

Prelude to Regulation: EPA Announces Greenhouse Gas Endangerment Findings

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On December 7, 2009, U.S. EPA Administrator Lisa Jackson announced that U.S. EPA had finalized its decision that greenhouse gases (“GHGs”) constitute an endangerment to public health and welfare (the “endangerment finding”) and that GHGs emitted from motor vehicles cause or contribute to this endangerment (the “cause or contribute finding”).¹ U.S. EPA’s Final Rule clears the path for regulation of GHG emissions from vehicles and stationary sources under the federal Clean Air Act.

U.S. EPA’s action follows the U.S. Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that GHGs, including carbon dioxide emitted from vehicles, are a “pollutant” under the Clean Air Act; and therefore, under Clean Air Act § 202, U.S. EPA must decide whether these emissions “cause or contribute” to air pollution which “may reasonably be anticipated to endanger public health or

welfare,” or whether the science is too uncertain to allow a decision. On April 24, 2009, U.S. EPA released its proposed findings that anthropomorphic GHG emissions endangered human health and welfare and that motor vehicle emissions cause or contribute to the health and welfare risks.

Not coincidentally, on the first day of the United Nations Framework Convention on Climate Change Conference in Copenhagen, U.S. EPA made these findings final, demonstrating an intent to address GHG emissions under existing law, even though Congress has not passed specific GHG legislation to date.² The endangerment finding is substantially identical to the proposed findings released in April, and focuses on five effects of anthropomorphic GHG emissions: “air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens.”³ U.S. EPA considered the human

and non-human impact of those effects, including “far-ranging risks to food production and agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure, and settlements, and ecosystems and wildlife.”⁴ U.S. EPA determined that “evidence provides support for a finding of endangerment” for each of the human and non-human impact categories.⁵ U.S. EPA rejected calls to conduct new research on the climactic effects of GHG emissions, citing its involvement in major climate change studies, including those issued by the Intergovernmental Panel on Climate Change, the National Research Council, and the U.S. Climate Change Science Program. U.S. EPA stated that it gave “limited weight” to adverse studies referenced by those who submitted comments on the proposed findings.⁶ U.S. EPA’s Final Rule will go into effect thirty days after publication in the Federal Register, *i.e.*, in early 2010.

On June 23, 2009, the U.S. Chamber of Commerce submitted an 84-page petition to U.S. EPA under the Administrative Procedure Act, seeking to have the agency conduct a formal rulemaking process prior to issuing the endangerment and cause or contribute findings. This process would involve, *inter alia*, a formal administrative hearing allowing the submission of scientific, regulatory, and technical evidence and the right to appeal any administrative decision-making. In its Final Rule issuing the findings, U.S. EPA specifically discussed and rejected this request.⁷ U.S. EPA's procedural decision may be one of the bases for court actions to contest the Final Rule and to stay the findings' effective date.

Absent any intervening court decision staying their effective date, with the issuance of the

findings, U.S. EPA can finalize the GHG emission limits from light-duty vehicles which were proposed on September 15, 2009. Currently, U.S. EPA has stated that it intends to make the GHG vehicle emissions rule final in March 2010. When U.S. EPA finalizes the vehicle emissions rule, GHGs will become a "pollutant subject to regulation" under the Clean Air Act's programs for stationary sources, *i.e.*, the Prevention of Significant Deterioration ("PSD") and Title V operating permit programs. As discussed in Jenner & Block Climate Change Update "[EPA Proposes Rule for Applying Clean Air Act Permit Requirements to GHG Stationary Sources](#)" (Oct. 6, 2009), U.S. EPA warns that, absent U.S. EPA or Congressional action, regulation of GHG emissions under the PSD and Title V programs will impose

Clean Air Act requirements on millions of industrial, commercial, and residential sources. In addition, other provisions of the Clean Air Act, such as those regulating emissions from airplanes and maritime shipping, also require endangerment findings, which may be substantially similar to those under § 202.⁸ Thus, although U.S. EPA's endangerment findings do not themselves control GHG emissions, unless stopped by Congress or the courts, they could lead to a cascading series of GHG regulations under the Clean Air Act.

Both the endangerment and cause or contribute findings will be published as a Final Rule in the Federal Register. In the interim, U.S. EPA has created a website providing advance copies of the findings and technical support documents, as well as other background information.⁹

Endnotes:

[1] Press Release, U.S. EPA, "[Greenhouse Gases Threaten Health and the Environment/ Science Overwhelmingly Shows Greenhouse Gas Concentrations at Unprecedented Levels Due to Human Activity](#)," Dec. 7, 2009.

[2] [Pre-Publication Endangerment Finding](#).

[3] *Id.* at 10.

[4] *Id.* at 12.

[5] *Id.*

[6] *Id.* at 91.

[7] *Id.* at 49-54.

[8] *See, e.g.*, Clean Air Act §§ 213 (marine shipping and non-road vehicles) and 231 (aircraft and engines).

[9] *See* <http://www.epa.gov/climatechange/endangerment.html>.

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