

Environmental and Utilities Update

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EPA's Endangerment Finding for Greenhouse Gases Clears Way to Regulation

On Monday, December 7, 2009, the U.S. Environmental Protection Agency (EPA) released its long-awaited finding that emissions of greenhouse gases (GHGs) endanger public health and welfare, and that GHG emissions from cars and trucks cause or contribute to that endangerment. Absent intervening action by Congress, the finding effectively opens the path for EPA to adopt GHG emissions controls under the existing Clean Air Act for industrial and commercial facilities that emit GHGs. The scope, timing, and content of such controls have yet to be resolved.

Background

The endangerment finding, announced on the opening day of global climate change talks in Copenhagen, Denmark, responds to the Supreme Court's 2007 decision in Massachusetts v. EPA that EPA has authority under the Clean Air Act to regulate carbon dioxide and other GHG emissions from new motor vehicles.

In its endangerment finding, EPA cites scientific evidence that "compellingly supports" the finding that GHGs in the atmosphere endanger public health and welfare. EPA identifies specific instances of harm including disruptions to food crop and livestock lifecycles; increased instances of asthma and respiratory illness and related mortality; sea ice loss and resultant coastal erosion endangering property, habitats, ecosystems, and communities; ocean acidification; disruptions in energy use and production; increases in food and waterborne pathogens; and disruptions in the seasonal availability of water.

The finding defines six "well-mixed greenhouse gases" (carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons) as "air pollutants" under the Clean Air Act. Notably, only four of these gases (carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons) are emitted from motor vehicles and engines. The finding cites the climate change impacts of additional substances, including chlorofluorocarbons and hydrochlorofluorocarbons, but declines to designate them as additional GHG "air pollutants" at this time.

Significance for Stationary Sources of GHGs

The endangerment finding does not have a direct impact on industrial and commercial facilities that emit GHGs, but it sets the stage for EPA to regulate such emissions through interlinked sections of the Clean Air Act. On the basis of the endangerment finding, EPA is expected in the spring of 2010 to finalize pending proposed "tailpipe" standards for GHG emissions from cars and light-duty trucks. Once adopted, such standards would, for the first time, make GHGs subject to regulation under the Clean Air Act. At that point, other sections of the Act will require EPA (and states administering EPA-approved air permit programs) to include GHG emission standards in all air permits thereafter issued to certain stationary sources - specifically, each new

"major source" of GHGs or existing major source that seeks to undertake a "major modification." The Act sets "major source" thresholds at 250 tons per year (or 100 tons per year for certain source categories) of potential emissions. If these thresholds were applied to GHGs, EPA estimates that the number of new and modified facilities triggering permit requirements each year would increase over a hundredfold.

To prevent otherwise unregulated sources from being swept up into "major source" permitting programs, EPA has proposed to temporarily "tailor" the "major source" threshold for GHGs to 25,000 tons of potential emissions per year. This proposal (known as the "PSD and Title V tailoring rule," in reference to the Clean Air Act's Prevention of Significant Deterioration and Title V permit programs) is expected to be finalized concurrently with the tailpipe standards next spring. The tailoring rule would be effective for at least five years, during which EPA says it will further consider options for sources under the 25,000 ton threshold.

The finalized endangerment finding and proposed tailpipe and PSD/Title V tailoring rules lead to numerous additional questions about possible further GHG regulations. These questions include how EPA will establish what constitutes "Best Available Control Technology" (as required under PSD) for controlling GHG emissions when traditional end-of-pipe control technology is apparently lacking for carbon dioxide, the most common GHG. Also unclear is whether EPA will (or must) develop GHG emission standards for various categories of industrial and commercial sources (under the Clean Air Act's New Source Performance Standards program). A further issue is whether EPA will (or must) establish a "National Ambient Air Quality Standard" for GHGs under the Act's longstanding provisions, which were developed some forty years ago to address domestic air quality issues and which would trigger a further cascade of GHG regulation by EPA and states.

So far, within this complex context, industry and environmentalist reactions to the endangerment finding have ranged across the spectrum from strong opposition to strong support. At least one business interest group has already announced that it will challenge the endangerment finding in court.

In the meantime, as EPA continues to work on the GHG tailpipe standards and the PSD/Title V tailoring rule, Congress continues to seek a legislative solution to address climate change, which may or may not preempt EPA's current efforts.

In short, the endangerment finding initiates a new and critical phase in the emerging climate change regulatory regime in the U.S.

Robinson & Cole is currently advising a number of clients regarding the final rule, as well as the challenges and opportunities from emerging climate change programs at federal, regional, state and local levels. We stand ready to apply our experience and insights to your operations and strategic planning, particularly in these challenging economic times. If you would like to discuss how these issues may impact your business, please contact any of these attorneys in our Environmental and Utilities Practice Group:

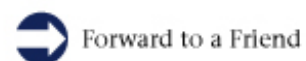
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