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Clean Air Act Issues in the 107th Congress

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SUMMARY

As the 107th Congress convenes, a new Administration, a new Chairman of the House Commerce Committee, and possible new leadership of the Senate Environment clean air subcommittee may all affect congressional attitudes and priorities regarding air quality issues. A number of air issues from the 106th Congress remain on the new Congress's agenda. How these are dealt with should give early indications of the new leadership's views and priorities.

Since mid-1999, bills to diminish the use of MTBE, a gasoline additive, have been at the top of the clean air agenda. MTBE is used to meet Clean Air Act requirements that gasoline sold in the nation's worst ozone nonattainment areas contain at least 2% oxygen, but the additive has been implicated in numerous incidents of ground water contamination. On September 28, 2000, the Senate Environment and Public Works Committee reported S. 2962 to ban MTBE use, waive the oxygen requirement, and provide additional funding for ground water cleanup (S.Rept. 106-426), but no further action was taken.

Revisions to the air quality standards for ozone and particulates, promulgated by the Environmental Protection Agency in 1997, may also command renewed attention in the 107th Congress. The standards were challenged in the courts, and implementation is currently in limbo, pending resolution of appeals to the Supreme Court. The Court heard oral arguments November 7, 2000, and a decision is expected in spring 2001. The decision is likely to stimulate congressional oversight, and perhaps legislation.

A third set of issues on the congressional agenda concerns recent efforts by EPA to control emissions from coal-fired power plants. In addition to implementing acid rain controls targeting sulfur dioxide emissions from such plants, the Agency has promulgated new rules to control nitrogen oxide emissions, has initiated enforcement actions against several major utilities, and has announced plans to regulate mercury emissions. Electric utilities are also major sources of the leading "greenhouse" gas, carbon dioxide, as yet unregulated. Many parties in industry, the Congress, and in both the outgoing and incoming Administrations have suggested the time is ripe for comprehensive, multi-pollutant legislation to regulate utility emissions.

The last Congress also expressed an interest in the degree to which plans for new highways must conform to emission budgets under the Clean Air Act. This "conformity" issue may also remain on the agenda.

Congress last enacted major amendments to the Clean Air Act in 1990, and EPA is still implementing numerous provisions of those amendments. Recent efforts include development of tighter emission standards for diesel engines and fuels, implementation of controls on sources of 188 air toxics, and review of state implementation plans for attaining ozone air quality standards. EPA decisions regarding implementation of these and other programs mandated by the Clean Air Act will provide opportunities for oversight and possible legislation in the 107th Congress.

Note: This Issue Brief does not discuss the greenhouse effect or most issues related to global climate change. For a discussion of those issues, see CRS Issue Brief IB89005, *Global Climate Change*, updated regularly.

MOST RECENT DEVELOPMENTS

On December 21, 2000, EPA Administrator Carol Browner signed final rules requiring emission reductions of greater than 90% from diesel engines, beginning in Model Year 2007. To facilitate the use of new pollution control equipment, the rules also require a 97% reduction in allowable sulfur in highway diesel fuel, beginning in mid-2006.

On October 27, 2000, the President signed H.R. 4635 (P.L. 106-377), the VA-HUD-Independent Agencies appropriation for FY2001. The bill prohibits the Environmental Protection Agency from designating ozone nonattainment areas prior to a decision by the Supreme Court in American Trucking Associations v. EPA*, or June 15, 2001, whichever occurs first. The action was intended to prohibit the Agency from moving forward with implementation of its new 8-hour ozone standard before the Supreme Court decides a case challenging the Agency's authority to promulgate the standards. Oral arguments in the case were heard November 7. The appropriation bill also delays for one year the application of transportation conformity requirements after any such areas are designated.*

BACKGROUND AND ANALYSIS

The Clean Air Act requires the Environmental Protection Agency (EPA) to establish minimum national standards for air quality, and assigns primary responsibility to the states to assure compliance. Areas not meeting the standards, referred to as nonattainment areas, are required to implement specified air pollution control measures. The Act requires federal emission standards for autos and other mobile sources of air pollution, for sources of 188 hazardous air pollutants, and for sources of acid rain. It establishes a comprehensive state-run permit system for all major sources of air pollution. It also addresses the prevention of pollution in areas with clean air, as well as protection of the stratospheric ozone layer.

The last comprehensive amendments to the Act, enacted November 15, 1990 (P.L. 101-549), included the program to control acid rain, new standards for emissions of hazardous air pollutants, new requirements for motor vehicles and fuels; stringent new requirements for nonattainment areas; and the comprehensive permit program.

Many of these provisions (notably the acid rain and air toxics provisions, and some of the requirements for autos and fuels) were strenuously debated, but most have not been subject to controversy since enactment. The new provisions on acid rain, air toxics, and automobiles have generally been implemented on schedule, in many cases at less cost than anticipated. There have also been noticeable improvements in air quality in recent years: of 98 metropolitan areas not attaining the 1-hour ozone standard in 1990, two-thirds now do so. Even greater progress has been achieved with carbon monoxide: 36 of the 42 areas not in attainment in 1990 now meet the standard. Nevertheless, major controversies remain concerning implementation of the Act.

Issues in the 107th Congress

At least five air quality issues are on the agenda at the outset of the 107th Congress: 1) whether Congress should modify Clean Air Act requirements that have led to the use of a substance called MTBE in gasoline, in response to a growing number of ground water contamination incidents involving the substance; 2) how or whether Congress should respond to a Supreme Court decision expected in spring 2001 regarding the setting of air quality standards; 3) whether Congress should enact new legislation to address in a comprehensive fashion emissions from coal-fired electric power plants; 4) whether Congress should respond to new EPA regulations governing diesel engines and fuel; and 5) whether Congress should modify the sanction and conformity provisions of the Clean Air Act, which seek to ensure state and local government compliance with the Act's planning provisions.

MTBE and Reformulated Gasoline

Whether Congress should modify the requirements of the reformulated gasoline program or regulate use of the substance MTBE in gasoline in response to incidents of ground water contamination by the substance is an issue that has grown in importance over the last four years. Under the Clean Air Act Amendments of 1990, numerous areas with poor air quality are required to add chemicals called "oxygenates" to gasoline as a means of improving combustion and reducing emissions. The Act has two programs that require the use of oxygenates, but the more significant of the two is the reformulated gasoline (RFG) program, which took effect January 1, 1995. Under the RFG program, areas with "severe" or "extreme" ozone pollution (82 counties with a combined population of 55 million) must use reformulated gas; areas with less severe ozone pollution may opt into the program as well, and many have. In all, portions of 17 states and the District of Columbia use RFG, and a little more than 30% of the gasoline sold in the United States is RFG.

The law requires that RFG contain at least 2% oxygen by weight. Refiners can meet this requirement by adding a number of ethers or alcohols, any of which contains oxygen and other elements. By far the most commonly used oxygenate is MTBE. In 1999, 87% of RFG contained MTBE. MTBE has also been used since the late 1970s in non-reformulated gasoline, as an octane enhancer, at lower concentrations. As a result, gasoline with MTBE has been used virtually everywhere in the United States, whether or not an area has been subject to RFG requirements.

State and local environmental agencies and EPA attribute marked improvements in air quality to the use of oxygenated and reformulated gasoline. The improvements in air quality have not come without controversy. In Alaska and Wisconsin, residents complained of a wide array of effects, including headaches, dizziness, nausea, sore eyes, and respiratory irritation, from exposure to gasoline/MTBE exhaust, before refiners switched to alternative gasoline formulations using ethanol. MTBE from a number of sources, including leaking underground storage tanks, has also been linked to contamination of drinking water supplies.

For a variety of reasons, concerns over MTBE have focused on California for much of the past 4 years. California has the most extensive reformulated gasoline requirements in the country, with state requirements separate and in addition to the federal. In addition, it has experienced the most significant contamination of drinking water by MTBE. The incidents

of drinking water contamination led the state legislature in October 1997 to enact legislation to require state standards for MTBE in drinking water and to require the University of California (UC) to conduct a study of the health and environmental effects of MTBE. The UC report, issued in November 1998, recommended a gradual phase-out of MTBE use in the state. Based on the report and on subsequent public hearings, on March 25, 1999, Governor Davis of California signed an Executive Order to require a phase-out of MTBE use in the state by December 31, 2002, and requested a waiver of federal requirements to use oxygenates in reformulated gasoline. (Seven other states – Iowa, Arizona, Colorado, New York, Connecticut, Michigan, and Minnesota – have subsequently passed legislation to limit or phase out MTBE.)

The California request for a waiver of the oxygen requirement resulted in months of negotiation between EPA and the state, with EPA initially expressing skepticism that it had authority to grant a waiver under the circumstances. Nearly 2 years later, a decision on the request is still awaited. Without a waiver, ozone nonattainment areas in the state would be required to substitute another oxygenate (most likely, ethanol) when the MTBE ban takes effect.

In response to concerns over MTBE, EPA Administrator Carol Browner appointed a Blue-Ribbon Panel on Oxygenate Use in Gasoline, composed of industry representatives, state and local officials, environmentalists, academics, and others. In July 1999, the panel recommended that Congress remove the RFG program's oxygenate requirement and clarify state authority to regulate gasoline components. Subsequently, on August 4, 1999, the Senate adopted by voice vote Senator Boxer's amendment to the FY2000 Agriculture appropriations bill (S. 1233) expressing the sense of the Senate that use of MTBE should be phased out. Since then, congressional committees have conducted hearings and marked up MTBE legislation, but floor action on legislation to change the Clean Air Act requirements or ban the substance has not occurred.

The principal issues for Congress are whether Clean Air Act provisions concerning oxygenate use in reformulated gasoline should be waived to allow refiners to discontinue or lessen their use of MTBE and whether stronger steps, such as a ban on MTBE use, should be considered. Legislation to provide a waiver for California refiners (H.R. 11 / S. 266) had the nearly unanimous support of that state's congressional delegation in the 106th Congress. The legislation would have removed the oxygenate requirement for refiners and marketers of RFG provided that the fuel continued to meet all performance (i.e., emission reduction) standards. The bill would have applied in California only — not in other states.

The House Commerce Subcommittee on Health and Environment approved H.R. 11, with an amendment, September 30, 1999. Amendments to phase out the use of MTBE, to apply the bill's provisions to areas outside California, and to address international trade issues related to MTBE phase-out were offered and withdrawn during markup. A hearing on these issues was held March 2, 2000, by the Health and Environment Subcommittee. Separate legislation allowing additional flexibility in all states was also introduced, as were numerous bills that would phase-out or ban the use of MTBE in gasoline.

While support for waiving the oxygen requirement now is widespread among environmental groups, the petroleum industry, and states, a potential obstacle to enacting legislation lies among agricultural interests. About 6% of the nation's corn crop is used to

produce a competing oxygenate, ethanol. If MTBE use is reduced or phased out, but the oxygen requirement remains in effect, ethanol use would likely soar, increasing demand for corn. Conversely, if the oxygen requirement is waived by EPA or legislation, not only would MTBE use decline, but so, likely, would demand for ethanol. Thus, Members of Congress and Governors from corn-growing states have taken a keen interest in MTBE legislation. Unless their interests are addressed, they might pose a potent obstacle to its passage.

Reflecting these dual concerns, EPA Administrator Carol Browner and Agriculture Secretary Dan Glickman called on Congress at a press conference, March 20, 2000, to amend the Clean Air Act to "significantly reduce or eliminate" the use of MTBE and to require the use of ethanol in all gasoline. EPA also announced that it would begin the process of requiring a phase-out of MTBE under Section 6 of the Toxic Substances Control Act, a process likely to take "several years" in EPA's estimation.

Legislation to mandate the use of ethanol while allowing limits on MTBE use (S. 2503 and S. 2971) was subsequently introduced in the 106th Congress, and Senator Smith of New Hampshire, Chairman of the Environment and Public Works Committee, introduced S. 2962, which preserved a role for ethanol as well. The committee ordered Senator Smith's bill reported with an amendment in the nature of a substitute on September 7. (The report [S.Rept. 106-426] was filed September 28.) This legislation is considered a possible starting point for debate on the MTBE issue in the 107th Congress.

As reported, the bill would have given the EPA Administrator authority to phase down use of MTBE in gasoline. Whether or not the Administrator used this authority, the bill would have banned MTBE use within 4 years of enactment. The bill allowed Governors to waive the RFG program's oxygenate requirement, and would have set new standards for toxic substance and aromatic content of RFG in areas where the waiver was exercised. It would have stimulated the use of ethanol and clean vehicles: each fuel supplier would have had the option of using an increasing percentage of renewable fuel (ethanol) in each year between 2002 and 2011, or could have used credits generated by the manufacture and sale of zero emission or "super ultra low" emission vehicles. The report noted that this requirement could nearly triple the consumption of ethanol by 2011. The bill would have provided additional authority to EPA to regulate fuel additives and emissions. It also would have authorized a one-time appropriation of $200 million from the Leaking Underground Storage Tank Trust Fund to clean up MTBE leaks from tanks, and authorized another $200 million over 6 years for states to use to oversee and enforce tank leak prevention and detection regulations.

As the deadlines for state phaseout of MTBE move closer, investment decisions involving hundreds of millions of dollars hang on the regulatory framework of the post-MTBE gasoline market. Thus, pressure for congressional action on this issue is likely to be high in the 107th Congress. Whether this pressure will produce enacted legislation is less clear. (For additional discussion of the MTBE issue, see CRS Report 98-290, *MTBE in Gasoline: Clean Air and Drinking Water Issues*.)

Implementation of the National Ambient Air Quality Standards

Another issue that Congress has followed closely for some time is that of the revised air quality standards promulgated by EPA in 1997. The standards have been challenged in the courts, with the case reaching the Supreme Court in the current term. How or whether

Congress should respond to a Supreme Court decision regarding the standards could be a major issue later this year.

Under the Clean Air Act, EPA sets national standards for ambient (outdoor) air quality and is directed to review the standards every 5 years. On July 18, 1997, the Agency completed its review of two of the six standards, promulgating a new standard for fine particulates (referred to as $PM_{2.5}$) and revised standards for ozone and coarse particles (PM_{10}). (For background on the standards, see CRS Report 97-8, *Air Quality: Background Analysis of EPA's 1997 Ozone and Particulate Matter Standards*.)

The net impact of the promulgated standards would be increased stringency. For the new ozone standard, 332 counties have pollutant concentrations above the standard, as compared to 189 counties under the old standard. The new particulate standard is expected to bring at least 100 new counties into nonattainment status, as well. Such an increase in the number of nonattainment areas would have broad implications for the states, affected industries, economic sectors such as agriculture and transportation, and individuals. As a result, Congress has remained interested in the standards and decisions regarding their implementation, and numerous groups have sued EPA to overturn them.

On May 14, 1999, the U.S. Court of Appeals for the D.C. Circuit, in a case filed by the American Trucking Associations and other plaintiffs, remanded both the ozone and particulate standards to EPA. In a split decision (2-1), the court ruled that EPA had unconstitutionally usurped legislative powers. In Sections 108 and 109 of the Clean Air Act, Congress directed EPA to establish ambient air quality standards necessary to protect public health with an adequate margin of safety. But the court found that EPA exercised legislative discretion in actually setting the ozone and PM standards, since it was not clear from the statute or from EPA's interpretation of it where the standard should be set. "Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no 'intelligible principle' to channel its application of these factors; nor is one apparent from the statute," according to the opinion.

The court also considered several other issues — rejecting five arguments the plaintiffs made regarding both standards, but finding in favor of the plaintiffs on various issues specific to one or the other standard. Regarding ozone, the court ruled that the 1990 Clean Air Act Amendments preclude EPA from enforcing a revised ozone standard as a result of language in Section 181(a) that requires all nonattainment areas to be classified on the basis of the old 1-hour ozone standard. The court also held that the Agency erred in not considering possible benefits of ground-level ozone in its analysis of the health effects of the pollutant. Regarding particulates, the court concluded that EPA's choice of PM_{10} as the indicator for coarse particles was arbitrary and capricious. The court concluded that there was "ample support" for the Agency's decision to regulate coarse particles, but argued that the Agency needed to choose an indicator such as $PM_{10-2.5}$ (particles smaller than 10 microns but larger than 2.5) rather than PM_{10} (all particles smaller than 10 microns, including fine particles) in its regulations aimed to control the coarse fraction.

The 105th Congress held a number of oversight hearings on standards-related issues and enacted legislation (P.L. 105-178, Title VI) to address some of the concerns raised. The legislation codified EPA's announced implementation schedule, giving the Agency until July

2000 to designate ozone nonattainment areas and December 2005 to designate $PM_{2.5}$ areas. Despite remanding the standards to EPA, the Appeals Court left these deadlines for designation of nonattainment areas intact.

Designation of areas as nonattainment sets in motion more stringent requirements for permits and a requirement that plans for transportation projects demonstrate that they will "conform" to the area's plan to attain the air quality standard. As a result, many in Congress expressed concern that EPA was moving ahead with the designation process, arguing that designation would force state and local governments and the private sector to dedicate resources toward meeting standards that could be rendered null and void by the courts. On June 21, 2000, Representatives Collins and Linder offered an amendment to the VA-HUD-Independent Agencies Appropriation for FY 2001(H.Amdt. 859 to H.R. 4635) to prohibit EPA from using any funds in the bill prior to June 15, 2001 to designate nonattainment areas under the 8-hour ozone standard. The amendment passed, 225-199. An amendment by Senator Boxer (S.Amdt. 4308), to strike the language from the Senate version of the bill, failed, 63-32, on October 12. The final version of the bill, which was signed into law October 27, 2000 (P.L. 106-377), prohibits designating 8-hour ozone nonattainment areas prior to a Supreme Court decision or June 15, 2001, whichever occurs first. The conferees also agreed to language delaying the application of conformity requirements until one year after an area is designated nonattainment.

Meanwhile, the case has continued to move through the courts. After reviewing the appeals court's May 1999 decision, EPA and the Department of Justice decided to appeal the ruling. Since numerous environmental statutes give discretion to the EPA Administrator similar to that termed unconstitutional in this decision, the decision — if left unchallenged — could reshape dramatically EPA's authority to promulgate regulations. Acting on EPA's behalf, the Justice Department requested a rehearing by the full (en banc) Court of Appeals; the court rejected that request October 29, 1999. An appeal to the Supreme Court was accepted on May 22, 2000, however, with oral argument scheduled for November 7. On May 30, the Court also accepted an appeal from the American Trucking Associations and the U.S. Chamber of Commerce, who asked the Court to determine whether EPA must ignore non-health factors, including cost, when it sets National Ambient Air Quality Standards. Oral argument on this appeal also took place November 7. A decision is expected in spring 2001. (For a further discussion of the appeals court ruling, see CRS Report RS20228, *Clean Air Standards: the Supreme Court Agrees to Review American Trucking Associations v. EPA*, December 5, 2000.)

Congress will almost certainly wish to consider the implications of a Supreme Court decision in this case. Thus, oversight hearings are likely following the court's ruling.

Emissions from Coal-Fired Power Plants

Over the past several years, EPA has taken numerous regulatory and enforcement actions to reduce emissions from coal-fired electric power plants. The regulation of sulfur dioxide and some nitrogen oxide emissions to reduce acid precipitation, required under Title IV of the Clean Air Act, had statutory deadlines in 1995 and 2000. The other regulatory actions are expected to be implemented beginning in 2003 or 2004.

The number and variety of the prospective regulations has suggested to many in industry, the Congress, and in both the outgoing and incoming Administrations that the time may be ripe for comprehensive, multi-pollutant legislation to regulate utility emissions. These other actions include:

- the Ozone Transport Rule (also called the "NOx SIP call") promulgated by EPA on October 27, 1998. It requires power plants in 21 eastern states and the District of Columbia to reduce emissions of nitrogen oxides during the summer ozone season, beginning May 31, 2004;

- petitions under Section 126 of the Act, four of which were approved by EPA on January 18, 2000. These require the same actions to control emissions of NOx by a subset of the NOx SIP call utilities in 12 states and D.C., beginning in May 2003;

- enforcement actions against nine utilities alleging that they modified existing power plants without installing the best adequately demonstrated emission control technology, in violation of Section 111 of the Act (the "New Source Review" requirement). Three of these suits have been settled as of December 2000, with utilities agreeing in each case to spend at least $1 billion on pollution reductions over the coming decade; and

- a decision announced in December 2000 to go forward with regulation of mercury from electric utilities, using authority under Section 112 of the Act. These regulations are expected to be proposed in 2003, with an effective date of 2007 or 2008.

In addition to the above actions, two other uncertainties regarding pollution controls could affect coal-fired electric power plants. Electric utilities are major sources of the leading "greenhouse" gas, carbon dioxide (CO_2), which is, as yet, unregulated. Substantial controversy surrounds implementation of measures to reduce greenhouse gas emissions (particularly measures that could be seen as implementing the Kyoto Protocol on Global Climate Change, which has not been presented to the Senate for consideration); but the United States is voluntarily committed under an earlier treaty ratified by the Senate in 1992 (the United Nations Framework Convention on Climate Change) to reduce emissions of greenhouse gases to the levels emitted in 1990. As a result, utilities fear that CO_2 regulation lies somewhere in their future. Legislative proposals increasingly see regulation of carbon dioxide as part of any comprehensive approach to the regulation of utility emissions.

Whether to regulate more stringently coal-fired power plants has also arisen as an issue in the debate over deregulation of electricity markets. In the Northeast, the prospect of economic deregulation of electricity utilities has raised fears that older coal-fired Midwestern power plants with fewer emission control requirements may be able to sell electricity more cheaply than gas- and oil-fired plants in the Northeast, which tend to meet stricter emission standards. Thus, Northeastern Senators and Representatives tend to favor stricter emission controls for electric utilities as a necessary part of an electric restructuring legislation.

In the Congress, leading Republicans and Democrats, including Senator Bob Smith of New Hampshire, Chairman of the Environment and Public Works Committee, and Senators

Leahy and Jeffords of Vermont, as well as Representatives Henry Waxman and Sherwood Boehlert in the House, have introduced or plan to introduce legislation to control a broad spectrum of power plant emissions. Senator Smith announced in a statement December 18, 2000, that a four-pollutant utility emissions bill will be among his top priorities in the 107th Congress. Both President Clinton and Governor Bush have also recently stated their support for a four-pollutant approach to electric utility regulation. (For additional information on regulation of electric utility emissions, see CRS Report RS20553, *Air Quality and Electricity: Initiatives to Increase Pollution Controls.* For legislation introduced in the 106th Congress, see CRS Report RS20326, *Electricity Restructuring and Air Quality: Comparison of Proposed Legislation*.)

Regulation of Diesel Fuel / Emissions

Another issue raised in the last Congress that is likely to be of continuing interest early in the 107th is the regulation of diesel engines and fuel. A Senate Environment and Public Works subcommittee held oversight hearings on proposed EPA rules on this subject in June and September, 2000. On December 21, 2000, the EPA signed final rules, similar in most respects to those that the Agency had proposed. Powerful industries, including petroleum refiners and marketers and most elements of the trucking industry, are strongly opposed to the new rule, and at least one senator has suggested that the rule should be disapproved under the provisions of the Congressional Review Act. Thus, at the least, some congressional oversight of the Agency's decision is expected early in the new Congress.

Diesel emissions have been among the least regulated major sources of air pollution. While automobiles have been required to reduce emissions more than 90% since the 1970s and face even tighter controls under standards promulgated February 10, 2000, diesel emissions faced relatively few controls until the 1990s.

On May 17, 2000, EPA began the latest and most far-reaching step in changing this situation, proposing a greater than 90% reduction in allowable emissions from new diesel engines beginning in 2007. Because sulfur interferes with the effectiveness of the likely emission control technologies, the Agency also proposed a 97% reduction in the allowable sulfur content of diesel fuel, from 500 to 15 parts per million (ppm), effective in June 2006.

Engine manufacturers and manufacturers of emission control equipment were largely satisfied with the proposed rule, but refiners, service station owners, and the trucking industry have generally argued that achieving the proposed fuel standards would be difficult and costly, could result in refinery closures, and could cause shortages of diesel fuel. Instead of 15 ppm, trade associations representing refiners have backed a 50 ppm sulfur standard; EPA and the engine manufacturers say that would not be sufficiently stringent to permit optimal operation of pollution controls. EPA agrees that meeting the sulfur reduction standard will result in increased cost, but places the cost at 3-4 cents per gallon, vs. estimates of price spikes as high as 15 to 50 cents per gallon by some in industry.

As EPA's proposal noted, "The diesel engine is a vital workhorse in the United States, moving much of the nation's freight, and carrying out much of its farm, construction, and other labor." As a result, this proposal affects an unusually large number of economic sectors, and has generated substantial controversy. The Agency held five public hearings in New York, Chicago, Atlanta, Los Angeles, and Denver during the month of June 2000, took

public comments until August 14, and negotiated with interested parties inside and outside the Administration before reaching its final decision in December.

While some have suggested that the Congressional Review Act could be invoked to overturn the Agency's decision, it is not clear that the new Administration would want so controversial a step to mark its first months in office. Absent the Administration's support, the odds against congressional action would appear formidable. Continued congressional oversight of the rules and their implementation is considered likely, however.

Sanctions and "Conformity"

A final air quality issue that might be on the agenda of the 107th Congress is whether Congress should modify the sanction and conformity provisions of the Clean Air Act, which seek to ensure state and local government compliance with the Act's planning provisions, making continued funding of federal highway projects dependent on the approval and implementation of such plans.

Two Clean Air Act provisions can result in denial of federal highway funding to local areas: sanctions and a lapse in what is called "conformity." The sanction authority is found in Sections 179 and 110(m) of the Act. Under these sections, the EPA Administrator is required to impose highway fund and other sanctions on areas 18 - 24 months after reaching a finding that an area has not submitted or not implemented adequate plans to attain air quality standards. The Act authorizes EPA to use two types of sanctions: 1) imposing what are called "2:1 offsets" on new or modified sources of emissions; and 2) withholding certain federal highway funds. Under the sanction regulations, EPA first imposes the offset sanction, 18 months after reaching a finding (unless the deficiency has been corrected). If the deficiency has still not been corrected 6 months later, both sanctions are applied. It is not failure to attain air quality standards that leads to sanctions, but failure to submit an acceptable plan or to implement the measures identified therein.

When highway fund sanctions are imposed, not all funding is affected. Projects are exempt from sanctions when the Department of Transportation determines that the principal purpose is an improvement in safety. In addition, despite sanctions, DOT may approve several types of projects geared toward improvement of air quality, including transit projects, HOV lanes, breakdown lanes, projects to improve traffic flow, and park-and-ride lots.

The threat of sanctions is a powerful tool; but, perhaps because the threat is powerful, the imposition is a rare event. Since 1990, only 2 areas have had highway sanctions imposed.

Conformity requirements, found in Section 176 of the Act, have been invoked more frequently. This section prohibits federal departments and agencies from approving, permitting, or providing financial support to transportation improvements in areas that have not attained air quality standards, unless such improvements conform with the State Implementation Plan for achieving air quality. Conformity determinations are also a powerful tool — one meant to integrate transportation and air quality planning. Areas in 29 states have experienced a lapse of conformity at some time since 1993, and 5 areas, the largest of which is Atlanta, currently have lapsed conformity.

Conformity lapses operate in a fashion similar, in some respects, to highway fund sanctions. As with sanctions, exceptions are provided for highway projects that will improve safety or air quality. Further limiting their impact, conformity lapses, until recently, were applied only to new projects. In many cases, an area simply waited until the next revision of its Transportation Improvement Program (TIP) or its State Implementation Plan to revise the proposed project or through other measures return to conformity. Thus, until recently, few areas lost funding despite a conformity lapse.

On March 2, 1999, however, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Clean Air Act limits grandfathering of funding in conformity situations, overturning EPA's regulations. This action considerably raised the stakes for Atlanta and other areas that are subject to a conformity lapse, denying federal funding for billions of dollars in highway projects that were ready for construction. EPA and the Department of Transportation subsequently reached agreement on procedures to implement the court's decision, and the Agency announced on April 16, 1999, that it would not appeal the decision.

That decision and another case involving the St. Louis area aroused congressional interest in the sanctions and conformity issues. Seven bills were introduced in the 106th Congress to repeal the highway fund sanction provisions, restore the grandfather provisions of the conformity rule, or provide funding to certain transportation projects during a conformity lapse.

The Senate Environment and Public Works Committee held a hearing on the conformity issue July 14, 1999, and reported S. 1053, with substantial amendments, February 2, 2000. As amended, the bill would have restored the grandfather provisions in effect prior to the March 1999 court decision for a period of one year while EPA wrote new regulations. The bill also stipulated that certain projects, including any project approved prior to the court decision, could be implemented even if conformity lapsed. It would have established new requirements regarding approval of emissions budgets by EPA, allowed the use of non-federal funds for right-of-way acquisition and highway design during periods of conformity lapse, and delayed the application of conformity to areas that might be designated nonattainment under the pending 8-hour ozone standard. No further action was taken on the bill.

Whether sanctions and conformity will continue to be issues in the 107th Congress remains to be seen. A provision delaying for one year the application of conformity in areas newly designated nonattainment was attached to the VA-HUD-Independent Agencies FY2001 appropriation (H.R. 4635), which was signed by the President, October 27, 2000 (P.L. 106-377). This measure may have addressed the conformity issue of broadest potential impact. The specific problems faced by Atlanta and St. Louis have also been largely resolved, through local negotiations. In these circumstances, it is unclear whether Congress will continue its interest, or will consider the issues settled. (For additional background on sanctions and conformity, see CRS Report RL30131, *Highway Fund Sanctions and Conformity Under the Clean Air Act*, updated October 15, 1999.)

LEGISLATION

This selective list of legislation from the 106th Congress includes enacted bills and legislation on topics discussed in this Issue Brief.

P.L. 106-40, S. 880 (Inhofe)

Amends the Clean Air Act to remove flammable fuels from the list of substances with respect to which reporting and other activities are required under the risk management plan program of Section 112(r). Introduced April 26, 1999; referred to Committee on Environment and Public Works. Reported, amended, June 9, 1999 (S.Rept. 106-70). Passed Senate June 23, 1999. Passed House, amended, July 21, 1999. Senate agreed to House amendments, August 2, 1999. Signed into law August 5, 1999.

P.L. 106-377, H.R. 4635 (Walsh)

H.Amdt. 859 to this bill, which makes appropriations for the Departments of Veterans Affairs and Housing and Urban Development, and for independent agencies (including EPA) for the fiscal year ending September 30, 2001, as further modified by conferees, would prohibit EPA from designating nonattainment areas under the 8-hour ozone air quality standard prior to a decision by the Supreme Court in *American Trucking Associations v. EPA*, or June 15, 2001, whichever occurs first. Bill was reported as an original measure, June 12, 2000 (H.Rept. 106-674). H.Amdt. 859 and bill passed House, June 21, 2000. Received in the Senate and referred to the Committee on Appropriations, June 22. Reported, September 13, 2000 (S.Rept. 106-410). S.Amdt. 4308, to strike prohibition on designation, defeated, October 12, 2000. Bill passed Senate, October 12, 2000. Conference report (H.Rept. 106-988) filed October 18. Conference report also included language delaying the application of conformity requirements until one year after an area is designated nonattainment. House and Senate agree to conference report, October 19, 2000. Signed into law (P.L. 106-377) October 27, 2000.

H.R. 11 (Bilbray)

Amends the Clean Air Act to permit exclusive application of California state regulations regarding reformulated gasoline in federal RFG areas within the state. Introduced January 6, 1999; referred to Committee on Commerce. Hearing held, May 6, 1999, by Subcommittee on Health and Environment. Approved, amended, by Subcommittee on Health and Environment, September 30, 1999.

H.R. 25 (Boehlert)

To reduce acid deposition by requiring additional controls on sources of sulfur dioxide and nitrogen oxides and to provide for a study and controls on emissions of mercury. Introduced January 6, 1999; referred to Committee on Commerce.

H.R. 657 (Sweeney)

To reduce acid deposition. Similar to H.R. 25. Introduced February 9, 1999; referred to Committee on Commerce.

H.R. 1367 (Franks)

Amends the Clean Air Act to prohibit the use of the fuel additive MTBE in gasoline. Introduced April 12, 1999; referred to Committee on Commerce.

H.R. 1398 (Pombo)

Amends the Clean Air Act to prohibit the use of the fuel additive MTBE in gasoline. Introduced April 14, 1999; referred to Committee on Commerce.

H.R. 1626 (Baker)

Amends the Clean Air Act to repeal the highway fund sanctions. Introduced April 29, 1999; referred to Committee on Commerce.

H.R. 1705 (Pallone)

Amends the Clean Air Act to waive the oxygenate requirement for reformulated gasoline and to phase out the use of the fuel additive MTBE in gasoline; requires a study by the National Academy of Sciences on the health and environmental effects of all gasoline oxygenates. Introduced May 5, 1999; referred to Committee on Commerce.

H.R. 1876 (Talent)

Amends the Clean Air Act to incorporate the grandfather provisions of the transportation conformity regulations, as in effect on March 1, 1999. Introduced May 19, 1999; referred to Committee on Commerce.

H.R. 2667 (Allen)

Omnibus Mercury Emissions Reduction Act of 1999. Amends the Clean Air Act to establish requirements for operation of fossil fueled electric utility generators, commercial and industrial boilers, incinerators, chlor-alkali plants, and Portland cement plants to reduce mercury emissions. Introduced August 2, 1999; referred to Committee on Commerce.

H.R. 2900 (Waxman)

Clean Smokestacks Act of 1999. Amends the Clean Air Act to require reductions in emissions of sulfur dioxide, nitrogen oxides, mercury, and carbon dioxide from electric power plants and to subject older power plants to New Source Performance Standards. Introduced September 21, 1999; referred to Committee on Commerce.

H.R. 2980 (Allen)

Clean Power Plant Act of 1999. Amends the Clean Air Act to require reductions in emissions of sulfur dioxide, nitrogen oxides, mercury, carbon dioxide, and hazardous air pollutants from electric power plants and to provide assistance for workers and communities adversely affected by reduced consumption of coal. Introduced September 30, 1999; referred to Committees on Commerce, on Education and the Workforce, on Transportation and Infrastructure, on Banking and Financial Services, and on Science.

H.R. 3449 (Greenwood)

Amends the Clean Air Act to provide that petitioning states may waive the requirements concerning the oxygen content of RFG and to provide for a scheduled phasedown of MTBE use. Introduced November 18, 1999; referred to Committee on Commerce.

H.R. 3583 (Linder)

Amends the Clean Air Act to exempt mass transit projects from the conformity determinations required under Section 176(c) of the Act. Introduced February 8, 2000; referred to Committee on Commerce.

H.R. 3686 (Lewis)

Amends the Clean Air Act and titles 23 and 49, U.S. Code, to provide for continued authorization of funding of transportation projects after a lapse in transportation conformity. Introduced February 16, 2000; referred to Committees on Commerce and on Transportation and Infrastructure.

H.R. 3798 (Forbes)

Amends Section 211 of the Clean Air Act to prohibit the use of MTBE as a fuel additive; also amends the Solid Waste Disposal Act to accelerate the cleanup of MTBE released from leaking underground storage tanks, and the Safe Drinking Water Act to assist communities with MTBE contamination in drinking water supplies. Introduced March 1, 2000; referred to Committee on Commerce.

H.R. 4011 (Ganske)

Amends Section 211 of the Clean Air Act to prohibit the use of MTBE, to provide flexibility within the oxygenate requirement of the RFG program, and to promote the use of renewable ethanol. Introduced March 16, 2000; referred to Committee on Commerce.

H.R. 4120 (Shadegg)

Safe Water and Clean Air Attainment Act. Amends the Clean Air Act to permit states to waive the RFG program's oxygenate requirement. Introduced March 29, 2000; referred to Committee on Commerce.

H.R. 4303 (Ewing)

MTBE Elimination Act. Similar to S. 2233. Introduced April 13, 2000; referred to Committee on Commerce.

H.R. 4859 (Taylor)

To reduce emissions from TVA electric powerplants. Introduced July 13, 2000; referred to Committee on Commerce.

H.R. 4861 (Lazio)

To address the acid rain and greenhouse gas impacts of electric utility restructuring and to encourage the development of renewable energy resources. Introduced July 13, 2000; referred to Committee on Commerce.

S. 266 (Feinstein)

Senate counterpart to H.R. 11. Introduced January 20, 1999; referred to Committee on Environment and Public Works.

S. 495 (Bond)

Repeals the highway fund sanction provisions of the Clean Air Act. Introduced March 2, 1999; referred to Committee on Environment and Public Works.

S. 645 (Feinstein)

Amends the Act to waive the oxygen content requirement for reformulated gasoline. Introduced March 17, 1999; referred to Committee on Environment and Public Works.

S. 673 (Leahy)

Amends the Clean Air Act to establish requirements concerning the operation of fossil fuel-fired electric utility steam generating units, commercial and industrial boiler units, solid waste incineration units, medical waste incinerators, hazardous waste combustors, chlor-alkali plants, and Portland cement plants to reduce emissions of mercury. Introduced March 19, 1999; referred to Committee on Environment and Public Works.

S. 1037 (Boxer)

Amends the Toxic Substances Control Act to provide for reduction in the use of MTBE. Introduced May 13, 1999; referred to Committee on Environment and Public Works.

S. 1053 (Bond)

Amends the Clean Air Act to incorporate the grandfather provisions of the transportation conformity regulations, as in effect on March 1, 1999. Introduced May 14, 1999; referred to Committee on Environment and Public Works. Reported, amended, February 2, 2000 (S.Rept. 106-228).

S. 1369 (Jeffords)

Clean Energy Act of 1999. Requires EPA to set aggregate nationwide emission limits for carbon dioxide, mercury, nitrogen oxides, and sulfur dioxide from electric generation facilities beginning in calendar year 2002, and establishes a National Electric System Public Benefits Fund to support renewable energy, energy conservation and efficiency, and other purposes. Introduced July 14, 1999; referred to the Committee on Energy and Natural Resources.

S. 1731 (Chafee)

Amends the Clean Air Act to provide that certain environmental reports shall continue to be required to be submitted. Introduced October 14, 1999; referred to Committee on Environment and Public Works. Reported October 14 (S.Rept. 106-191). Passed Senate March 27, 2000.

S. 1886 (Inhofe)

Permits Governors to waive the oxygen requirements for reformulated gasoline, and allows the development of voluntary standards to control the release of MTBE from underground storage tanks. Introduced November 9, 1999; referred to Committee on Environment and Public Works.

S. 1949 (Leahy)

Clean Power Plant and Modernization Act of 1999. Promotes the modernization and efficiency of electric power generation capacity, requires reduction of emissions of mercury, carbon dioxide, nitrogen oxides, and sulfur dioxide, requires that all fossil fuel-fired electric utility generating units meet new source review requirements, and promotes the use of clean coal technologies and alternative energy sources. Introduced November 17, 1999; referred to Committee on Finance.

S. 2088 (Cleland)

Similar to H.R. 3686. Introduced February 23, 2000; referred to Committee on Environment and Public Works.

S. 2233 (Fitzgerald)
MTBE Elimination Act. Prohibits the use of MTBE and provides for remediation of water contaminated by it. Introduced March 8, 2000; referred to Committee on Environment and Public Works.

S. 2362 (Voinovich)
Air Quality Standard Improvement Act of 2000. Amends the Clean Air Act to direct the EPA Administrator to consider risk assessments and cost-benefit analyses as part of the process of establishing a new or revised air quality standard. Introduced April 5, 2000; referred to Committee on Environment and Public Works.

S. 2503 (Daschle)
Amends the Clean Air Act to authorize States to regulate harmful fuel additives and to require fuel to contain fuel made from renewable sources. Introduced May 4, 2000; referred to Committee on Environment and Public Works.

S. 2546 (Bond)
Amends the Clean Air Act to prohibit the use of MTBE, to provide flexibility within the oxygenate requirement of the RFG program, and to promote the use of renewable ethanol. Introduced May 11, 2000; referred to Committee on Environment and Public Works.

S. 2723 (Inhofe)
Amends the Clean Air Act to permit the Governor of a State to waive the oxygen content requirement for reformulated gasoline, to encourage development of voluntary standards to prevent and control releases of MTBE from underground storage tanks, and to establish a program to phase out the use of MTBE. Introduced June 13, 2000; referred to Committee on Environment and Public Works.

S. 2962 (B. Smith)
Amends the Clean Air Act to ban the use of MTBE within 4 years of enactment, to allow Governors to waive the RFG program's 2% oxygen requirement, and to provide $200 million from the LUST Trust Fund for MTBE cleanup. Introduced July 27, 2000; referred to Committee on Environment and Public Works. Reported, amended, September 28, 2000 (S.Rept. 106-426).

S. 2971 (Harkin)
Amends the Clean Air Act to phase out the use of MTBE in fuels or fuel additives and to promote the use of renewable fuels. Introduced July 27, 2000; referred to Committee on Environment and Public Works.

CONGRESSIONAL HEARINGS, REPORTS, AND DOCUMENTS

U.S. Congress. House. Committee on Commerce. Subcommittee on Health and Environment. *H.R. 11*. May 6, 1999.

—-. *National Implementation of the Reformulated Gasoline (RFG) Program.* March 2, 2000.

U.S. Congress. House. Committee on Science. Subcommittee on Energy and Environment. *Reducing Sulfur in Gasoline and Diesel Fuel.* July 21, 1999.

U.S. Congress. Senate. Committee on Environment and Public Works. *Conformity Regulations.* July 14, 1999.

U.S. Congress. Senate. Committee on Environment and Public Works. Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety. *MTBE*. October 5, 1999.

—-. *Clean Air Act Reauthorization.* October 14, 1999 and September 27, 2000.

—-. *Environmental Benefits and Impacts of Ethanol Under the Clean Air Act.* June 14, 2000.

—-. *Highway Diesel Sulfur Regulations.* June 15 and September 21, 2000.

FOR ADDITIONAL READING

CRS Issue Briefs

CRS Issue Brief IB97003. *Stratospheric Ozone Depletion: Implementation Issues*, by Larry B. Parker. (Updated regularly)

CRS Reports

CRS Report 98-236. *Air Quality: EPA's Ozone Transport Rule, OTAG, and Section 126 Petitions — A Hazy Situation?*, by Larry Parker and John Blodgett. Updated July 14, 2000. 25 p.

CRS Report RS20553. *Air Quality and Electricity: Initiatives to Increase Pollution Controls*, by Larry B. Parker and John E. Blodgett. November 30, 2000. 6 p.

CRS Report RL30737. *Diesel Fuel and Engines: An Analysis of EPA's Proposed Regulations*, by Brent D. Yacobucci, James E. McCarthy, John W. Fischer, Alejandro E. Segarra, and Lawrence C. Kumins. November 16, 2000. 23 p.

CRS Report RL30131. *Highway Fund Sanctions and Conformity Under the Clean Air Act*, by James E. McCarthy. Updated October 15, 1999. 8 p.

CRS Report 98-290. *MTBE in Gasoline: Clean Air and Drinking Water Issues*, by James E. McCarthy and Mary Tiemann. Updated October 2, 2000. 23 p.

CRS Report RS20228, *Clean Air Standards: the Supreme Court Agrees to Review American Trucking Associations v. EPA*, by Robert Meltz and James E. McCarthy. Updated December 5, 2000. 6 p.