. The group is scheduled to develop a proposed multisector cap-and-trade program within 12 months and to fully implement the system within 30 months. The alliance represents the third regional partnership to take shape as states seek to combat climate change, and is particularly noteworthy in that the Midwest relies heavily on coal, a major source of CO₂ emissions.⁵⁷

D. GHG Accounting and Disclosure

With heightened attention being paid to climate change at all levels of government, various officials and groups have begun to consider the potential benefits of disclosure of climate risks by public companies. Interest in public disclosures is due, in part, to the fact that future emissions regulations could lead to potential shareholder losses. On September 17, 2007, New York Attorney General Andrew Cuomo issued subpoenas to five companies asking for disclosures on potential CO₂ emissions from coal-fired power plants. The following day, a coalition of pension fund managers, environmental advocates, and other groups petitioned the U.S. Securities and Exchange Commission (SEC) to provide guidance as to when publicly traded companies must disclose climate risks and to more thoroughly scrutinize the adequacy of climate-related disclosures.⁵⁸

The coalition was specifically not asking for a rule-making. Rather, it petitioned the SEC to clarify that Regulation S-K, and in particular Items 101 (Description of Business), 103 (Legal Proceedings), and 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations), if read broadly, already cover the disclosure of climate risks. In a similar effort, several Democrats on the Senate banking committee asked the SEC on December 6, 2007, to release definitive guidance for companies on how to disclose material risk related to climate change. In a letter to SEC Chairman Christopher Cox, Sens. Chris Dodd

52. John M. Broder, *House, 314-100, Passes Broad Energy Bill; Bush Plans to Sign It*, N.Y. TIMES, Dec. 19, 2007, available at <http://www.nytimes.com/2007/12/19/washington/19energy.html>.

53. 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465.

54. Patricia Ware, *EPA Announces Plans to Develop Rules for Storing Carbon Dioxide Underground*, Daily Env't Rep. (BNA), Oct. 12, 2007.

55. Gerald B. Silverman, *RGGI Hopes to Hold First Auction for Emissions Allowances in June 2008*, Daily Env't Rep. (BNA), Nov. 8, 2007.

56. Carolyn Whetzel, *Six Western States, Two Provinces Agree to Reduce Emissions 15 Percent by 2020*, Daily Env't Rep. (BNA), Aug. 23, 2007.

57. Thom Wilder, *Nine Midwestern States, Canadian Province Sign Greenhouse Gas Reduction Accord*, Daily Env't Rep. (BNA), Nov. 16, 2007.

58. Petition available at <http://www.sec.gov/rules/petitions/2007/petn4-547.pdf>.

(D-Conn.) and Jack Reed (D-R.I.) requested the guidance in order to ensure greater consistency among companies in how and when they disclose information to investors. The senators addressed the need for standard criteria for assessment, a threshold for disclosure, and the expectation that companies will provide proposed measures to counteract the risks.⁵⁹

Some commentators have suggested that while these parties requested actions that potentially fall within the SEC's authority, the SEC is unlikely to act on such a highly political issue before the next administration. Furthermore, the SEC does not generally highlight a single issue for reporting. Because the materiality determination for public disclosure is the burden of each public filer, the SEC is unlikely to declare any single issue—in this case climate change risks—material across the board.

II. State Implementation of the Ozone NAAQS

The most significant NAAQS development in 2007 was the filing of a petition for certiorari in a case regarding the strengthening of the ozone NAAQS.⁶⁰ The D.C. Circuit ruled in 2006 that EPA had improperly granted areas that were only slightly out of ozone attainment status too much time to reduce emissions without imposing fines. At issue in the case were sections of the rule setting out how states should move from the one-hour standard to the stricter eight-hour standard.⁶¹ EPA had claimed that it had the option to follow CAA §181, Subpart 1, which gives it broad discretion, rather than Subpart 2, which provides structured guidelines for more severe nonattainment areas. The D.C. Circuit disagreed, holding that the tight deadlines imposed by Subpart 2 were required, and that anti-backsliding provisions required that fees from the older standard be assessed during the transition to the new standard.⁶² On January 14, 2008, the Supreme Court denied a petition for certiorari filed by industry, following the advice of environmentalists and EPA; the Agency, withdrawing its defense of its earlier actions, argued in briefs filed with the Court that it had the authority to adopt anti-backsliding measures when strengthening a standard.⁶³

III. National Emissions Standards for Hazardous Air Pollutants

In the area of toxic air emissions, challenges to two sets of EPA rulemakings generated significant attention in 2007, both relating to the control of hazardous air pollutants (HAPs) using maximum achievable control technology (MACT). Most recently, the D.C. Circuit heard arguments on whether mercury from power plants could be excluded

from regulation as a HAP. At issue was whether EPA had authority to reverse a President William J. Clinton-era determination under the CAA without conducting new studies and assessments. The D.C. Circuit also heard a set of cases relating to the risk-based exemptions established by EPA for various industrial operations. The court vacated some of EPA's rules, and states have therefore begun drafting their own MACT determinations for certain categories of sources. In light of the court decisions, EPA solicited comments on its legal analysis evaluating which standards are consistent with both the court decisions and the CAA, which standards EPA intends to change, and which standards need to be reexamined through a subsequent rulemaking.⁶⁴ EPA's application of these rulings to the new MACT rules will likely proceed in 2008 and could produce another round of legal challenges.

A. CAMR Developments

Following EPA's 2006 rejection of requests by several states for reconsideration of CAMR, 12 states revived a lawsuit targeting EPA's decision to withdraw mercury from §112's MACT regime in March 2005. In early 2008, the D.C. Circuit held CAMR invalid and vacated the rule, forcing states to directly regulate mercury emissions.

CAMR's history extended over nearly a decade. Early in its tenure, the Bush Administration reversed a decision made during the final days of the Clinton Administration to list power plants as a source category, which would have invoked a strict MACT requirement. The Bush Administration plan delisted mercury from power plants and replaced MACT with a cap-and-trade method of regulation. In reviewing this methodology, the D.C. Circuit examined the narrow issue of whether EPA has discretion to delist power plants as a source category of a HAP, specifically mercury, under §112 of the CAA.⁶⁵ Under §112, the court ruled, EPA must set strict limits on mercury emissions from all coal-fired plants, based on MACT, defined as the average of the best-performing 12% of sources.⁶⁶ In vacating CAMR, the court left no federal regulations in place to control mercury emissions. The decision has raised questions as to whether facilities will now become subject to the "MACT hammer," a provision of the CAA that requires states to make case-by-case determinations of the appropriate MACT level for individual facilities. The hammer applies to new or modified sources under §112(g) of the Act and to existing sources under §112(j). Some ambiguity remains, however, as to the appropriate application of the hammer under these sections. While environmentalists have suggested that it will apply per both §§112(g) and 112(j), a recent Congressional Research Service report claims it may apply only to new or modified sources under §112(g). The report holds that EPA never listed power plants as a source category under §112(j), potentially rendering existing power plants exempt from case-by-case determination of MACT.⁶⁷

59. *Dodd, Reed Urge SEC to Issue Guidance on Disclosure of Corporate Climate Risk*, Dec. 6, 2007, <http://dodd.senate.gov/index.php?q=node/4160>.

60. *National Petrochemical & Refiners Ass'n v. South Coast Air Quality Management Dist.*, No. 07-311 (U.S. cert. petition filed Sept. 6, 2007).

61. *Industry Faces Stiff EPA Air Quality Fines After High Court Declines Review*, InsideEPA.com, Jan. 14, 2008.

62. *South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 37 ELR 20003 (D.C. Cir. 2006).

63. *Industry Faces Stiff EPA Air Quality Fines After High Court Declines Review*, *supra* note 62.

64. *See* 72 Fed. Reg. 54875 (Sept. 27, 2007).

65. Cook, *supra* note 37.

66. *New Jersey v. EPA*, No. 05-1097 (D.C. Cir. Feb. 8, 2008).

67. Robert Meltz & James E. McCarthy, CRS Report for Congress, *The D.C. Circuit Rejects EPA's Mercury Rule: New Jersey v. EPA*, Feb. 28, 2008.

B. EPA's Risk-Based Exceptions to MACT Rules for Air Toxics

1. Brick Kiln MACT

In the first MACT decision of 2007 issued by the D.C. Circuit, EPA's emission standards for brick and ceramic kilns were held to be too lenient and in violation of the CAA.⁶⁸ Therefore, EPA's published standards⁶⁹ were vacated and remanded. The court ruled that the standards, which said that the MACT floors must be achievable by all sources using MACT to control HAPs, were less restrictive than required. EPA's practice of estimating variability among the best industry performers by setting floors to the level of the worst performers was deemed improper. In addition, the court held that EPA had to consider not only technological factors that affect emissions, but also non-technological factors such as naturally occurring HAPs in local clay types. Also, the court held that EPA may not use "work practice standards" instead of emissions floors for certain subcategories of kilns, unless measuring emission levels is technologically or economically impracticable (which was not shown). Citing §112(d)(1) of the CAA, the court indicated that EPA is required to set emissions standards for each listed HAP as well as each category or subcategory of major source.

2. Boiler MACT

Following the Brick MACT case, the D.C. Circuit in June 2007, vacated a 2004 EPA rule regarding the control of HAPs from commercial and industrial boilers, called the commercial and industrial solid waste incinerators (CISWI) rule.⁷⁰ The challenged rule gave unit-by-unit exemptions to sources that emit hydrogen chloride and manganese below a "health threshold" or a level under which EPA says no negative health effects occur. Also challenged was EPA's approach for setting the MACT floor requirements for boilers. Environmentalists argued that EPA's method for setting the MACT floor was invalid because it did not set a floor for "the vast majority" of HAPs. The court held that EPA incorrectly excluded some industrial boilers from the definition of solid waste incinerators, which under CAA §129 have more stringent emission limits.⁷¹ In its decision, the court indicated that EPA must rewrite the definition of solid waste incinerators to include industrial burners that burn waste.

3. Plywood and Composite Wood MACT

In a second June 2007 decision, the D.C. Circuit remanded two provisions establishing a "low-risk" subcategory for plywood and composite wood product manufacturing.⁷² EPA's approach, known as the "risk-based off-ramp," allowed lower risk facilities to avoid certain regulatory requirements. The court indicated that EPA lacked authority to

establish a low-risk subcategory exempt from the HAP emissions regulations. Another aspect of the ruling was the court's refusal to impose a new standing requirement on plaintiffs. Instead of adopting a new or enhanced standing requirement that would have forced plaintiffs to show they faced quantifiable risks in order to proceed with a challenge, the court relied on Supreme Court precedent in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*,⁷³ reading the case broadly to include a subjective perception of risk.

IV. NSR

During 2007, EPA worked on multiple fronts related to NSR, which governs modifications to power plants in pollution nonattainment regions.⁷⁴ EPA demonstrated a renewed focus on NSR enforcement actions, including a record \$4.6 billion settlement with American Electric Power (AEP). The most significant development in NSR, however, may have been the unanimous decision in *Environmental Defense v. Duke Energy Corp.*,⁷⁵ in which the Supreme Court vacated and remanded an earlier decision by the U.S. Court of Appeals for the Fourth Circuit.⁷⁶ The Justices agreed that allowing facilities to use the more lenient hourly emissions test of the NSPS program, rather than the annual standard of NSR, was not reasonable. Nonetheless, EPA has announced that it will shift to an hourly standard, a move that will likely face multiple challenges.

A. Environmental Defense v. Duke Energy Corp.

Potentially addressing many of the issues raised in NSR litigation in recent years, the Supreme Court took up the Fourth Circuit's ruling in *Duke Energy*.⁷⁷ The case originated as a challenge to the PSD rule, the companion to NSR that applies in regions of the country that are not exceeding air pollutant standards. In a 2005 decision that garnered a great deal of attention, both from critics and the courts, the Fourth Circuit struck down EPA's regulatory definition of "modification," holding that the Agency could not apply inconsistent definitions of the same term in different provisions of the same statute.⁷⁸ The court reasoned that the definition of modification used in the original 1970 NSPS rule must be applied, which defined modification as a change that results in an increase in a plant's hourly emissions rate, rather than the annual emissions rate test promulgated in 1978 for the PSD program; furthermore, modification under NSPS was limited to "major" physical modifications, not operational changes.⁷⁹

Because EPA decided on October 13, 2005, to adopt the industry-favored hourly emissions rate test,⁸⁰ it declined to petition for certiorari. Instead, the nonprofit organization Environmental Defense took over as intervenor, and the Su-

68. *Sierra Club v. EPA*, No. 03-1202, 37 ELR 20064 (D.C. Cir. Mar. 13, 2007).

69. 68 Fed. Reg. 26690 (July 21, 2003).

70. 70 Fed. Reg. 55568 (Sept. 20, 2005).

71. *Natural Resources Defense Council v. EPA*, No. 04-1385, 37 ELR 20135 (D.C. Cir. June 8, 2007).

72. *Natural Resources Defense Council v. EPA*, No. 04-1323, 37 ELR 20146 (D.C. Cir. June 19, 2007).

73. 528 U.S. 167, 30 ELR 20246 (2000).

74. 42 U.S.C. §§7501-7515.

75. 127 S. Ct. 1423, 37 ELR 20076 (Apr. 2, 2007).

76. *United States v. Duke Energy Corp.*, 411 F.3d 539, 35 ELR 20121 (4th Cir. 2005).

77. 127 S. Ct. at 1423.

78. 411 F.3d at 539, *overruled by* 127 S. Ct. at 1423.

79. *Id.*

80. 70 Fed. Reg. 61081 (Oct. 20, 2005).

preme Court granted certiorari to allow the organization to argue that the yearly emissions test was the correct standard to apply. Once the Court granted certiorari, however, EPA stepped back into the case to defend its discretion to adopt the annual emissions test, despite its efforts to promulgate the hourly rule. The Court held unanimously that the Fourth Circuit had overstepped its bounds, in effect challenging the validity of a regulation during an enforcement action, in violation of the provision in §307(b) of the CAA limiting the forum for such review to the D.C. Circuit, and then only within 60 days of rulemaking.⁸¹ In so doing, the Court reinstated the annual test that industry had long opposed, along with a broader definition of modification.

B. The AEP Settlement

On October 9, 2007, EPA and the U.S. Department of Justice (DOJ) announced a record settlement whereby AEP agreed to cut 813,000 tons of air pollutants annually at an estimated cost of more than \$4.6 billion.⁸² The settlement also required AEP to pay a fine of \$15 million and to spend \$60 million on mitigation projects for past emissions. The settlement marked the culmination of a lawsuit filed against AEP in Ohio federal court in 1999, alleging that the company had violated requirements under the CAA's NSR program. Eight states and 13 citizen groups joined with the federal government in pursuing the settlement. The case had been stayed in 2006 pending the outcome of *Duke Energy*.⁸³ Once the Supreme Court upheld the government's interpretation of NSR, the case against AEP could proceed. AEP contended that modifications it had made to its facilities constituted routine maintenance exempt from NSR, but this position was untenable after the *Duke Energy* ruling on the definition of modification.

Under the terms of the settlement, AEP will install pollution-control equipment to reduce SO₂ emissions by 79%, from 828,000 tons per year in 2006 to 174,000 tons per year when the settlement agreement is fully implemented, and to cut NO_x emissions by 69%, from 231,000 tons per year in 2006 to 72,000 tons per year. The projected SO₂ reduction is greater than the amount of SO₂ emitted individually by 45 states, according to the DOJ. To achieve these emissions reductions, AEP will install scrubbers for SO₂ emissions and selective catalytic reduction (SCR) for NO_x.

C. EPA Rulemaking Under NSR

While pursuing settlements and verdicts against a number of companies, EPA has also worked to simplify and clarify the application of NSR. Of particular interest is EPA's effort to adopt an hourly emissions increase test for electric generating units, which would be a reversal of EPA's stance in *Duke Energy*, in which an annual emissions test was upheld.⁸⁴ The rule would likely face court challenges. Because

routine maintenance can allow a plant to run longer and thereby trigger NSR under the yearly emissions test, the hourly test is seen as more favorable to industry. Also on the agenda is the NSR debottlenecking and aggregation rulemaking and the NSR "reasonable possibility" recordkeeping and reporting rulemaking, the latter being a response to the remand in 2005 of *New York v. U.S. Environmental Protection Agency*.⁸⁵ Any one or all of these rulemakings may become final in early 2008, and each faces inevitable court challenges.

V. EPA Rulemakings—Fall 2007

In its recent fall 2007 rulemaking agenda, EPA set forth over 300 actions under development or review, as well as those that have been completed or withdrawn since spring 2007. Of these, 30 were listed as priority issues by the Agency. Several priority rulemakings under the CAA are listed below, along with a selection of other relevant rulemakings.

A. PSD and Non-Attainment NSR: Reasonable Possibility in Recordkeeping

This rule clarifies a recordkeeping standard promulgated under the 2002 NSR Reform Rule providing that certain records be maintained only when a "reasonable possibility" exists that a proposed project will prompt significant emissions increases. The rulemaking is EPA's response to the D.C. Circuit's June 2005 action remanding the rule for EPA to clarify.⁸⁶ The final rule was published in the *Federal Register* on December 21, 2007.⁸⁷

B. Flexible Air Permit Rule

This rule will revise regulations on state and federal operating permit programs and NSR programs. Revisions will stem largely from pilot permitting efforts by EPA and states to develop flexible air permitting programs that provide greater operational flexibility through advanced approvals and alternative operating scenarios. The notice of proposed rulemaking comment period ended January 14, 2008, with final action pending as of this writing.⁸⁸

C. Control of Emissions From New Locomotives and New Marine Diesel Engines Less Than 30 Liters per Cylinder

This rule will establish a program to reduce emissions of NO_x and fine diesel PM from locomotives and marine diesel engines. It will create exhaust emissions standards and idle reduction requirements for diesel locomotives as well as new exhaust emissions standards for all marine diesel engines below 30 liters per cylinder. The final rule was signed on March 14, 2008.⁸⁹

81. 127 S. Ct. at 1436.

82. U.S. DOJ, U.S. ANNOUNCES LARGEST SINGLE ENVIRONMENTAL SETTLEMENT IN HISTORY—HISTORIC POLLUTANT REDUCTIONS WILL SAVE \$32 BILLION IN HEALTH COSTS ANNUALLY (2007), available at http://www.usdoj.gov/opa/pr/2007/October/07_enrd_797.html.

83. *United States v. American Elec. Power Corp.*, No. C2-99-1182 (S.D. Ohio June 6, 2006) (stay issued).

84. The Supplemental Notice of Proposed Rulemaking is at 72 Fed. Reg. 26202 (May 8, 2007).

85. 413 F.3d 3, 35 ELR 20135 (D.C. Cir. 2005).

86. *Id.*

87. The proposed rule would modify 40 C.F.R. Part 51, app. S, 40 C.F.R. §§51.165, 51.166, and 52.21. Text of rule available at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-24714.htm>.

88. The proposed rule would modify 40 C.F.R. Parts 51, 52, and 70.

89. Text of the rule available at <http://www.epa.gov/OMS/marine.htm#2008final>. The rule would modify 40 C.F.R. Parts 92 and 94.

D. Review of NAAQS for Lead

This review will lead to a proposal and subsequent decision to reaffirm or revise the existing lead NAAQS. Final action is expected in September 2008.⁹⁰

E. PSD and Non-Attainment NSR: Debottlenecking, Aggregation, and Project Netting

This rule will revise existing rules surrounding NSR's aggregation, debottlenecking, and project netting programs. The rule will clarify and codify what are currently only guiding principles for determining NSR applicability in order to improve program implementation. Under debottlenecking, when a modification in one portion of a facility increases throughput at other unchanged portions of the facility, only emissions from the modified portion would be analyzed under the NSR applicability test. Under aggregation, when two or more projects at a facility are related, they would be treated as a single project for NSR purposes, but otherwise they would be treated as separate and independent. Under project netting, when project emissions increases are not significant, a sourcewide analysis of emissions increases and decreases over a five-year period would no longer be required. Final action is expected in June 2008.⁹¹

F. PSD and Non-Attainment NSR: Emission Increases for Electric Generating Units

This rule will revise emissions tests for electric generating units under PSD and NSR. The new system will test maximum hourly emissions, as is already done under the NSPS program. Final action is expected in August 2008.⁹²

G. Rulemaking to Address GHG Emissions From Motor Vehicles

This rule will implement President Bush's executive order directing EPA to reduce GHG emissions from automobiles. The rule will address the president's proposal to cut gasoline consumption 20% over 10 years. Notice of proposed rulemaking occurred in December 2007; final action is expected in October 2008.⁹³

90. The review will focus on 40 C.F.R. Part 50.

91. The proposed rule would modify 40 C.F.R. §§51.165, 51.166, and 52.21.

92. The proposed rule would modify 40 C.F.R. Parts 51 and 52.

93. The proposed rule would modify 40 C.F.R. Parts 80 and 86.

H. Risk and Technology Review Phase II Group 2

This rule will review and revise MACT standards in accordance with CAA requirements to evaluate MACT standards every eight years. EPA combined MACT source categories requiring review into several groups, and this particular rule focuses on Group 2, which covers 11 MACT standards and 21 source categories. The rule will consider inhalation risk, cancer risk, and non-cancer risk. Final action is expected in November 2008.⁹⁴

I. Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder

This rule will set standards for NO_x and PM emissions from Category 3 marine engines and will consider whether or not to apply those standards to foreign flagged vessels in U.S. ports. Final action is expected in December 2009.⁹⁵

J. PSD and Non-Attainment NSR: Reconsideration of Inclusion of Fugitive Emissions

Under this rule, EPA will reconsider a final rule issued December 31, 2002,⁹⁶ that included fugitive emissions in order to determine whether facilities had undergone major modifications for the first time. The reconsideration is a response to a July 2003 petition by Newmont USA Limited. A date for final action is to be determined.⁹⁷

VI. Conclusion

The year 2007 may well turn out to be a pivotal year in the development of CAA law. The Supreme Court's review of two high-profile cases, one on climate change and the other on NSR, has already lead to new laws, regulations, and lawsuits. The final effects of the decisions, however, will likely take years to fully develop. While it is unlikely that we will see the Supreme Court take such an active role in the interpretation of the CAA in the foreseeable future, the circuit courts will certainly remain active, as evidenced by recent decisions on the ozone NAAQS and CAMR. The full docket of cases, laws, and regulations proves that despite the CAA having been enacted nearly 40 years ago, the work of interpreting it is far from over.

94. C.F.R. citation information has not been determined.

95. The proposed rule would modify 40 C.F.R. Part 1042.

96. 67 Fed. Reg. 80185 (Dec. 31, 2002).

97. The proposed rule would modify 40 C.F.R. Parts 51 and 52.