



## Legal Updates

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### **EPA Issues Greenhouse Gas Endangerment Finding: A First Step Toward Regulation Under the Clean Air Act**

On April 17, 2009, EPA issued its much anticipated Endangerment Finding regarding greenhouse gas (GHG) emissions, taking the first step toward regulating GHG emissions under the Clean Air Act (CAA). This action comes two years after the Supreme Court ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007), found GHG emissions qualify as an "air pollutant" under the CAA. The Court held EPA could not avoid making the central endangerment determination required under Section 202 of the CAA based on either the difficulties in administering GHG controls under the CAA or the global nature of the environmental harm. The Bush EPA delayed responding to the Supreme Court's ruling and ultimately left the endangerment decision for the Obama EPA.

Under Section 202 (the CAA provision at issue in *Massachusetts*), EPA must determine whether GHG emissions from new motor vehicles and new motor vehicle engines "cause or contribute" to "air pollution" which "may reasonably be anticipated to endanger public health or welfare." In the proposed rule released on April 17th, EPA finds that, as a group, six GHGs (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sodium hexafluoride) collectively create air pollution which endanger public health and welfare. While the direct subject of this finding is the GHG contribution made by new motor vehicles and new motor vehicle engines, the evidence and conclusions underlying this finding could be applied more broadly to support regulation of GHG emission sources in almost any large industrial, commercial or institutional sector of the economy.

It is worth noting what the Endangerment Finding does not contain. It does not contain a finding that regulating GHG emissions from new motor vehicles and engines will reduce or reverse global warming. In fact, it does not propose to actually regulate GHGs from new motor vehicles or engines. It does not provide an anticipated "roadmap" or schedule for further regulatory steps. It also does not address how EPA anticipates its rulemaking process will dovetail with any Congressional action on climate change. Finally, it fails to address any of the ancillary CAA GHG issues, such as when and how EPA will address the California Waiver and the Johnson Memo/*Deseret Power* issues. It is also silent on any relationship between this proposal and EPA's recently proposed Greenhouse Gas Registry rule published in the Federal Register on April 10, 2009, which will be open for comment at practically the same time as this proposal. See McGuireWoods news items for 1/20/09, 2/23/09, 3/12/09 and 4/6/09.

Rather than providing a full picture of how this finding will relate to other GHG initiatives and issues, EPA has chosen to propose a stand alone -- and broadly applicable -- Endangerment Finding for GHGs. This proposal is nonetheless an extremely important document which unveils the new Administration's approach to climate change and possibly to future environmental regulation in general.

#### **Key EPA Findings and Analysis**

EPA makes a series of key findings that underpin its ultimate conclusion that GHG emissions from new motor vehicles and new motor vehicle engines can reasonably be anticipated to be a source of global pollution adversely affecting public health and welfare and thus subject to regulation under the CAA. EPA finds that the evidence of climate change is overwhelming, that the rise in heat trapping gases is (at least in part) the cause of climate change, that manmade GHG emissions contribute to

the atmospheric GHG pollution, and that motor vehicle GHG emissions are the second largest source of manmade GHG emissions in the United States. While recognizing that new vehicle emissions alone are not the source of the global warming, EPA describes GHG pollution as a result of many collective actions and points to its authority under Section 202 to regulate this large mobile source sector because it “contributes” incrementally to the greenhouse gas effect.

EPA expressly recognizes that GHG pollution is unusual in that it does not endanger health *directly* like other criteria pollutants. Nonetheless, EPA argues GHG emissions cause *indirect* harm to the public health and welfare which is cognizable under the CAA and the Supreme Court’s *Massachusetts* decision. EPA lists numerous adverse impacts on public health and welfare which may result from high levels of GHG in the atmosphere, which induce climate change, which in turn results in rising temperatures and increased sea levels, changes in air quality (particularly increases in regional ozone), and increased intensity of storms and precipitation.

The proposal includes a painstaking and methodical discussion of the framework for EPA’s decision. In that discussion, EPA lays the groundwork for its key determination that, while some level of scientific uncertainty may remain as to the mechanism for global warming, a precautionary approach demands regulation of large man-made sources of GHG emissions. EPA acknowledges “there are varying degrees of uncertainty across many of these scientific issues,” but cites the *Massachusetts* case and *Ethyl Corp. v. EPA* (D.C. Cir., Cert. Denied 1976) for the 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.”

This precautionary approach, a new basis for CAA regulation, is strikingly similar to the “precautionary principle” underlying the European Union’s controversial chemical regulatory regime (REACH). The “precautionary principle” essentially stands for the proposition that in the face of a known harm, but scientific uncertainty as to causation, regulators should err on the side of regulating. The EU’s “precautionary principle” shifts the burden of proof and is sometimes described as requiring a manufacturer or importer to “prove a negative.” In contrast, most U.S. environmental regulation in the past has been based on risk assessment, cost-benefit analysis, and the availability of control technology. This proposed Endangerment Finding may be the first time the “precautionary principle” has been expressly relied upon to justify a major U.S. environmental initiative. If this finding signals the new Administration’s approach to environmental regulation in general, it may have significant implications beyond greenhouse gas regulation, particularly in the arena of air toxics and chemical regulation where evolving scientific methods allow the detection of hazardous constituents at lower and lower levels without necessarily linking those constituents to health impacts.

It is notable that EPA proposed the GHG Endangerment Finding separately for public comment without giving any inkling as to how it would actually limit GHG emissions from new motor vehicles or any other category of sources. In the past, EPA’s Section 202 “endangerment findings” have been announced together with proposed regulations for control of emissions. For example, EPA’s endangerment finding for lead in gasoline emissions was accompanied by proposed regulations. But in this proposal, EPA points out that “the threshold endangerment and cause or contribute criteria are separate and distinct from the standard setting criteria.”

The issuance of a stand alone Endangerment Finding at this time should not be interpreted as solely a ploy to spur Congressional action. EPA is keenly aware that any move it makes on GHG regulation under the CAA is likely to be both appealed and ultimately superseded by legislation. The Obama Administration also wants the United States to be an active participant at the United Nations global climate change summit in Copenhagen in December. Thus, EPA has streamlined its proposal, yet moved the Administration’s agenda forward incrementally for Copenhagen in the Fall. It has also carefully presented the Endangerment Finding as a single question for public comment and ultimately for the appellate court. Unburdened by questions regarding how the finding may ultimately be translated into concrete regulations, this momentous finding will undoubtedly draw less fire from regulated industries.

EPA states that it will separately consider other pending petitions for regulation of GHGs from other mobile sources and stationary sources. But should the GHG Endangerment Finding withstand appeal in the context of the Section 202 motor vehicles requirements, the same finding will be essentially “appeal proof” for any other substantial category of GHG emission

sources – whether additional mobile sources or stationary sources. Thus, the significance of this finding cannot be overstated in terms of its potential ultimate impact on GHG regulation across all sectors of the economy.

## Conclusion

The proposed Endangerment Finding for motor vehicles represents a warning shot in the developing battle over how, when and whether to regulate GHGs. Although the Obama Administration has stated that it would prefer a legislative approach to overall GHG regulation, climate change legislation is facing renewed opposition in the face of a slumping economy. Many believe the Administration's strategy is to keep the drumbeat for GHG regulation under the CAA going in order to spur Congressional action. Because of the numerous and widely acknowledged problems associated with regulating GHGs under the current CAA, every step EPA takes toward regulating GHGs will intensify that drumbeat.

If the endgame is to spur Congressional action to legislate a comprehensive GHG control program which will either supersede regulation under the CAA or provide for a mix of regulatory and legislative controls, the proposal of the Endangerment Finding appears to be an effective first volley. Indeed, Representative Markey, the sponsor of a House climate change proposal currently in hearings, greeted the news of the Endangerment Finding stating: "It is now no longer a choice between doing a bill or doing nothing. It is now a choice between regulation and legislation. The EPA will have to act if Congress does not."

The April 17 announcement includes a pre-publication copy of the proposed regulation. The actual proposal will be published in the Federal Register in about two weeks and its publication will initiate a 60 day time period to submit comments. Two public hearings are also scheduled, one on May 18 in Arlington, Virginia and the second on May 21 in Seattle, Washington. The Endangerment Finding will become final only after the EPA publishes the Final Rule in the Federal Register which is not expected until this fall.

## McGuireWoods LLP Clean Air Act Team

McGuireWoods LLP is a full service law firm with a specialty practices in Climate Change and Clean Air Act matters. For further information on EPA's proposed Endangerment Finding and its implications, please contact the authors or any member of our Clear Air Act team.

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