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Environmental LAW

Has Congress handed climate change to the courts?

Prolonged heat waves in North America and Northern Europe, sparking massive fires in Russia, occurring simultaneously with unprecedented flooding in Asia and parts of interior Europe, have been cited by many as examples of the prophecy of global warming becoming reality.

Vindication, perhaps, after a cold and snowy winter left many skeptical that global warming was real. Is climate change flexing its muscles?

While scientists have more data to ponder, and the public opinion meter shifts again from "skepticism" to "acceptance" of global warming as fact, it appears Congress officially has abandoned the field to EPA and the courts. In late July, the Senate scuttled the effort to address climate change in this Congress, apparently restricting its environmental agenda for the remainder of the session to addressing the BP oil spill and energy efficiency. Those are important issues to be sure, but far smaller in scope than promised just a few months ago.

Meanwhile, as we reported in this space in April, the wheels of administrative regulation have been turning, moving EPA closer to implementing a host of new regulations to control greenhouse gases.

The linchpin of EPA's authority is its determination in late 2009 that greenhouse gases emitted from motor vehicles endanger public health and welfare. The endangerment finding forms the cornerstone of EPA's recent regulatory push, including not only emission limitations for cars and light trucks, but also large stationary sources. Under the Clean Air Act, a finding that a pollutant endangers the public health and welfare mandates EPA to take steps to regulate the pollutant to control the danger.

Following EPA's ruling, 10 petitions were filed with the agency challenging the validity of the climate science underpinning the finding of endangerment and demanding reconsideration. On July 29, EPA denied the petitions on the grounds "that climate science is credible, compelling, and growing stronger."

EPA rejected arguments that the underlying climate data has

been manipulated unfairly to exaggerate the existence of global warming. EPA defended its finding as one "based on years of science from the U. S. and around the world" and characterized the petitions as based on "selectively edited, out-of-context data and a manufactured controversy."



By **RONALD G. HULL**

Daily Record
Columnist

EPA's affirmation of its original decision exhausts potential administrative remedies and set the stage for a showdown in the courts. About two dozen lawsuits challenging the endangerment finding have been filed in the U. S. Court of Appeals for the District of Columbia Circuit by industry groups, a number of states and 13 members of the House of Representatives. On the other side, a coalition of 16 states and New York City has intervened on behalf of EPA. The challenges have been consolidated as *Coalition for Responsible Regulation v. U. S. Environmental Protection Agency*, Appeal Docket No. 09-1322.

Simultaneously, at least 25 derivative lawsuits have been filed in the D.C., Circuit challenging the EPA's greenhouse gas tailoring rule defining and limiting what stationary sources of greenhouse gas emissions will be regulated initially. Published June 3, the tailoring rule limits the scope of new permit requirements to facilities with emissions exceeding 75,000 tons per year. The rule is intended to shield an estimated 1 million or more small businesses, schools, hospitals and other entities from permit requirements and limits the initial reach of the newly imposed restrictions to coal-fired plants, refineries, cement plants, and landfills and other large emitters. EPA has been sued by all sides and faces challenges that the rule is both too harsh and too lenient, and that the timetable for implementation is too fast and too slow. One state, Texas, also served notice Aug. 2 that it simply refuses to implement the rule.

EPA can deal with such rebellion by revoking state delegation and undertaking federal implementation, but one has to wonder whether EPA has the resources to monitor and enforce imple-

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mentation in Texas or any other state that refuses to enforce the new rules.

Absent intervention by the D.C. Circuit or Congress, EPA's new permitting regulations for greenhouse gases are set to take effect Jan. 2, 2011. If the petitioners succeed on the merits of their challenge to the endangerment finding, EPA's authority to regulate greenhouse gases will be restricted and the new requirements put in place will be overturned.

Alternatively, Congress still may act not to adopt a long-term policy, but simply to block EPA from putting the new rules into effect. Both Democratic and Republican senators have proposed interim legislation that would prevent EPA from taking any action for two years that would implement greenhouse gas emissions permit requirements. The Stationary Source Regulations Delay Act has co-sponsors in both parties. White House officials have indicated President Obama will veto the bill if it is passed.

Much of the Senate resistance to the regulation of greenhouse gases seemingly has grown more out of concern over the economic impact of new regulation through permits or a cap-and-trade program, rather than from challenges to the underlying science. Ironically, perhaps, resistance to a federal cap-and-trade program seems to have strengthened just as reports are appearing that the regional cap and trade program in the northeast, the Regional Greenhouse Gas Initiative, in operation now for two years, has operated without a significant problem and has had no measurable impact on electricity prices. Reportedly, auctions of carbon dioxide allowances have raised \$663 million for the 10 participating states, with most of the money channeled into energy efficiency initiatives and support of renewable energy.

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