
The Next Step—EPA Makes Greenhouse Gas Endangerment Finding

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The U.S. Environmental Protection Agency (EPA) today announced the most recent and to date most significant development in its efforts to address climate change and greenhouse gas emissions ("GHG") under existing Clean Air Act authority. This fall the Agency issued a final regulation establishing a mandatory GHG reporting rule, and on December 7, it announced that it had finalized its decision that GHGs emitted from motor vehicles constitute an "endangerment" under the Clean Air Act, thereby paving the way for new emissions standards for GHGs emitted from new motor vehicles. The ramifications of this finding will extend far beyond emission standards for motor vehicles.

EPA's endangerment finding arises from a petition filed in 1999 by the International Center for Technology Assessment and 18 other environmental and renewable energy industry organizations that sought to have EPA regulate GHGs emitted from motor vehicles under Section 202 of the Clean Air Act, based on evidence that those emissions "contribute to air pollution which is reasonably anticipated to endanger public health or welfare." In 2003, EPA concluded that it lacked authority under the CAA to regulate greenhouse gases for purposes of global climate change. The U.S. Supreme Court believed otherwise, holding in an April 2, 2007, decision in

Massachusetts v. EPA (549 U.S. 497 (2007)) that greenhouse gases are air pollutants covered by the Clean Air Act. As a result of the Court's decision, EPA was required to address the petition and determine whether the GHGs at issue cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.

On April 24, 2009, the Agency published a proposed endangerment finding (74 Fed.Reg. 18886). After reviewing the more than 380,000 comments that were submitted during the 60-day public comment period, the Agency has issued a final endangerment and cause or contribute finding that (a) concentrations of the mix of GHGs at issue threaten the public health and welfare (the "endangerment finding") and (b) emissions of GHGs from new motor vehicles and motor vehicle engines contribute to the concentrations of these GHGs that pose the threat (the "cause or contribute finding."). In light of these findings, the Agency must promulgate final GHG emission standards for new motor vehicles. This fall, EPA (jointly with the Department of Transportation) issued a proposed rule for specific classes of new motor vehicles, including passenger cars, light-duty trucks, and medium-duty passenger vehicles, covering model years 2012 through 2016 that would set these emission standards (74 Fed.Reg. 49454 (Sept. 28, 2009)). EPA expects to finalize that regulation in the spring of 2010.

In the document setting forth the endangerment finding, the Agency addresses the concern regarding whether its finding triggers other regulatory requirements under the Clean Air Act, specifically with respect to Prevention of Significant Deterioration ("PSD") permitting for stationary sources. At least for now, the Agency has indicated it will continue to follow the position it took in the so-called "Johnson Memorandum" on this issue – that a pollutant is not subject to regulation under the Clean Air Act unless and until the pollutant is subject to emission limits pursuant to a final EPA

rule.¹ In fact, in the final endangerment finding the Agency definitively states that the findings "...do not make well-mixed greenhouse gases 'subject to regulation' for purposes of the CAA's Prevention of Significant Deterioration (PSD) and title V programs."

While the first formal regulatory requirements flowing from these findings will cover automobiles, it is likely that in the longer term the findings will subject a much larger universe of stationary sources to regulatory requirements under the Clean Air Act, including PSD permitting and requirements under the Title V operating permit program. It is also likely that, in the short term, this endangerment finding will be cited, in litigation and in administrative proceedings, in support of efforts to require controls on GHGs from stationary sources under the Clean Air Act.

¹ EPA has announced that it is considering whether to continue to follow the Johnson Memorandum ("EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program" (Dec. 18, 2008)) on the issue of whether a final endangerment finding should trigger PSD permitting. 74 Fed. Reg. 51535 (Oct. 7, 2009).

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