

EPA ISSUES PROPOSED ENDANGERMENT FINDING: WHAT'S NEXT FOR GREENHOUSE GAS REGULATION?

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To Our Clients and Friends:

On April 17, 2009, the United States Environmental Protection Agency (the "EPA") issued a proposed rule stating that six greenhouse gases ("GHGs"), including carbon dioxide, endanger the public health and welfare of current and future generations. The EPA's proposed "endangerment finding" raises the stakes for emitters of GHGs and may pressure Congress to pass comprehensive climate change legislation.

RESPONSE TO SUPREME COURT DECISION

The proposed endangerment finding is a response to the United States Supreme Court's landmark 2007 case, *Massachusetts v. EPA*, in which several states had petitioned the EPA to regulate carbon dioxide emissions from motor vehicles under the Clean Air Act. The Supreme Court held that the EPA must determine whether or not GHG emissions from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether scientific uncertainty precludes the EPA from making a reasoned determination.

The EPA's proposed endangerment finding comes two years after the Supreme Court's decision. The Bush Administration effectively deferred any finding for the next administration. President Obama's EPA administrator, Lisa Jackson, promptly responded to the Court's directive.

IMPLICATIONS OF THE EPA'S FINDING

The proposed rule would make GHGs subject to regulation under the federal Clean Air Act. The EPA emphasized that it was not taking action on any provision of the Clean Air Act other than the section regulating motor vehicle emissions. However, the EPA specified that it is reconsidering its past interpretation as to whether the endangerment finding would make GHGs a regulated pollutant under its Prevention of Significant Deterioration program, which regulates other sources of emissions.

Although the EPA's proposed rule does not signal an immediate change in regulations affecting emissions of GHGs, critics of the endangerment finding charge that the proposed rule opens the door to regulation of GHG emissions from a wide range of stationary sources

under a statute, the Clean Air Act, which is ill-suited for the task. An expansion of regulation of GHGs to other sources under the Clean Air Act could have far-reaching effects on various industries and thousands of GHG emitters.

The proposed rule will not be finalized until after a 60-day public comment period. The EPA has not yet proposed any regulations that would follow a final rule, though it stated that it is developing such regulations and expects them to be available for public comment in several months.

ALL EYES ON CONGRESS

The proposed endangerment finding shifts the focus to Capitol Hill as Congress will decide whether to supersede EPA regulation under the existing provisions of the Clean Air Act by enacting climate change legislation. Currently, the House of Representatives is discussing a proposed climate change bill recently introduced by Representatives Henry Waxman (D-Calif.) and Edward Markey (D-Mass.). The legislation, the American Clean Energy and Security Act of 2009, proposes a nationwide cap-and-trade program to reduce the country's GHG emissions to 83% below 2005 levels by 2050. The Senate is expected to propose similar legislation. With the threat of regulation under the Clean Air Act's existing programs now looming, expect lawmakers to vigorously debate the merits of climate change legislation.

Although they support the endangerment finding, President Obama and Administrator Jackson have expressed their preference that GHG emissions be addressed through climate change legislation rather than through regulation under the existing Clean Air Act. Many Congressional leaders have expressed similar views.

Please feel free to contact us with any questions.

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