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NEWSLETTER

New Pressure Coming on U.S. Aircraft Emissions: Pressures Now Being Felt in EU Likely to Accelerate Here

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The federal District Court in the District of Columbia this week issued an order presenting new regulatory challenges for aircraft manufacturers and airlines. In *Center for Biological Diversity, et al. v. United States Environmental Protection Agency and Lisa Jackson, Administrator*, No. 10-985 (D.D.C. July 5, 2011) (CBD), the court let the plaintiffs proceed with their suit to force the Environmental Protection Agency (EPA) to regulate greenhouse gas emissions from aircraft under the Clean Air Act.

The CBD decision came as the EPA issued a proposed Clean Air Act pertaining to aircraft nitrogen oxide emissions.[1] Nitrogen oxides are not greenhouse gases, but the rule signals increasing EPA attention to aviation. The new rule would adopt as binding voluntary international standards for nitrogen oxides.

These actions signal the beginning of a regulatory process that could dramatically impact the aircraft and air travel industries, not unlike recent initiatives seen in the European Union (EU). There, U.S. airlines are resisting controversial fees implemented under the EU's climate change program requiring airplanes that fly in Europe to pay a fee for their greenhouse gas emissions. Domestically, the airline and aircraft industries should similarly be concerned about efforts by EPA to impose burdensome greenhouse gas emissions standards for aircraft.

This recent court decision requires EPA to take the first step toward what is likely to be a more aggressive regulatory regime for aircraft engines. The effort, in turn, will generate regulations and judicial challenges much like the litigation that brought global warming issues

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to the Supreme Court's attention in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

The Significance of an "Endangerment Finding" Relating to Aircraft Engine Emissions

Before EPA can assert Clean Air Act authority over aircraft engine emissions, it must find that emissions reasonably can be expected to endanger public health or welfare. In the *CBD* case, plaintiffs allege EPA is obliged to make this threshold finding.[2] EPA argued that it has no such duty, based on the statute's instruction that "[t]he Administrator shall, from time to time, issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7571(a). EPA focused on the "from time to time" provision and the language about EPA acting on emissions that in his "judgment" pose a threat as indications that the statute does not impose a mandatory duty to make an endangerment finding.

The court disagreed, concluding that the best reading of the statute creates a mandatory obligation to conduct the endangerment inquiry demanded by plaintiffs. The court reasoned that Congress "intended to mandate a certain outcome-the regulation of harmful aircraft emissions." Because Congress's "purpose would be defeated by allowing EPA to avoid triggering its obligation to regulate in the first place," it concluded that "Congress intended the predicate endangerment finding to be a compulsory step."

This Case Is Part of a Broader Regulatory Push to Impose Global Warming Regulations on Aircraft

This activity is a harbinger of additional regulation of aircraft engine emissions by EPA. Although the International Civil Aviation Organization has been addressing emissions standards for aircraft on a largely voluntary basis for years, environmental groups have been urging EPA to establish additional, mandatory standards for aircraft engines' greenhouse gas emissions. As plaintiffs state in their complaint, they view high-altitude aircraft emissions as having a disproportionate impact on global warming and are concerned about projections for projected growth in air transport worldwide. Plaintiffs have ignored the fact that the airline industry has many new, lower-emissions aircraft that are operating around the world.

What's Next? Continued Litigation, a Likely EPA Endangerment Inquiry and Possible Emissions Standards

Although EPA is likely to continue contesting some or all of its obligations in the *CBD* case, including eventually through an appeal, in practical terms this week's court ruling means that it likely is no longer a question of if, but only when, regulatory proceedings begin.

Although the *CBD* court found that EPA does not have discretion to refuse to conduct the aircraft emission endangerment analysis, it acknowledged that EPA has broad discretion under the Clean Air Act to weigh various factors in arriving at appropriate standards. Thus, under the court's view of "the study-and-regulate scheme that EPA was required to follow," EPA eventually will have to grapple with this issue.

Affected industries should see this decision as a call to action. The next step is for EPA to conduct an endangerment analysis. The court did not impose a time limit on that inquiry, but in allowing plaintiffs' claims of unreasonable delay to proceed, the court indicated that the "from time to time" language gave the Court enough guidance to hold EPA's feet to the fire.

If EPA ultimately concludes that there is no endangerment, that finding may be subject to judicial challenge for its lawfulness. The outcome of that case largely will be based on the strength of the record EPA has compiled-to which affected industries can contribute. Conversely, if EPA concludes that there is a risk of endangerment from the greenhouse gas emissions of aircraft engines, the record that has been created will be central to the lawfulness of that finding. And, based on that finding and the validity thereof, EPA will then have to decide when and how to regulate and must consult with the FAA.

Notably, under the court's view of the language compelling action "from time to time," after an endangerment finding, EPA may have flexibility only to decide when and how it will regulate, not if it will do so. And the FAA's consulting role may be limited to input on the regulations themselves, rather than at the endangerment phase. Section 231(a)(2)(B) requires EPA to consult with the FAA "on aircraft engine emissions standards" and provides that EPA "shall not change" the standards "if such change would significantly increase noise and adversely affect safety." 42 U.S.C. § 7571(a). Thus, the endangerment phase of EPA's inquiry into aircraft greenhouse gas emissions will be a critical step in the upcoming regulatory process.

Endnotes

1 See Control of Air Pollution From Aircraft and Aircraft Engines; Proposed Emission Standards and Test Procedures, Proposed Rule, available at http://www.epa.gov/otaq/regs/nonroad/aviation/aircraft-engine-emission-standards-nprm.pdf (EPA's website states that "Included in the proposal are two new tiers of more stringent emission standards for oxides of nitrogen (NOx). These are referred to as Tier 6 (or CAEP/6) standards and Tier 8 (or CAEP/8) standards. The proposed standards would become effective for newly manufactured aircraft engines beginning in 2013.")

2 CAA, Section 231, 42 U.S.C. § 7571. In this case, plaintiffs also sought to force the EPA to regulate the emissions of other nonroad vehicles and engines like marine vessels. The Court granted the EPA's motion to dismiss those claims, which were brought under Section 213(a)(4), concluding based on the conditional text of Section 213(a)(4) that Congress did not impose a mandatory obligation on the EPA to conduct an endangerment finding.