



EPA Finalizes GHG Endangerment and Cause-or-Contribute Findings

In April of this year, we alerted you to the Environmental Protection Agency's (EPA) proposed findings that (1) the current and projected concentration of six key greenhouse gases¹ (GHGs) in the atmosphere threatens the public health and welfare (the proposed endangerment finding), and that (2) the combined emissions of these GHGs from new motor vehicles contribute to this concentration, which threatens the public health and welfare (the proposed cause-or-contribute finding). As expected, on December 7, 2009 EPA finalized these findings.² Although the findings do not impose any new regulatory requirements, they require EPA to regulate GHG emissions from new motor vehicles under Section 202(a) of the Clean Air Act (CAA), and they will ultimately support regulation of GHG emissions from stationary sources as well.

The Findings

EPA made these findings in response to the Supreme Court's April 2007 ruling in *Massachusetts v. EPA*³ that EPA was required to determine whether or not GHG emissions from new motor vehicles caused or contributed to air pollution that endangered the public health or welfare, or whether the science was too uncertain to make a reasoned determination. EPA found that the body of scientific evidence supports the conclusion that the current and projected concentration of GHGs in the atmosphere threatens the public health and welfare of both current and future generations, and that the risk and severity of adverse impacts from GHGs are likely to increase in the future. The primary scientific basis supporting EPA's findings can be found in assessments by the U.S. Global Climate Research Program (USGCRP), the Intergovernmental Panel on Climate Change (IPCC), and the National Research Council (NRC). These assessments have evaluated the risks associated with changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens that may be caused by an elevated concentration of GHGs in the atmosphere. EPA concluded that the most serious potential adverse impacts from GHG emissions are likely to be the increased risk of storm surge and flooding in coastal areas due to rises in sea level and more intense storms.

In addition, EPA found that GHG emissions from mobile sources, which make up almost one-quarter of total U.S. GHG emissions, contribute to the risk and severity of these adverse impacts. EPA reasoned that, under *Massachusetts v. EPA* and the CAA, it need only determine that GHG emissions from new motor vehicles contribute to the concentration of GHGs in the atmosphere that endangers the public health and welfare, not that they are the sole cause of the problem.

¹ The six key GHGs are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆).

² Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Dec. 7, 2009, available at <http://www.epa.gov/climatechange/endangerment/downloads/FinalFindings.pdf>.

³ 549 U.S. 947 (2007).

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Regulation To Be Supported by the Findings

In September 2009, in anticipation of the finalization of the endangerment and cause-or-contribute findings, EPA (jointly with the Department of Transportation's National Highway Safety Administration (NHTSA)) proposed a national program to reduce GHG emissions from new cars and trucks sold in the United States.⁴ The regulatory program would set emissions and fuel economy standards for these mobile sources. EPA and NHTSA intend to finalize these rules by March 2010. If EPA begins to regulate GHG emissions from mobile sources, it will be bound to regulate GHG emissions from stationary sources as well under its existing New Source Review (NSR) and Title V permit programs. Under these programs, stationary sources are subject to permit requirements only if they emit a *regulated* air pollutant above a certain threshold level. Once the mobile-source regulations are finalized, however, GHGs will unquestionably be *regulated*. In October 2009, in anticipation of this result, EPA proposed a rule that would tailor the NSR and Title V permit programs to stationary sources that emit more than 25,000 tons per year of GHGs.⁵

The Future of GHG Regulation

The finalized endangerment and cause-or-contribute findings pave the way for EPA to regulate both mobile and stationary sources under the CAA. A widely held view among industry, environmental advocates, administration officials, and Congressional leaders, however, is that regulation of GHG emissions under a comprehensive new cap-and-trade regime would be more efficient and effective than doing so under EPA's existing CAA authority. In this vein, a cap-and-trade bill, the American Clean Energy and Security Act (ACES), was narrowly passed by the House of Representatives this summer.⁶ A similar bill, the Clean Energy Jobs and American Power Act (CEJAP), is currently being considered in the Senate.⁷ The prospect of EPA regulation of GHG emissions under the CAA is likely to garner increased support for such climate change legislation in 2010.

What Happens Next?

The endangerment and cause-or-contribute findings will become effective 30 days after their publication in the Federal Register. Under Section 307(b)(1) of the CAA, judicial review of the findings will be available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of their publication in the Federal Register.

⁴ Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (September 28, 2009) (to be codified at 49 C.F.R. Parts 531, 533, 537, 538).

⁵ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009) (to be codified at 40 C.F.R. Parts 51, 52, 70, 71).

⁶ H.R. 2454 (111th Cong.).

⁷ S. 1733 (111th Cong.).

Please contact any of the Winston & Strawn attorneys listed below if you have any questions or would like to discuss the endangerment and cause-or-contribute findings:

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