

## [ Alerts and Updates ]

### Environmental Protection Agency's "Endangerment" Proposal: A Carrot or a Stick?

April 20, 2009

On April 17, 2009, the U.S. Environmental Protection Agency (EPA) issued a proposed rule that, if adopted, would find that the atmospheric concentrations of certain greenhouse gases (GHGs) endanger the public health and welfare within the meaning of section 202(a) of the Clean Air Act (CAA). The EPA also proposed to find that GHG emissions from new motor vehicles are contributing to the mix of GHGs in the atmosphere, and therefore contribute to public health and welfare endangerment. While the proposal – an effort to manage what the EPA refers to as the "enormous problem" of climate change – ultimately could result in regulations affecting a range of sectors of the economy from automobiles to power plants, the proposal itself does not include any draft regulations limiting the emission of GHGs. Such regulations would be developed in a subsequent EPA rulemaking proceeding unless Congress moves ahead with broader legislation addressing climate change. While the EPA's action is itself very significant, its political implications may be of greater import. Indeed, the very *threat* of proposed EPA regulation of GHGs is essentially a "stick" intended to prod Congress into action on a cap-and-trade regime as an alternative means of confronting climate change.

#### The Clean Air Act

The recent "endangerment" proposal complies with the 2007 U.S. Supreme Court decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). That landmark decision directed the EPA to examine whether GHG emissions linked to climate change could be curbed under the CAA. The Court held that the EPA Administrator must determine whether GHG emissions from new motor vehicles cause or contribute to air pollution that reasonably may be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. The Court also found that in making these decisions, the EPA Administrator is required to follow the language of section 202(a) of the CAA, which, among other things, states that the Administrator "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

The EPA under the Bush administration did not respond to the Supreme Court decision, leaving room for new EPA Administrator Lisa P. Jackson to make the "endangerment" finding. As noted above, this proposal finding does not itself impose any requirements on any industry. Such requirements would be developed in a separate EPA rulemaking unless Congress steps in and enacts legislation addressing climate change.

#### Prodding Congress into Action

The issuance of the "endangerment" finding at this time appears to be part of an overall strategy to incent or force Congress to take action on legislation. The EPA more than hinted at its agenda in its April 17 statement, in which Administrator Jackson said, "This pollution problem has a solution – one that will create millions of green jobs and end our country's dependence on foreign oil." Although the solution was not described specifically in the EPA's statement, the EPA stated that "[n]otwithstanding this required regulatory process, both President Obama and Administrator Jackson have repeatedly indicated their preference for comprehensive legislation to address this issue and create the framework for a clean energy economy."

U.S. Sen. Barbara Boxer (D-Calif.), chairwoman of the Environment and Public Works Committee, quickly praised the administration for making the finding, but said that legislative action would be the best way to address carbon regulation. "The Clean Air Act provides EPA with an effective toolbox for cutting greenhouse gas emissions right now," Boxer said in a statement. "However," she added, "the best and most flexible way to deal with this serious problem is to enact a market based cap and trade system which will help us make the transition to clean energy and will bring us innovation and strong economic growth."

During the 60-day comment period, the ball will be in Congress' court. Several climate change proposals have been put forth, but no decisive action has been taken. Whether viewed as a carrot – an incentive to Congress to get serious – or a stick – legislate or else, EPA's action raises the stakes on the Hill.

### For Further Information

If you have questions about this Alert, please contact [James W. McTarnaghan](#) in our [San Francisco office](#), [Seth v.d.H. Cooley](#) in our [Philadelphia office](#), [Stephen L. Teichler](#) or [Jennifer D. Cook](#) in our [Washington, D.C.](#) office, any other [member](#) of the [Energy, Environment and Resources Practice Group](#), or the attorney in the firm with whom you are regularly in contact.