

## EPA Finalizes Endangerment Finding for Greenhouse Gases

On December 7, 2009, girded by Supreme Court-verified authority under section 202(a) of the Clean Air Act, Environmental Protection Agency (EPA) Administrator Lisa Jackson signed two key findings that move EPA one step closer to regulating emissions of greenhouse gases (GHGs) from mobile and stationary sources as early as 2010. These two findings are:

- (1) The current and projected atmospheric concentrations of six GHGs—carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>)—threaten the public health and welfare of current and future generations; and
- (2) The combined emissions of these GHGs from new motor vehicles in the United States contribute to global climate change.

### BACKGROUND

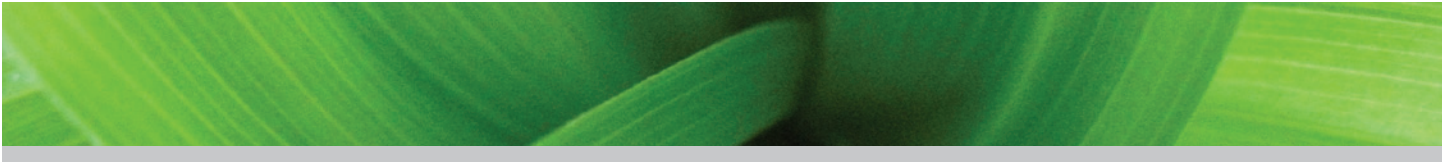
In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that GHGs are “air pollutants” under the Clean Air Act (CAA), and found that EPA had improperly denied a petition by States and environmental organizations to regulate vehicle GHG emissions under this authority. However, before GHGs from new motor vehicles can be subjected to regulation—as EPA jointly proposed with the National Highway Safety Administration in September, 2009—section 202(a) of the CAA requires that EPA make a two-part finding: (1) that the “air pollutant” in question may reasonably be anticipated to threaten the public health and welfare; and (2) that the motor vehicles emissions at issue cause or contribute to this air pollution.

### ENDANGERMENT FINDING

Citing a variety of negative impacts associated with climate change (e.g. heat waves, respiratory ailments from increase surface ozone concentrations, exacerbated disease vectors, flooding, droughts, sea level rise, and ocean acidification), EPA lists a group of six GHGs—CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, and SF<sub>6</sub>—as “air pollutants” that pose a growing threat to the public health and welfare

While EPA finds that climate change is actually harming Americans’ health and welfare at present, the Agency argues that its endangerment finding need not be based on actual harm: EPA interprets the phrase from the CAA “will endanger” to mean that “harm is threatened; no actual injury need ever occur.”

EPA refuses to set a minimum threshold for the level of risk that amounts to endangerment. Instead, EPA asserts its discretion to weigh the “reciprocal” elements of the probability and severity of potential harm, citing an observation of the District of Columbia Court of Appeals in *Ethyl Corp v. EPA*, 541 F.2d 1 (1976) that “[m]an’s ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations.”



The endangerment test also cannot legally, according to EPA, weigh the effectiveness or economic impacts of the GHG regulations that will be promulgated pursuant to this finding. Considering economic impacts at this phase would be like asking whether a “cure is worse than the illness,” when the real question is “whether there is an illness in the first place.”

## CONTRIBUTION FINDING

While motor vehicles are just one of the causes of global warming, EPA finds that motor vehicles make a sufficiently meaningful contribution to the danger of climate change through their GHG emissions to satisfy the second prong of the section 202(a) test. According to EPA, America’s motor vehicle fleet contributes to over 23 percent of total U.S. GHG emissions—4 percent of the world total. These comparisons, “independently and together,” form the basis of the contribution finding.

## IMPLICATIONS

These findings alone impose no direct requirements on automakers or other industries. But they are a key link in a chain of proposed EPA regulatory activities under the CAA. The Agency already has proposed certain rules in contemplation of the finalization of the endangerment finding.

For example, the endangerment finding is a legal predicate for EPA’s promulgation of GHG emission standards for motor vehicles. As discussed above, EPA proposed such standards in September, 2009, and aims to finalize the regulations in March, 2010.

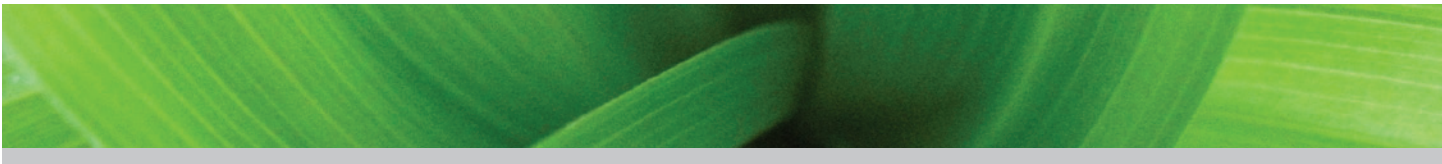
EPA’s finalization of motor vehicle standards, in turn, has implications for stationary sources of GHG emissions. Under the Clean Air Act, making a pollutant is “subject to regulation” triggers the Prevention of Significant Deterioration (PSD) program, under which new or modified “major emitting facilities” must obtain certain permits and install “Best Available Control Technology.”

In two other proceedings, EPA has requested comment on proposals regarding the timing and the scope of the PSD program with respect to GHG emissions. In one pending rulemaking, the Agency is reconsidering current EPA policy on when GHG emissions become “subject to regulation” thereby triggering the PSD program for stationary sources. In this pending rulemaking, EPA is proposing to retain its current policy so that the Agency’s finalization of the motor vehicle regulations will render GHG emissions “subject to regulation.”

In a second pending rulemaking, known as the “Tailoring Rule,” EPA has proposed to limit the reach of the PSD program for GHG emissions, at least for several years, only to stationary sources that emit more than 25,000 tons of CO<sub>2</sub> equivalent emissions annually.

## POSSIBLE OUTCOMES

A number of events could derail this EPA regulatory activity. First, the anticipated legal challenge to the endangerment finding could result in its invalidation by the courts. Second, Congress could eliminate appropriated funding for EPA to implement any regulatory program to control or limit GHG emissions. Third, Congress could enact legislation that would preclude EPA regulation in favor of an alternative regulatory



program. The House-passed Waxman-Markey bill, for example, places a broad restriction on EPA's regulatory authorities under the Clean Air Act and, in their place, would establish an economy-wide cap-and-trade program.

Although the rule has not yet been published in the Federal Register, it is available at: <http://www.epa.gov/climatechange/ endangerment.html>.

#### FOR ADDITIONAL INFORMATION

Van Ness Feldman 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 about the proposed tailoring rule or assistance with participation in this rulemaking, please contact Kyle Danish, Stephen Fotis, Britt Fleming, Doug Smith, or any member of the firm's Climate Change practice at (202) 298-1800. Those interested in on-going coverage of climate change policy developments may wish to subscribe to the weekly Climate Change Policy Update at <http://www.vnf.com/news-signup.html>.

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