

Environmental Group, Sustainable Development Group | April 21, 2009

## EPA Endangerment Ruling

On April 17, 2009, the Environmental Protection Agency (“EPA”) issued a proposed finding declaring that greenhouse gasses (“GHGs”) pose a threat to public health and welfare and contribute to the threat of climate change.<sup>1</sup> The Proposed Findings (“Proposed Findings”) were in response to the Supreme Court’s ruling in *Massachusetts vs. the EPA*, 549 U.S. 497 (2007), in which the Supreme Court remanded the case to the EPA to determine whether emissions of GHGs from new motor vehicles cause or contribute to air pollution that is adverse to public health or welfare. Formalization of the Proposed Findings would require the EPA to regulate GHG emissions, which would likely impact a variety of industries. The Proposed Findings, along with an EPA notice in the Federal Register<sup>2</sup> earlier in the week concerning increasing ocean acidification may act as a catalyst for, as well as accelerate the timeline for, federal regulation of GHGs.

### Massachusetts vs. the EPA

In *Massachusetts vs. the EPA*, the Supreme Court held that GHGs are air pollutants covered by the Clean Air Act and that, correspondingly, the EPA has the authority to regulate them. In issuing its decision, the Supreme Court remanded the case to the EPA to determine whether GHGs cause or contribute to air pollution that may reasonably be anticipated to endanger the public. While the case before the Supreme Court concerned GHG emissions from new motor vehicles and new engines, the Court’s ruling was widely interpreted to ultimately allow the EPA to regulate GHG emissions from a wide array of industries, potentially exposing all GHG emitters to regulation under Section 202 of the Clean Air Act.

### Proposed Findings

The Proposed Findings<sup>3</sup> stem from the *Massachusetts vs. the EPA* decision, and are based on scientific analysis of six GHGs.<sup>4</sup> According to the Proposed Findings, anthropogenic emissions have resulted in atmospheric GHG concentrations at unprecedented levels and are likely responsible for observed increases in average temperatures and other climate changes.

<sup>1</sup> This proposed rule is titled, The Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (the “Proposed Findings”).

<sup>2</sup> 74 Fed. Reg. 17484 (Apr. 15, 2009).

<sup>3</sup> These findings are (1) the “Endangerment Finding,” in which the EPA proposes that the mix of atmospheric concentrations of six key GHGs threaten public health and welfare; and (2) the “Cause or Contribute Finding,” in which the EPA proposes that the combined emissions from new motor vehicles and motor vehicle engines contribute to the atmospheric concentrations of key GHGs and hence to the threat of climate change.

<sup>4</sup> Carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.

The Proposed Findings conclude that the observed and projected effects of climate change<sup>5</sup> constitute effects on public health and welfare within the meaning of the Clean Air Act. In addition to threatening human health, the Proposed Findings recognize that GHG emissions may also pose a national security challenge to the United States due to increasing scarcity of water and other resources in certain regions of the world. This lack of resources, driven by climate change patterns, could drive massive migration to more stabilized regions of the world.

The Proposed Findings do not impose any requirements or regulations and the EPA will have to conduct further rulemaking to impose regulatory requirements on either motor vehicles or stationary sources of GHG emissions. There will be a 60-day comment period and two public hearings before the rule is formalized. If the rule is formalized, the EPA will be required to regulate GHG emissions under the Clean Air Act.

## Potential Impacts to Industry: Regulation versus Legislation

Upon formalization of the Proposed Findings, the EPA would be mandated to enact “backdoor” regulation of GHG emissions, absent Congressional debate and approval. EPA regulation of GHG emissions under the Clean Air Act could have significant impacts on several industries, including automobile, transportation, building and energy.

Regulatory changes, among others, could include:

- Heightened emissions reduction standards for vehicles;
- Heightened fuel-efficiency standards for motor vehicles and aircraft, such as a nationwide adoption of new rules for tailpipe emissions;
- Energy efficiency standards applied to utilities, builders and manufacturers of appliances, such as efficiency ratings for commercial and residential buildings or appliances;

- Heightened reporting, disclosure and diligence requirements for covered emitters and entities engaging in transactions with covered emitters;
- Requirements to implement systems or technology to reduce emissions, such as carbon capture and sequestration for the six key GHGs identified in the Proposed Findings;
- Modification of existing EPA regulations, such as EPA GHG allowance platforms for state issued Nitrogen Oxide allowances; or
- Mandates of emissions-reduction technology for the construction of new power plants, or the retrofit of older plants.

The Proposed Findings, though anticipated, have drawn criticism from industry groups. One common objection is that EPA regulations would likely be less favorable towards business than Congressional action. Some commentators have characterized the Proposed Findings as a backdoor attempt to enact a national energy tax. In addition, commercial or industrial operators subject to the Clean Air Act could be named in lawsuits arising from their own, previously unregulated GHG emissions under the Act. Such litigation could include enforcement actions brought by the EPA or state regulatory agencies, as well as claims by private individuals to compel emitters to control their GHG emissions.

The integration of any EPA regulation with future federal GHG legislation could also create issues of overlapping authority. For example, the cap and trade system contemplated by the Obama administration<sup>6</sup> could potentially overlap with the EPA’s GHG regulation. In announcing the Proposed Findings, the EPA noted that both President Obama and EPA Administrator Lisa P. Jackson have indicated a preference for comprehensive legislation from Congress over agency rule making. Nevertheless, the EPA’s Proposed Findings will likely

<sup>5</sup> These changes include more frequent and intense heat waves, more severe wildfires, degraded air quality, changes in precipitation patterns, greater sea level rise, more intense storms, harm to water resources, harm to agriculture, and harm to wildlife and ecosystems.

<sup>6</sup> The Obama administration has called for an economy-wide cap and trade system to reduce GHG emissions. This proposed system would require covered entities to hold tradable emissions credits for each ton of GHGs emitted.

intensify pressure on Congress to pass its own GHG legislation.<sup>7</sup>

## Possible Expansion of Regulatory Authority Under Clean Water Act

In addition to an expansion of regulatory authority under the Clean Air Act, recent developments raise the possibility of future EPA GHG regulation under the Clean Water Act. On April 15, 2009, the EPA published a “Notice of Data Availability” in the Federal Register seeking additional information on oceanic acidification to better determine whether the “aquatic life criteria” for marine pH levels warranted revision. Ocean waters absorb large amounts of GHGs from the atmosphere, affecting the pH levels of the water. The Notice of Data Availability states that “[i]t is important to note that ocean acidification is a direct consequence of fossil

<sup>7</sup> House Representatives Edward Markey (D-MA) and Henry Waxman (D-CA), co-authors of the draft Energy and Greenhouse Gas Emissions Bill, announced that hearings on climate legislation will begin this week with a vote on the measure expected by Memorial Day.

fuel . . . CO<sub>2</sub> emissions, which are also the main driver of the anticipated climate change.” Should the EPA conclude that a relationship between marine pH levels and ocean acidification exists, the EPA could potentially regulate GHGs under the Clean Water Act.

## Looking Forward

The EPA’s Proposed Findings represent a significant development in the evolution of federal GHG regulations and are likely to increase pressure on Congress to adopt federal GHG regulation. If adopted, the Proposed Findings will provide the federal government with a choice between enacting a national GHG management plan, such as a cap and trade program, or regulating climate change through existing environmental laws. Regardless of whether the EPA ultimately regulates GHGs under one or more existing environmental laws, these developments present the Obama administration with an alternate route to GHG regulations, and as a result, greater leverage in negotiations with Congress for a federal approach to GHG emissions management.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

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