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EPA Issues Greenhouse Gas Endangerment Finding; Sets Stage For Future Federal Action

On December 7, 2009, the Administrator of the Environmental Protection Agency (EPA) issued findings declaring first, that a combination of six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydro fluorocarbons, perfluorocarbons, and sulfur hexafluoride) constitute the root cause of human-induced climate change and threaten both the public health and the public welfare (Endangerment Finding); and second, that greenhouse gas emissions from motor vehicles contribute to that threat.

The information in
this alert affects
developers.

[The findings](#) were made as a result of the United States Supreme Court decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the International Center for Technology Assessment and 18 other environmental and renewable energy industry organizations requested that EPA issue standards for greenhouse gas emissions from new motor vehicles and engines. The Supreme Court held that carbon dioxide is an "air pollutant" within the meaning of the Clean Air Act, and thus, EPA was required to either regulate greenhouse gases under the Clean Air Act, or explain why it was unwilling to do so.

EPA's findings are based on a "careful consideration of the full weight of scientific evidence and a thorough review of the full weight of scientific evidence and a thorough review of the over 380,000 comments received on the Proposed Findings published April 24, 2009." (Findings, p. 1.) Although EPA's findings do not themselves impose any requirements, they do set the stage for future federal action.

First up are the joint EPA and Department of Transportation's Corporate Average Fuel Economy (CAFE) standards, which were proposed on September 15, 2009. These standards will include miles per gallon requirements and set greenhouse gas emission standards for light-duty vehicles in model years 2012-2016. According to the EPA, greenhouse gas emissions from all on-road vehicles account for 4% of total global greenhouse gas emissions and just over 23% of total U.S. greenhouse gas emissions. EPA's endangerment finding is a prerequisite to adoption of the new CAFE standards.

What will follow along behind the CAFE standards is not yet clear.



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However, the EPA did identify five key areas that are affected by climate change, and as a result of the Endangerment Finding, EPA may now consider regulating industries that contribute to these areas. The categories identified by EPA include:

- Sea level rise – increased risk of storm surge and flooding in coastal zones;
- Water and implications for water use - decreased snow packs in the western United States, which will have an impact on available water supplies;
- Agriculture and forestry – increased size and number of wildfires, insect outbreaks and tree mortality;
- Energy and infrastructure – impacts on energy use and production and impacts on physical and institutional infrastructure; and
- Ecosystems – changed biodiversity as species move north and to higher elevations because of climate change in combination with development, habitat fragmentation and invasive species.

By highlighting these items in the Endangerment Finding, the EPA has provided additional support to those who seek to delay or halt development by means of requiring more detailed greenhouse gas emissions analysis, findings of significance and additional, costly mitigation. This will certainly be true for federal actions requiring compliance with the National Environmental Policy Act, as well as local and state projects that are subject to rigorous environmental review.

As a practical matter, in California, the Endangerment Finding will not result in a new emphasis on greenhouse gas emissions analysis in project-related environmental documents. This has already happened as the result of the actions of the governor, the state legislature, the state attorney general, and numerous lawsuits all identifying the release of greenhouse gas emissions as a potentially significant environmental impact that must be addressed during the environmental review process. With respect to the regulation of motor vehicles, California already has enacted AB 1493 (July 22, 2002), which requires the California Air Resources Board to develop and adopt regulations that will reduce greenhouse gas emissions from passenger vehicles and light duty trucks. Thus, California is ahead of the EPA, at least with regard to emissions from motor vehicles.

The real world implication of these findings, beyond those described above, remains to be seen, but it is certain that EPA has taken a significant first step towards regulating the release of greenhouse gas emissions.

Please contact us with any questions.

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