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CLIMATE CHANGE

LEGISLATION

The author of this article discusses the many new rulemakings that would be required of the Environmental Protection Agency under the American Clean Energy and Security Act of 2009 (H.R. 2454), which was passed by the House June 26. The author identifies 31 new regulations the bill would mandate that EPA issue within specified deadlines, most required within 18 to 24 months of the statute's final enactment, and discusses the many regulatory obligations imposed on EPA by the bill. Ultimately, the author suggests that the effectiveness of the legislation if enacted will depend in large measure on the outcome of the rulemaking and judicial review process, reopening the advocacy battle lines that have followed the decades-long debate over the need for federal climate change legislation.

House Global Climate Bill Mandates Many EPA Rulemakings With Tight Deadlines

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The opinions expressed here do not represent those of BNA, which welcomes other points of view.

On June 26, 2009, the U.S. House of Representatives passed the Waxman-Markey "American Clean Energy and Security Act of 2009"—all 1427 pages of it—by a vote of 219-212.¹ The main focus of the press coverage and public debate thus far has been on the bill's new cap-and-trade system for greenhouse gas emissions. The bill (H.R. 2454) would cap greenhouse gases at 97 percent of 2005 levels by 2012, and 17 percent of 2005 levels by 2050.

The bill also would require much, much more. The Environmental Protection Agency (EPA), Department of Energy, Federal Energy Regulatory Commission, and Department of Interior would have many new duties

¹ "House Passes Bill to Cap Emissions After Push from Obama, Democrats," *Daily Environment Report*, (122 DEN A-10, 6/29/09).

and responsibilities. These and other agencies would be required to issue new regulations, develop and disseminate various types of guidelines, initiate and manage new programs, issue grants and contracts, perform studies and issue reports, conduct research on new technology, develop a “smart grid”—the list could go on for pages.

The bill has five titles:²

Title I—Clean Energy (308 pages);

Title II—Energy Efficiency (357 pages);

Title III—Reducing Global Warming Pollution (410 pages);

Title IV—Transitioning to a Clean Energy Economy (299 pages); and

Title V—Agricultural and Forestry Related Offsets (39 pages).

The bulkiest part of the bill is Title III, which is separately named “The Safe Climate Act.” None of the other titles has its own independent act name. The Safe Climate Act would add new Titles VII and VIII to the existing Clean Air Act, to be called the “Global Warming Pollution Reduction Program” and “Additional Greenhouse Gas Standards,” respectively.

This article will not take on the (perhaps hopeless) task of analyzing and summarizing all of the bill’s numerous, highly diverse, and extraordinarily complex provisions. Instead, this article will focus on one aspect of the bill: its mandates for EPA to issue an amazing number of brand new regulations with tight statutory deadlines that can become enforceable in federal court. It also will address a related feature of the bill that would allow these new EPA regulations (and all Clean Air Act regulations) to remain in force if they are found illegal by federal courts on judicial review.

While there can be good faith disputes over the costs, wisdom, and effectiveness of the bill, one point is beyond debate. If this bill were to become law, a major flurry of EPA rulemaking and judicial review activity would be unleashed that would go on for years. As explained below, EPA personnel would have to devote an immense amount of time and resources to these efforts. The regulated community, environmental groups, and other interested parties would face a constant stream of regulatory proposals, public hearings, public comment periods, and final rules.

In many situations, there could be citizens suits to force EPA to meet lapsed statutory deadlines for rulemaking followed by court-ordered deadlines for EPA to complete the rulemakings. Judicial review proceedings would follow many (if not most) of the final rules. These proceedings could result in judicial reversals of portions or all of a rule, which could start a whole new rulemaking process rolling again.

Ultimately, the effectiveness of the bill (especially the Safe Climate Act) could depend in large measure on the outcome of this rulemaking and judicial review process. As is the case with most EPA statutes, nothing meaningful could happen by way of implementation and enforcement without final and effective EPA regulations.

Overview of EPA’s New Regulatory Duties

Most of EPA’s new regulatory mandates in the bill are in the Safe Climate Act (Title III of the bill). The

Safe Climate Act houses the new “cap and trade” program, including elements for the designation and reduction of greenhouse gases, emission allowances, banking and borrowing, permits, and offset projects and credits. There would also be numerous requirements for new controls on various forms of hydrofluorocarbons and for the mitigation of “black carbon.”

The Appendix at the end of this article lists 31 new regulations the bill would mandate that EPA issue within specified deadlines. (Many other provisions in the bill authorize EPA to issue regulations, but do not set a deadline.) Almost all of the deadlines for final rules are pegged to a number of years or months from the date of the final statute’s enactment (that is, after the Senate and House have both passed a final climate bill and it is signed by the president).

Here is a breakdown of the deadlines for final EPA regulations, running from date of enactment:

12 months — 5 regulations

18 months — 8 regulations

24 months — 12 regulations

36 months — 2 regulations

Two of the deadlines are pegged to specific dates rather than number of months from enactment. Two others are mandated upon the occurrence of contingent events.

For many, if not most, of these regulatory mandates, EPA would be required to develop regulations addressing issues and governing conduct that have rarely been addressed by or subjected to federal regulation. To give just a few examples, EPA’s new regulations would be required to:

- establish a program to minimize the risk of escape to the atmosphere of carbon dioxide injected for purposes of geologic sequestration;

- provide for allocated emission allowance distributions that would support commercial deployment of carbon capture and sequestration technologies;

- establish national transportation-related greenhouse gas reduction goals, including new standardized models and data collection methods, sufficient to meet overall greenhouse gas reduction goals provided elsewhere in the bill;

- establish a program for international offset credits based on activities that reduce or avoid greenhouse gas emissions, or increase sequestration of greenhouse gases, in a “developing country”;

- establish standards to ensure that international deforestation reductions are “measurable, verifiable, permanent, and monitored, and account for leakage and uncertainty,” including the establishment of a “national deforestation baseline” for each country involved;

- develop and implement formulas based upon many factors specified in the statute to assure that emission allowances are distributed among local electricity distribution companies “ratably” based on the annual average carbon dioxide attributable to electricity generated by each company during a defined base period;

- establish a program for the phase-down and trading of allowances (including an auction) for a group of 20 hydrofluorocarbons; and

- establish a program to reduce emissions of “black carbon” unless EPA finds through rulemaking that

² A copy of H.R. 2454 can be found at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-2454>.

other programs under the bill “adequately” regulate black carbon emissions.

More Work for EPA, Interested Parties

EPA’s regulations would not only be exploring uncharted territory for federal regulation, but also delving into highly controversial issues. The vote on the bill (219-212) is testimony to this, as are the intense academic, political, scientific, and economic debates that have surrounded the entire global climate issue. Thus, interest groups on all sides of the issues (regulated industries of many types, environmental groups, state and local governments, etc.) would almost certainly be mounting major advocacy campaigns on many if not most of the regulatory actions.

If one were to read Section 4 of the federal Administrative Procedure Act (APA) of 1946 (5 U.S.C. § 553), which sets forth the basic requirements for agency rulemaking, one might conclude that going through the rulemaking process is no big deal. The basic requirements are merely that the agency must (1) publish a proposed regulation in the Federal Register, (2) allow for a period of written public comments, and then (3) after consideration of those comments, publish final rules along with a “concise general statement of their basis and purpose.”

We are a long way from 1946, however. Even though Congress has never changed these basic requirements in the APA, agency rulemakings for major and controversial rules are now resource-intensive exercises that often string out for years. The rulemaking process has become burdensome and time-consuming for at least the following reasons³:

(i) EPA’s final regulations are subject to judicial review. For nationally-applicable Clean Air Act regulations, judicial review lies exclusively in the U.S. Court of Appeals for the District of Columbia Circuit. Reviewing courts now are demanding that EPA explain and back up with data and facts all facets of the basis of its proposed rules (technical, economic, legal, policy, etc.), and that EPA fully respond to (with “reasoned decision-making”) all relevant public comments in its final rule. Interested parties often file lengthy written comments on every aspect of the rulemaking (technical, economic, legal, policy, etc.), and EPA must fully respond to all relevant comments.

(ii) Congress has passed several statutes and several presidents have issued executive orders requiring EPA to perform many types of studies and analyses when proposing and issuing final regulations. As part of these obligations, EPA normally prepares a “Regulatory Impact Analysis” (RIA) at both the proposed and final rule stages. These RIAs often are hundreds of pages in length.

Executive Order 12866, issued by President Clinton in 1993, is probably the primary driver of agency RIA work.⁴ For significant rulemakings, E.O. 12866 requires

³ While this discussion is tailored to EPA, generally it applies to all federal agencies.

⁴ Early in the Obama Administration, the President’s Office of Management and Budget (OMB) announced that it was considering revisions to E.O. 12866 and solicited public comments on various approaches. As of this writing, OMB was just beginning to review the hundreds of comments filed. No changes to E.O. 12866 are expected any time soon, and most observers

an agency to prepare a “detailed” description of the need for the regulatory action and an assessment of the potential costs and benefits. This cost/benefit analysis must include, among other things, an explanation of how the rulemaking is consistent with statutory mandates, promotes the president’s priorities, and avoids undue interference with state, local, and tribal governments’ exercise of their governmental functions.⁵

Agency Reviews Extend Rulemaking Process

In light of the foregoing demands, EPA has created an elaborate “intra-agency” rulemaking development and review process, where the lead office (the Office of Air and Radiation (OAR), in the case of Clean Air Act rules) first must prepare a detailed “analytic blueprint” to initiate work on a proposed rule. Then an interdisciplinary (engineers, economists, lawyers, policy analysts) “work group” representing other agency offices is formed, and a rulemaking package works its way up the agency chain of command. In this intra-agency review process, there can be disagreements—often sharp disagreements—among various work group members and the EPA offices they represent. This can cause further delays.

E.O. 12866 also provides for inter-agency review managed by the Office of Information and Regulatory Affairs (OIRA) within OMB. Under this process, EPA must submit both its draft proposed and final regulations to OIRA for approval. E.O. 12866 provides that the Director of OIRA should take action to approve or disapprove an agency’s draft within 90 days. However, as a practical matter, because OIRA and OMB represent the president and the EPA administrator serves at the pleasure of the president, OIRA can and sometimes does hold rulemaking packages for more than 90 days. Sharp disagreements between EPA and OIRA, and/or between EPA and other federal agencies, can arise during this process.

OIRA may shorten the review period when there are court-ordered deadlines for issuance of a rule (see discussion of citizens suits below). The bottom line, however, is that the requirement for EPA to subject its proposed and final rules to this inter-agency review process almost always adds significant time for EPA to complete its rulemaking tasks.

doubt whether any changes that might be forthcoming would significantly reduce burdens for EPA and other agencies in preparing proposed and final rules.

⁵ The current version of E.O. 12866 is available at <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>. Other statutory and executive order provisions impose similar requirements for EPA and other agencies to prepare analyses along with their proposed and final rules. Among the most significant are: (1) the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 601 et seq. (1980); (2) the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq. (1980); (3) the Unfunded Mandates Reform Act, 2 U.S.C. § 658 et seq. (1995); (4) Executive Order 13132—Federalism, 64 Fed. Reg. 43,255 (8/10/99); (5) Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (11/9/00); and (6) Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629 (2/11/94).

Procedures Would Apply to New EPA Rules

Nothing in the bill relieves EPA of any of these procedural obligations. In fact, the Clean Air Act—unlike other major statutes that EPA administers—specifies rulemaking procedures in Section 307(d) that go beyond the standard rulemaking procedures imposed by the federal APA. For instance, while the APA requires only written comments on a proposed rule, Clean Air Act Section 307(d)(5) requires EPA also to allow for oral presentations at a public hearing, and for rebuttal submissions in response to these oral comments. In the “conforming amendments” provisions in the bill, it is clear that all of the new Clean Air Act rulemakings mandated by the bill would be subjected to these same enhanced rulemaking procedures.⁶

Unlikely EPA Could Meet Deadlines

Since 1970, through the Clean Air Act and all the other statutes EPA administers, Congress has routinely imposed deadlines for regulatory action on EPA. In light of all the above, it should not be surprising that EPA often has missed those deadlines—often by months and even years. In fact Congress, as evidenced by the bill, keeps piling on more and more mandates for regulations and other activities without giving EPA a commensurate measure of new resources to accomplish these tasks. One need only leaf through the Clean Air Act and other federal environmental statutes and look for the words “the Administrator shall promulgate, within __ months after the date of enactment” to fully appreciate the mind-numbing number of times this type of mandate appears.

A report issued by the Government Accountability Office (GAO) in April 2009, based on case studies of several federal agencies, found that the average time for an agency to complete a significant regulation (from the beginning of the pre-proposal spadework to the issuance of the final rule) was slightly more than four years.⁷ GAO found the EPA average to be five and one-half years (with great variability). Recent examples of major rulemakings under the Clean Air Act bear this out.⁸ GAO also found that it usually took an agency “at least” as much time to develop a proposed rule as it did to issue a final rule after proposing it.

The GAO report also noted that rulemakings that address “complex topics” or that “raise new issues” typically take longer to complete. As explained above, one

⁶ H.R. 2454, § 337(e)(3).

⁷ Gov’t Accountability Office, GAO-09-205, FEDERAL RULEMAKING—IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS (2009), available at <http://www.gao.gov/new.items/d09205.pdf>.

⁸ The Clean Air Fine Particle Implementation Rule was proposed Nov. 1, 2005, and finalized May 16, 2008 (73 Fed. Reg. 28,231). The Clean Air Mercury Rule (CAMR) was proposed Dec. 17, 2003, and finalized March 15, 2005. The Clean Air Interstate Rule (CAIR) was proposed Jan. 30, 2004, and finalized May 12, 2005 (70 Fed. Reg. 25,162). Assuming (as the GAO Report found) that it takes as long as long to ready a proposed rule for publication as it does to go from a proposed to a final rule, these three rules would have taken between three and five years to develop and complete.

can assume that many (if not most) of the rulemakings EPA would undertake under the bill will raise issues of scope and complexity that have not previously been addressed in federal rulemakings. With the bill’s mandates for 31 new regulations and only two with a three-year deadline—the rest are two years, eighteen months, and one year—it seems almost inevitable that EPA would not be able to meet many of these deadlines.

It should be noted that even without the new mandates of the bill, EPA already has plenty of Clean Air Act rulemaking activity underway, many with missed statutory and court-ordered deadlines. EPA’s most current (Spring 2009) “Regulatory Agenda” lists 59 Clean Air Act rules currently scheduled to be within one year of proposal and 47 Clean Air Act rules anticipated to be issued in final form within one year.⁹ What would happen to EPA’s work on these rules if EPA were suddenly mandated to add 31 brand new major rules to its plate?

There is no reason to think the new Obama EPA would take any shortcuts from the established procedures for the rules that would be mandated by the bill. As recently as April 23, 2009, EPA Administrator Lisa Jackson sent a memorandum to all EPA employees stressing that EPA would “provide for the fullest possible public participation in decision-making.”

Jackson said it is “crucial that we apply the principles of transparency and openness to the rulemaking process.” She added: “Robust dialogue with the public enhances the quality of our decisions. EPA offices conducting rulemaking are therefore encouraged to reach out as broadly as possible for the views of interested parties.”¹⁰

Thus, the Obama EPA can be expected to follow prior administrations’ practices (going back to the creation of EPA in 1970) of actively engaging with—through face-to-face meetings, workshops, and other formats—various “stakeholder” groups while developing proposed and final regulations. This process obviously adds to the time it takes for EPA staff to complete its tasks.

Court-Ordered Deadlines May Follow

Several of EPA’s statutes have citizens suit provisions, including the Clean Air Act. Section 304(a)(2) provides that “any person” may sue in federal district court to force the administrator to perform a “non-discretionary” duty under the act. The duty to issue a regulation by a statutory deadline has long been held to be “non-discretionary,” and for years citizens groups have brought these lawsuits when EPA has missed deadlines. Clean Air Act Section 304(d) provides that citizens groups may be reimbursed for the costs of such litigation (including attorneys fees), so there is little downside to doing this.

The result is usually a court order establishing new deadlines for issuing proposed and final rules. EPA (and OIRA) take these court deadlines more seriously than statutory deadlines, for there is always the possibility of contempt action for the violation of court orders.

⁹ The Regulatory Agenda may be found at <http://www.epa.gov/lawsregs/documents/regagenda-book-spring09.pdf>.

¹⁰ The Jackson Memorandum can be found at <http://www.epa.gov/administrator/operationsmemo.html>.

Even a judicially-set deadline will not always be met. However, at least when EPA determines that it will not be able to comply with judicial deadlines, it is forced to return to the court and seek an extension. Usually, the court will go along with reasonable requests for extensions, particularly if the plaintiff agrees. As a result, citizens groups who initiated the lawsuit often have an extra measure of influence and bargaining power with EPA over the timing—and sometimes even the direction—of the rulemaking.¹¹

This citizens suit mechanism also can give citizens groups an influential role in setting EPA's priorities. For example, assume EPA has missed statutory deadlines for issuing four separate regulations: A, B, C, and D. Assume further that a citizens group believes regulation B is quite important to its agenda, while regulations A, C, and D are not. The group can file suit to secure a judicial deadline for EPA to issue regulation B. If no other group brings a lawsuit to secure deadlines for regulations A, C, or D, the citizen group will have forced EPA to give high priority to regulation B, even if EPA had previously decided that regulation B should be a low priority. Accordingly, citizens suits could play a role in establishing the priorities under which EPA would attack the 31 new rules mandated by the bill.

Pending Greenhouse Gas Reporting Rule

Although Congress has not yet enacted a comprehensive global climate law (the sponsors of H.R. 2454 hope that it will become the first such law), Sens. Barbara Boxer (D-Calif.) and Dianne Feinstein (D-Calif.) inserted a provision into an appropriations bill Dec. 26, 2007, requiring EPA to issue regulations that would be the first step towards a greenhouse gas cap-and-trade regime. This new provision mandated that EPA use its Clean Air Act authority to issue regulations establishing reporting requirements for facilities emitting greenhouse gases above "appropriate thresholds" (to be determined by EPA). The statute mandated that the regulations be proposed by September 2008 and finalized by June 2009. Congress thus established an 18-month rulemaking deadline from the date of enactment, much like many of the deadlines contained in the new bill.

Experience thus far with this greenhouse gas rulemaking illustrates many of the points made above:

(i) EPA already has missed the statutory June 2009 deadline for final rulemaking. The regulations were not proposed until April 10, 2009 (74 Fed. Reg. 16,448), and the public comment period ended in June. To date, no citizens suit has been filed to secure a court-ordered deadline.

¹¹ For one recent example (out of probably hundreds over the years), see "Ninth Circuit Upholds Attorney Fees Awarded To Sierra Club in Portland Cement Lawsuit," *Daily Environment Report*, (114 DEN A-5, 6/17/09). As reported in that article, the Sierra Club had originally brought a citizens suit under the Clean Air Act against EPA for failing to revise the Portland cement new source performance standards (NSPS) within the deadlines mandated by the Clean Air Act. This resulted in a court order compelling EPA to issue final NSPS regulations by May 31, 2009. The district court awarded the Sierra Club \$35,275 in attorneys fees, and the Ninth Circuit affirmed this award. The BNA story also reported: "On May 11, the parties filed a notice with the district court extending by agreement the May 31, deadline to Aug. 31."

(ii) The proposed regulation is a massive document, filling 285 pages of *Federal Register* fine print (equivalent to almost 1000 pages of a double-spaced Word document).

(iii) More than 1300 written public comments were filed.

(iv) The RIA that EPA staff prepared to support the proposed rule is more than 500 pages including its appendix.¹²

In light of the complexity of the greenhouse gas reporting rulemaking and the daunting tasks EPA personnel have before them in preparing a final rulemaking package and new RIA, it appears unlikely that this final rule will be issued any time soon.

Judicial Review of Regulations Under Bill

The new Clean Air Act regulations EPA would promulgate under the bill would be subject to judicial review in the D.C. Circuit pursuant to Clean Air Act Section 307(b). For almost all major Clean Air Act regulations, parties on both sides of the issues (industry/business and environmental/public interest) seek judicial review. Many times, the D.C. Circuit has held that part or all of an EPA regulation is legally defective, agreeing with either the industry groups' or the environmental groups' challenges.

One issue that has been subject to controversy and inconsistent approaches within the D.C. Circuit (and other federal courts) is the appropriate remedy for the court to impose when it finds a rule legally defective. The two alternative remedies are "remand" and "vacatur."

With a remand, the court finds the rule legally defective and directs the agency to come up with new provisions (or explanations in the record) that will correct the defects. However, during the remand period, the rule remains in full force and effect. Thus, regulated parties may be subject to civil and criminal penalties for violating provisions of the rule even though it is legally defective. Generally, courts impose no deadlines on agencies to complete work on a remand, and EPA has often taken years to do so.

With a vacatur, on the other hand, the court voids the rule. The rule is no longer in force, and is in effect wiped off the books.

Since 1946, APA has provided that a reviewing court "shall . . . hold unlawful and set aside" (*i.e.*, vacate) rules found legally defective (5 U.S.C. § 706(2)). A line of case law in the D.C. Circuit holds that these words mean that the court has no discretion but to vacate a rule found legally defective. Many times, the D.C. Circuit accordingly has vacated EPA's rules that the court has found defective. Some judges on the D.C. Circuit have disagreed with this interpretation, however, and have ruled that it is acceptable to remand a defective regulation without vacating it, particularly if vacating

¹² The source for points (iii) and (iv) is EPA's rulemaking docket for the greenhouse gas rulemaking, which is EPA-HQ-OAR-2008-0508. This and all EPA rulemaking dockets can be found at <http://www.regulations.gov>.

the regulation would mean the public health would go unprotected.¹³

The Clean Air Act currently contains no provision dealing with this remand v. vacatur issue. However Section 336 of the bill provides:

If the court determines that any action of the Administrator is arbitrary, capricious, or otherwise unlawful, the court may remand such action, without vacatur, if vacatur would impair or delay protection of the environment or public health or otherwise undermine the timely achievement of the purposes of this Act.

Note that this provision would apply to *all* Clean Air Act rules in the future, not just the new rules the bill would require EPA to promulgate. Thus, assume the bill becomes law and three years from now, an industry group prevails in convincing the D.C. Circuit that a Clean Air Act Section 112 “maximum achievable control technology” (MACT) standard EPA had issued for that industry was without basis in the record and beyond EPA’s statutory authority. The court could decide, under the language of Section 336, merely to remand the standard to EPA. For almost any standard EPA might issue under the Clean Air Act, it might be easy to find that vacatur could “delay” protection of the environment or undermine the “timely achievement” of the Clean Air Act’s purposes. Any affected facility would accordingly be subject to civil and criminal liabilities for violating the illegal standard.

It appears this provision was added to address a brouhaha over the fact that the D.C. Circuit had vacated the Clean Air Interstate Rule in its entirety, even though no party (industry, environmental groups) sought that result. Eventually, when petitions for rehearing showed the court that no party desired vacatur and vacatur

¹³ For an analysis of D.C. Circuit cases on this issue, see Daugirdas, “Evaluating Remand without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings.” *N.Y.U. L. Rev.* 80, no. 1 (2005): 278-311. For more recent D.C. Circuit cases, see *Sierra Club v. EPA*, 479 F.3d 875, 884; 64 ERC 1097 (D.C. Cir. 2007); *NRDC v. EPA*, 489 F.3d 1250, 1261; 64 ERC 1673 (D.C. Cir. 2007).

would have major adverse consequences, the court relented and changed its vacatur order to a remand order. This was, of course, a highly unusual situation.¹⁴

Critics of the remand option have complained that EPA has no deadlines to fix a defective rule under a remand, so that a legally defective rule may remain uncorrected for a long time.¹⁵ The bill attempts to address this concern for delay by including a provision (also in Section 336) requiring that following a remand, EPA must complete its corrective rulemaking action within one year, or “such shorter or longer period” as the court may determine appropriate. While one can anticipate that EPA might often seek and obtain a period longer than a year from the court, it appears that at least with court supervision, responses to remands will move more quickly than they have in the past.

Conclusion

If the bill becomes law, the decades-long debate over the need for federal climate change legislation would be settled. However, advocates on all sides of the issues would have to move their advocacy efforts to the rule-making process, where a whole host of important decisions would still be up for grabs. Resolution of these issues will not happen quickly, as the rulemaking process can be expected to be drawn-out, and judicial review would almost certainly follow. Whenever judicial review produced a vacatur or remand, EPA would be under the gun to conduct follow-up rulemaking activities, and once again advocacy battle lines would be drawn. One can only hope that the climate will remain safe through all this.

¹⁴ *North Carolina v. EPA*, 531 F.3d 896, 901; 67 ERC 1151 (D.C. Cir. 2008) (per curiam); D.C. Cir. Case No. 05-1244, Order of Dec. 23, 2008.

¹⁵ A good example would be EPA’s MACT standards for Portland cement kilns. The D.C. Circuit ruled that the standards were insufficient and remanded them to EPA for further work in 2000 (*National Lime Assn. v. EPA*, 233 F.3d 625; 51 ERC 1737 (D.C. Cir. 2000)). EPA proposed standards in response to the remand five years later (70 Fed. Reg. 72,332, 12/2/05). Final rules still have not been issued.

Appendix

Excerpts from H.R. 2454 Mandating New EPA Regulations with Deadlines

[When the subject of the rulemaking is not clear from the statutory excerpts, a brief identification is included in brackets.]

Page 58 – (§ 112 of bill, adding § 813 to the Clean Air Act)

“(b) REGULATIONS.—Not later than 2 years after the date of enactment of this title, the Administrator shall promulgate regulations to protect human health and the environment by minimizing the risk of escape to the atmosphere of carbon dioxide injected for purposes of geologic sequestration.

Page 87 – (§ 115 of bill, adding § 786 to the Clean Air Act)

“(a) REGULATIONS.—Not later than 2 years after the date of enactment of this title, the Administrator shall promulgate regulations providing for the distribution of emission allowances allocated pursuant to section 782(f), pursuant to the requirements of this section, to support the commercial deployment of carbon capture and sequestration technologies in both electric power generation and industrial operations.

Page 92 – (§ 115 of bill, adding § 786 to the Clean Air Act)

“(2) REGULATIONS.—Not later than 2 years prior to the date on which the capacity threshold identified in subsection (c)(1) is projected to be reached, the Administrator shall promulgate regulations to govern the distribution of emission allowances to the owners or operators of eligible projects under this subsection.

[Distribution of allowances to electric generating units]

Page 108 – (§ 116 of bill, adding § 812 to the Clean Air Act)

“(e) REGULATIONS.—Not later than 2 years after the date of enactment of this title, the Administrator shall promulgate regulations to carry out the requirements of this section.”

[Performance standards for new coal-fired power plants]

Page 138 – (§ 131 of bill – free standing, not amending the Clean Air Act or other statute)

(d) REGULATIONS.—Not later than one year after the date of enactment of this Act, the Administrator shall promulgate regulations to carry out this section, including regulations—

[State Energy and Environmental Development (SEED) Accounts]

Page 505 – (§ 221 of bill, adding § 821 to the Clean Air Act)

“(a) NEW MOTOR VEHICLES AND NEW MOTOR VEHICLE ENGINES.—(1) Pursuant to section 202(a)(1), by December 31, 2010, the Administrator shall promulgate standards applicable to emissions of greenhouse gases from new heavy-duty motor vehicles or new heavy-duty motor vehicle engines, excluding such motor vehicles covered by the Tier II standards (as established by the Administrator as of the date of the enactment of this section). The Administrator may revise these standards from time to time.

Page 510-11 – (§ 222 of bill, adding § 841 to the Clean Air Act)

“(b) TIMING.—The Administrator shall — “(1) publish proposed regulations under subsection (a) not later than 12 months after the date of enactment of this section; and “(2) promulgate final regulations under subsection (a) not later than 18 months after the date of enactment of this section.

[Relating to petitions for designation of additional greenhouse gases]

Page 707 – (§ 311 of bill, adding § 711 to the Clean Air Act)

“(f) REGULATIONS.—Not later than one year after the date of enactment of this title, the Administrator shall promulgate regulations to carry out this section. Such regulations shall include—“(1) requirements for the contents of a petition submitted under subsection (c); “(2) requirements for the contents of a notice required under subsection (e); and “(3) methods and standards for evaluating the carbon dioxide equivalent value of a gas.

[Relating to designation and registration of greenhouse gases]

Page 713 – (§ 311 of bill, adding § 713 to the Clean Air Act)

“(b) REGULATIONS.— “(1) IN GENERAL.—Not later than 6 months after the date of enactment of this title, the Administrator shall issue regulations establishing a Federal greenhouse gas registry.

[This is the rulemaking that EPA has already initiated pursuant to the Boxer-Feinstein amendment of Dec. 26, 2007, as discussed in the article]

Page 734 – (§ 311 of bill, adding § 721 to the Clean Air Act)

“(h) REGULATIONS.—Not later than 24 months after the date of enactment of this title, the Administrator shall promulgate regulations to carry out the provisions of this title.

[Apparently intended as residual regulatory authority for all provisions of what would become new Title VII of the Clean Air Act (“Global Warming Pollution Reduction Program”)]

Page 773 – (§ 311 of bill, adding § 727 to the Clean Air Act)

“(e) REGULATIONS.—Not later than 2 years after the date of enactment of this title, the Administrator shall promulgate regulations to implement this section. To provide for permits required under this section, each State in which one or more stationary sources that are covered entities are located shall submit, in accordance with this section and title V, revised permit programs for approval.

Page 780 – (§ 311 of bill, adding § 732 to the Clean Air Act)

(a) REGULATIONS.—Not later than 2 years after the date of enactment of this title, the Administrator, in consultation with appropriate Federal agencies and taking into consideration the recommendations of the Advisory Board, shall promulgate regulations establishing a program for the issuance of offset credits in accordance with the requirements of this part. The Administrator shall periodically revise these regulations as necessary to meet the requirements of this part.

Page 805 – (§ 311 of bill, adding § 743 to the Clean Air Act)

“(1) REGULATIONS.—Not later than 2 years after the date of enactment of this title, the Administrator, in consultation with the Secretary of State, the Administrator of the United States Agency for International Development, and any other appropriate Federal agency, and taking into consideration the recommendations of the Advisory Board, shall promulgate regulations for implementing this section. Except as otherwise provided in this section, the issuance of international offset credits under this section shall be subject to the requirements of this part.

Page 753 – (§ 311 of bill, adding § 753 to the Clean Air Act)

“(a) REGULATIONS.—Not later than 2 years after the date of enactment of this title, the Administrator, in consultation with the Administrator of USAID and any other appropriate agencies, shall promulgate regulations establishing a program to use emission allowances set aside for this purpose under section 781 to reduce greenhouse gas emissions from deforestation in developing countries in accordance with the requirements of this part.

Page 921 – (§ 321 of bill, adding § 783 to the Clean Air Act)

“(f) REGULATIONS.—Not later than 2 years after the date of enactment of this title, the Administrator, in consultation with the Federal Energy Regulatory Commission, shall promulgate regulations to implement the requirements of this section.

[Establishing a program for electricity consumers]

Page 937 – (§ 321 of bill, adding § 787 to the Clean Air Act)

“(e) REGULATIONS.—Not later than 3 years after the date of enactment of this title, the Administrator, in consultation with the Administrator of the Energy Information Administration, shall promulgate regulations that establish a formula for distributing emission allowances consistent with the purpose of this section.

Page 942 – (§ 321 of bill, adding § 790 to the Clean Air Act)

“(a) IN GENERAL.—Not later than one year after the date of enactment of this title, the Administrator shall issue regulations allowing any person in the United States to exchange greenhouse gas emission allowances issued before December 31, 2011, by the State of California or for the Regional Greenhouse Gas Initiative, or the Western Climate Initiative (in this section referred to as ‘State allowances’) for emission allowances established by the Administrator under section 721(a).

Page 950 – (§ 321 of bill, adding § 792 to the Clean Air Act)

“(e) REGULATIONS.—The Administrator shall issue regulations within 24 months after the date of enactment of this title to implement this section.

[Relating to auctioning of allowances]

Page 965 – (§ 332 of bill, adding § 619 to the Clean Air Act)

Within 24 months after the date of enactment of this section, the Administrator shall amend the regulations under this title (including the regulations referred to in sections 603, 608, 609, 610, 611, 612, and 613) to apply to class II, group II substances.

[Relating to hydrofluorocarbon phase-down]

Page 965-66 – (§ 332 of bill, adding § 619 to the Clean Air Act)

“(b) CONSUMPTION AND PRODUCTION OF CLASS II, 20 GROUP II SUBSTANCES.—“(1) IN GENERAL.—“(A) CONSUMPTION PHASE DOWN.—In the case of class II, group II substances, in lieu of applying section 605 and the regulations there under, the Administrator shall promulgate regulations phasing down the consumption of class II, group II substances in the United States, and the importation of products containing any class II, group II substance, in accordance with this subsection within 18 months after the date of enactment of this section.

[Relating to hydrofluorocarbon phase-down]

Pages 971-72 – (§ 332 of bill, adding § 619 to the Clean Air Act)

“(III) Not later than three years after the date of the initial auction and from time to time thereafter, the Administrator shall determine through rulemaking whether any persons who did not produce or import a class II substance during calendar year 2004, 2005, or 2006 will be permitted to participate in future auctions.

[Relating to hydrofluorocarbon phase-down]

Page 981 – (§ 332 of bill, adding § 619 to the Clean Air Act)

“(A) INITIAL REGULATIONS.—Not later than 18 months after the date of enactment of this section, the Administrator shall promulgate regulations governing the auction of allowances under this section.

[Relating to hydrofluorocarbon phase-down]

Page 986 – (§ 332 of bill, adding § 619 to the Clean Air Act)

“(A) INITIAL REGULATIONS.—Not later than 18 months after the date of enactment of this section, the Administrator shall promulgate regulations governing the payment for allowances purchased in auction and non-auction sales under this section.

[Relating to hydrofluorocarbon phase-down]

Page 989 – (§ 332 of bill, adding § 619 to the Clean Air Act)

“(B) the Administrator shall promulgate regulations within 12 months of the date the United States becomes a party or otherwise adheres to such agreement or amendment, or the date on which such agreement or amendment enters into force, whichever is later, to establish a new baseline for purposes of paragraph (2), which new baseline shall be the original baseline less the carbon dioxide equivalent of the annual average quantity of any class II substances regulated by such agreement or amendment contained in products imported from parties to such agreement or amendment in calendar years 2004, 2005, and 2006;

[Relating to hydrofluorocarbon phase-down]

Page 990 – (§ 332 of bill, adding § 619 to the Clean Air Act)

“(A) CHLOROFLUOROCARBON DESTRUCTION.—Within 18 months after the date of enactment of this section, the Administrator shall promulgate regulations to provide for the issuance of offset credits for the destruction, in the calendar year 2012 or later, of chlorofluorocarbons in the United States.

Page 996 – (§ 332 of bill, adding § 619 to the Clean Air Act)

“(1) IN GENERAL.—The Administrator shall promulgate initial regulations not later than 18 months after the date of enactment of this section, and revised regulations any time thereafter, which establish a schedule for phasing down the consumption (and, if the condition in subsection (b)(1)(B) is met, the production) of class II, group II substances that is more stringent than the schedule set forth in this section if, based on the availability of substitutes, the Administrator determines that such more stringent schedule is practicable, taking into account technological achievability, safety, and other factors the Administrator deems relevant, or if the Montreal Protocol, or any applicable international agreement to which the United States is a party or otherwise adheres, is modified or established to include a schedule or other requirements to control or reduce production, consumption, or use of any class II, group II substance more rapidly than the applicable schedule under this section.

Page 1010 – (§ 332 of bill, amending the Clean Air Act § 609)

“(B) Not later than 18 months after enactment of this subsection, the Administrator shall either promulgate regulations requiring that containers which contain less than 20 pounds of a class II, group II substance be equipped with a device or technology that limits refrigerant emissions and leaks from the container and limits refrigerant emissions and leaks during the transfer of refrigerant from the container to the motor vehicle air conditioner or issue a determination that such requirements are not necessary or appropriate.

Pages 1010-11 – (§ 332 of bill, amending the Clean Air Act § 609)

“(C) Not later than 18 months after enactment of this subsection, the Administrator shall promulgate regulations establishing requirements for consumer education materials on best practices associated with the use of containers which contain less than 20 pounds of a class II, group II substance and prohibiting the sale or distribution, or offer for sale or distribution, of any class II, group II substance in any container which contains less than 20 pounds of such class II, group II substance, unless consumer education materials consistent with such requirements are displayed and available at point-of sale locations, provided to the consumer, or included in or on the packaging of the container which contain less than 20 pounds of a class II, group II substance.

Pages 1014-15 – (§ 333 of bill, adding § 851 to the Clean Air Act)

“(a) DOMESTIC BLACK CARBON MITIGATION.—Not later than 18 months after the date of enactment of this section, the Administrator, taking into consideration the public health and environmental impacts of black carbon emissions, including the effects on global and regional warming, the Arctic, and other snow and ice-covered surfaces, shall propose regulations under the existing authorities of this Act to reduce emissions of black carbon or propose a finding that existing regulations promulgated pursuant to this Act adequately regulate black carbon emissions. Not later than two years after the date of enactment of this section, the Administrator shall promulgate final regulations under the existing authorities of this Act or finalize the proposed finding. Such regulations shall not apply to specific types, classes, categories, or other suitable groupings of emissions sources that the Administrator finds are subject to adequate regulation.

Page 1093 – (§ 401 of bill, adding § 763 to the Clean Air Act)

“(b) ELIGIBLE INDUSTRIAL SECTORS.— “(1) IN GENERAL.—Not later than June 30, 2011, the Administrator shall promulgate a rule designating, based on the criteria under paragraph (2), the industrial sectors eligible for emission allowance rebates under this subpart.

Page 1105 – (§ 401 of bill, adding § 764 to the Clean Air Act)

“(C) NEW ENTITIES.—Not later than 2 years after the date of enactment of this title, the Administrator shall issue regulations governing the distribution of emission allowance rebates for the first and second years of operation of a new entity in an eligible industrial sector.