

## Environmental Protection Agency Issues Proposed “Endangerment Finding,” A Precursor to Greenhouse Gas Regulation Under the Clean Air Act

On April 17, 2009, the Environmental Protection Agency (EPA) issued a proposed finding that six greenhouse gases (GHGs) endanger the public health and welfare under Section 202(a) of the Clean Air Act (CAA). This “endangerment finding” also proposed to conclude that motor vehicle emissions contribute to GHG pollution, laying the groundwork for EPA to issue vehicle GHG emission standards.

### BACKGROUND

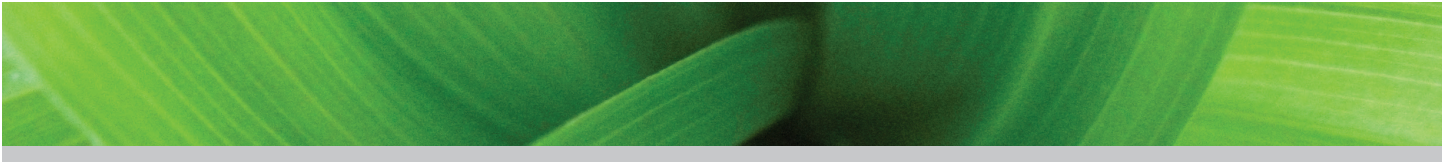
EPA’s proposed finding responds to the Supreme Court’s opinion in *Massachusetts v. EPA*, 549 U.S. 497 (2007), decided more than two years ago. The Court held that GHGs are “air pollutants” under the CAA, and found that EPA had improperly denied a petition by States and environmental organizations to regulate vehicle GHG emissions under Section 202(a) of the CAA. The Court remanded to EPA to reconsider the petition.

### THE PROPOSED ENDANGERMENT FINDING

The proposed endangerment finding begins with a discussion of EPA’s interpretation of the legal standard and analytical approach for determining endangerment under the CAA, including these features:

- Collective consideration of six GHGs (carbon dioxide, methane, nitrous oxide, perfluorocarbons, hydrofluorocarbons, and sulfur hexafluoride), and exclusion of other poorly-understood or localized GHGs;
- Consideration of both current and anticipated future impacts of climate change;
- Balancing of the severity and likelihood of future impacts, including a judgment that even a low likelihood of catastrophic events can constitute endangerment;
- Consideration of cumulative impacts of GHGs from *all* sources, not just motor vehicles;
- Consideration of impacts on vulnerable communities; and
- Exclusion of “private adaptation” to climate change (e.g., seawalls) as a factor that lessens endangerment.

Based primarily on reports by the government’s Climate Change Science Program and the Intergovernmental Panel on Climate Change, EPA proposed that GHGs pose a danger to both public health and welfare. Public health impacts identified by the agency include increased morbidity and mortality from heat waves, especially



among the elderly, young children, and the chronically ill; respiratory ailments linked to increasing surface ozone concentrations; and increased spread of pathogens such as salmonella. Adverse welfare impacts include increased incidence of heavy rainfall and flooding; sea-level rise and saltwater intrusion into water supplies; ocean acidification; intensified drought in dry areas of the country; decreases in hydroelectric power generation; forest fires, crop failures, and insect outbreaks; and more intense tropical storms and storm surges.

EPA acknowledged that moderate global warming could have some offsetting near-term welfare and health benefits. However, the agency's conclusion describes the evidence of endangerment overall as "compelling" and "overwhelming." According to EPA, the "probability of the consequences is shown to range from likely to virtually certain to occur. This is not a close case . . . . In both magnitude and probability, climate change is an enormous problem."<sup>1</sup>

### THE PROPOSED "CAUSE OR CONTRIBUTE" FINDING

Citing its past regulatory actions for "class" pollutants such as volatile organic compounds and particulate matter, EPA determined that motor vehicles "contribute" to four GHG pollutants: carbon dioxide, methane, hydrofluorocarbons and nitrous oxide. EPA's contribution analysis was based on comparisons of recent United States transportation sector emissions, nationwide GHG emissions, and global GHG emissions, for GHGs collectively and for individual greenhouse gases. The agency found that the United States transportation sector emissions account for 24% of nationwide GHG emissions and 4% of global GHG emissions.

EPA declined to define a threshold share of emissions required for a given sector to "contribute" to GHG pollution. The agency reasoned that for global pollutants such as GHGs, for which any individual sector accounts for a relatively small share of emissions, a globally minor sector may nevertheless "contribute" to air pollution. Although EPA did not consider the effects of new fuel economy standards, the agency stated that doing so would not have altered its conclusion.

### LOOKING AHEAD

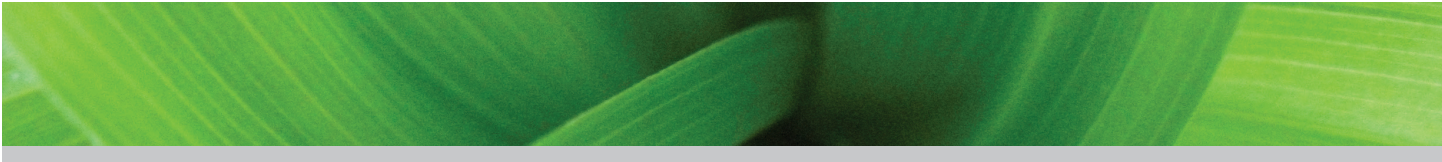
The endangerment finding is not yet final, and does not propose any specific new regulations for motor vehicles or any other GHG sources. Comments on the proposed findings are due 60 days after the publication of the findings in the *Federal Register*. The agency will also hold public hearings in Arlington, VA on May 18, and in Seattle, WA on May 21.

If and when EPA finalizes an endangerment finding, the agency will proceed within "several months"<sup>2</sup> to issue proposed GHG emission standards for new motor vehicles, as required under Section 202(a) of the CAA. It is not clear how such standards would interact with Federal fuel economy regulations, or the state-level GHG

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<sup>1</sup> Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, at 100 (Environmental Protection Agency, April 17, 2009).

<sup>2</sup> *Id.* at 24.



emission standards for which California has sought a Clean Air Act preemption waiver from EPA. These regulations may eventually encompass most classes of motor vehicles, since EPA's "contribution" analysis includes not only passenger vehicles but also buses, motorcycles, and medium/heavy duty trucks.

This EPA endangerment finding is likely to have far-reaching impacts on other industries given that the finding can also trigger obligations for EPA to regulate a multitude of sources of GHG emissions under other CAA authorities. Notable examples include preconstruction permitting requirements under the New Source Review/Prevention of Significant Deterioration Program, New Source Performance Standards, and Title V operating permitting requirements.

#### FOR ADDITIONAL INFORMATION

Van Ness Feldman is currently preparing an in-depth analysis of EPA's endangerment finding. The firm closely monitors congressional and executive branch developments on climate change and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation and regulatory activity, the surrounding policy and political debate, and the implications for your organization. If you would like more information, please contact Kyle Danish, Stephen Fotis, Doug Smith, Tom Roberts, or any member of the firm's Climate Change practice at (202) 298-1800.

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