



EPA Issues Proposed Endangerment Finding

On April 17, 2009, the Environmental Protection Agency (EPA) issued a proposed finding that greenhouse gases (GHGs) cause air pollution that may endanger public health or welfare. The proposed “endangerment finding,” if finalized, would require EPA to promulgate rules regulating GHG emissions from new motor vehicles under the Clean Air Act. The widely held view among industry, environmental advocates, administration officials, and Congressional leaders alike is that regulating GHGs under a comprehensive new statute would be more effective and efficient than doing so under the Clean Air Act. Therefore, some are speculating that EPA issued the proposed endangerment finding to encourage Congress to act on climate change legislation. A draft cap and trade bill introduced by Representatives Henry Waxman (D-CA) and Edward Markey (D-MA) on March 31, 2009, called the American Clean Energy and Security Act of 2009, is currently before the House Energy and Commerce Committee. It remains to be seen, however, whether the House and the Senate will be able to reach a consensus on the Waxman-Markey draft bill or on future climate change legislation.

Background

Two years ago, the Supreme Court decided *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007), and held that the Clean Air Act requires EPA to regulate GHGs from new motor vehicles if EPA made an endangerment finding. EPA had taken the position that it was not authorized to regulate GHGs under the Clean Air Act. After the Supreme Court’s ruling, the Bush Administration EPA did not issue a finding on whether GHGs endangered public health or welfare. Instead, EPA continued to maintain its position that GHG regulation under the Clean Air Act would be too burdensome. On April 2, 2008, a Congressional committee subpoenaed EPA to obtain documents the agency had prepared in response to *Massachusetts v. EPA*. After reviewing the documents, which were not released to the public, Congressional committee members stated publicly that EPA had prepared a draft endangerment finding, dated December 5, 2007, which concluded that GHG emissions may endanger public health or welfare. According to testimony provided to a Senate committee from a former EPA official, the White House Office of Management and Budget (OMB) asked EPA to withdraw the draft endangerment finding. Instead of issuing the proposed endangerment finding, EPA issued an Advance Notice of Proposed Rulemaking (ANPR) for regulating GHGs under the Clean Air Act on July 11, 2008. The ANPR solicited comments on the advantages and disadvantages of regulating GHGs under the Clean Air Act. EPA received thousands of comments from interested parties before the comment period ended on November 28, 2008. In contrast to the Bush Administration’s approach, soon after the new administration took office, EPA Administrator Lisa Jackson signaled her intent to make the endangerment finding a priority.

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Proposed Rule

The proposed endangerment finding consists of two parts. First, it includes a general finding that atmospheric concentrations of six major GHGs (carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆))¹ constitute air pollution that endangers public health and welfare. Second, it includes a narrower finding that the combined emissions of CO₂, CH₄, N₂O, and HFCs from new motor vehicles and engines cause or contribute to this air pollution. EPA cited compelling scientific evidence that supports the conclusion that GHGs are causing the climate change that has occurred in recent years. EPA concluded that climate change has likely already resulted in detrimental effects to natural resources in the U.S. EPA also based its decision on the potential for future climate changes to result in further risks to public health and welfare. EPA justified its proposed endangerment finding by reasoning that the statutory language authorizes EPA's Administrator to act to prevent harm despite uncertainties about the effects of GHGs on climate change. EPA also reasoned that it need only determine that GHGs contribute to air pollution that endangers public health or welfare, not that they are the sole cause of the problem.

What Happens Next?

EPA published the proposed finding in the Federal Register on April 24. EPA will accept public comments on the proposed finding for 60 days after April 24. There will be two public hearings during this period, the first on May 18 in Arlington, Virginia, the other on May 21 in Seattle, Washington. Also, EPA indicated it is currently developing GHG emission standards for new motor vehicles and engines. EPA stated it expected to propose these GHG emission standards in the next several months. The notice states that EPA has the discretion to set emission standards for the six GHGs as a group or on an individual basis. EPA also noted that the endangerment finding does not make the six covered GHGs subject to the Prevention of Significant Deterioration (PSD) program due to a December 18, 2008 memorandum issued by former Administrator Stephen Johnson, which precluded the regulation of CO₂ emissions under the PSD program. However, EPA indicated that it is reconsidering that memorandum and will seek comments on the implications of regulating GHGs in the PSD program at some point in the future.

Please contact any of the Winston & Strawn attorneys listed below if you have any questions or would like to discuss the proposed endangerment finding:

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¹ EPA left open the possibility of determining that other anthropogenic GHGs cause air pollution that endangers public health or welfare. The six GHGs that are subject to the endangerment finding were selected based on the extensive body of climate change research on these GHGs.