



## Legal Updates

12/9/2009

### EPA Announces Greenhouse Gas Endangerment Finding as United Nations Climate Talks Open in Copenhagen

Citing the Supreme Court in *Massachusetts v. EPA* for the "precautionary" proposition that "the Clean Air Act and common sense . . . demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable," EPA has announced its expected, yet controversial action finalizing its Greenhouse Gas (GHG) Endangerment Finding.

EPA concludes that GHGs, including carbon dioxide, "endanger" public health and the environment. In a 280-page explanation of its Finding, EPA expressly rejects the U.S. Chamber of Commerce's petition for an APA "on the record" hearing, and staunchly defends its process as consistent with Clean Air Act (CAA) requirements.

EPA chose to announce its Endangerment Finding Dec. 7, 2009 - the opening day of the United Nations Climate Change Conference in Copenhagen. With U.S. climate change legislation stalled in the Senate, U.S. representatives to Copenhagen undoubtedly want to provide reassurance of the United States' commitment to leadership on climate change. On the world stage, EPA's positive Endangerment Finding for GHGs is certain to be viewed as distinguishing the Obama Administration's position from that of the prior U.S. administration.

The Finding triggers a CAA requirement for EPA regulation of GHGs as "air pollutants." Unlike the pending "cap-and-trade" legislative proposals, CAA regulation of GHGs is anticipated to take the form of less flexible "command and control" style performance standards. While EPA Administrator Jackson reiterated in her announcement that the Obama Administration would prefer to address GHG emissions under comprehensive cap-and-trade legislation, she also noted that EPA was required to undertake the Endangerment Finding process by the Supreme Court in *Massachusetts*. The positive Finding now creates a CAA mandate for regulation and an increasingly loud drumbeat for legislative action - which as of this date has been drowned out by the national healthcare debate.

EPA has already issued regulations requiring GHG emission monitoring and reporting for most major sources to commence in 2010. See 74 FR 56260 (Oct. 30, 2009). But, once the Finding is published in the Federal Register, the pathway will be clear for EPA to issue regulations that *actually control* GHG emissions. The task of regulating this new set of pollutants is potentially enormous since the CAA prescribes no "significance" thresholds for GHGs and they are emitted by almost every sector of the U.S. economy. Many state permitting agencies have expressed concern about being overwhelmed with GHG permitting and enforcement obligations.

In response to this dilemma, EPA has already proposed regulations to limit the scope of facilities that would be subject to GHG regulation. In what is known as the "Tailoring Rule," proposed Sept. 30, 2009, EPA proposed 25,000 tons per year (TPY) of carbon dioxide equivalent emissions as the threshold level of emissions which would subject a facility to GHG regulation. See 74 FR 55292 (Oct. 27, 2009). However, EPA's authority to prescribe by regulation "major source" and "new source review" thresholds that differ from those stated in the CAA is questionable, and many predict the Tailoring Rule will not withstand appeal.

In the preamble to the Tailoring Rule proposal, EPA provides a "roadmap" for when and how GHGs will be deemed "subject to

regulation" under the CAA. The first regulation to actually require control of GHGs is expected to be the New Light-Duty Vehicle GHG Regulation proposed Sept. 28, 2009, (74 FR 49454) and expected to be finalized in March 2010.

Once that rule has been finalized, published and cleared under the Congressional Review Act, sometime in May 2010, EPA will consider GHGs to be "subject to regulation" under the CAA for all categories of new emissions sources - even without further regulation. This means that all CAA permits for new facilities or modifications that result in 25,000 TPY of CO<sub>2</sub> equivalent emissions will be required to install "best available control technology" to reduce emissions.

What these control technologies will be is an open question. Unlike conventional pollutants such as particulate matter or sulfur dioxide, there are no commercially demonstrated means of reducing CO<sub>2</sub> emissions other than by reducing the production of CO<sub>2</sub> in the first place - e.g., through reduced use of CO<sub>2</sub> generating materials and processes or more efficient combustion of fossil fuels. Furthermore, geologic sequestration of CO<sub>2</sub> gas, known as "carbon capture and sequestration" (CCS), is still in the pilot testing stage, albeit with millions of dollars in Department of Energy funding to promote CCS research.

Facing this dilemma, most industry observers consider switching to cleaner fuels and "energy efficiency" projects to be the "low-hanging fruit." Indeed, the threat of GHG regulation has spurred a worldwide race to discover and bring to market energy-efficiency technologies and scientific breakthroughs that will either sequester CO<sub>2</sub> or reduce its production.

Also an open question is the impact the Endangerment Finding and coming EPA regulations or legislation will have on pending and future climate change litigation matters. The 2nd and 5th Circuit Courts of Appeal have recently rejected defense arguments that climate change is a non-justiciable political question - freeing the way for nuisance cases claiming Hurricane Katrina was exacerbated by man-made GHG emissions.

Appeals of those matters could reach the Supreme Court. Moreover, EPA is now poised to regulate GHGs based on its Finding that public health is endangered from global warming. Violations of specific health and safety regulations can turn cases into per se liability matters, in which damages are the only consideration for the fact finder.

EPA received an astounding 380,000 public comments on its proposed Finding - a majority of which were identical "mass mail comments," but including 11,000 individual comments raising scientific, technical, legal and procedural issues. Rejecting "climategate" critics who have claimed bias in the science, EPA's press release is subtitled the "Science overwhelmingly shows greenhouse gas concentrations at unprecedented levels due to human activity."

EPA defends its Finding as based on a thorough public process, comprehensive scientific assessments, and "robust synthesis reports," synthesizing thousands of individual studies that were subjected to a "rigorous and exacting standard of peer review by the expert community."

In recognition of the serious and momentous nature of this Finding, and undoubtedly in anticipation of an appeal, EPA's pre-publication draft spends more than 280 pages explaining its process and conclusions - and another 190 pages responding to specific comments. At least one group has already threatened to appeal the Finding. However, it is unlikely that the Appellate Court will be willing to step into this public policy debate or to substitute its judgment for that of EPA on the scientific issues involved.

A copy of EPA's pre-publication Endangerment Finding and technical support document can be accessed at [www.epa.gov/climatechange/endangerment.html](http://www.epa.gov/climatechange/endangerment.html).

McGuireWoods LLP is a full service law firm with focused practices in the Clean Air Act, Energy and Climate Change, and Environmental Litigation.

*If you would like to receive our legal news updates by e-mail, please use our online sign-up form.*

McGuireWoods news is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention.

## MORE INFORMATION

Patricia F. Sharkey  
312.750.8601  
psharkey@mcguirewoods.com

James Y. Kerr II  
919.755.6688  
jkerr@mcguirewoods.com

Scott C. Oostdyk  
804.775.4743  
soostdyk@mcguirewoods.com

Gordon R. Alphonso  
404.443.5716  
galphonso@mcguirewoods.com

Neal J. Cabral  
202.857.1727  
ncabral@mcguirewoods.com

David L. Rieser  
312.849.8249  
drieser@mcguirewoods.com