



December 16, 2009

EPA ISSUES ENDANGERMENT FINDING FOR GREENHOUSE GASES**ENERGY/ENVIRONMENTAL LAW ALERT**

On December 7, 2009, the Environmental Protection Agency (EPA) issued its “endangerment finding” for carbon dioxide and five other greenhouse gases (GHGs). EPA Administrator Lisa Jackson found that GHGs threaten the public health and welfare of current and future generations, and GHG emissions from new motor vehicles cause or contribute to GHG pollution. This finding imposes no regulatory requirements on industry or other entities, but is a prerequisite to finalizing the agency’s proposed GHG standards for light-duty vehicles (the mobile source standard). This Energy/Environmental Alert examines several likely and potential impacts.

One result appears virtually certain: litigation to overturn the finding. Within hours of EPA’s issuance of the finding, a conservative activist organization announced that it would file suit seeking to have the finding rejected by the courts. In addition, industry has threatened to attack the finding on the basis that EPA denied its petition for an “on the record” hearing under the Administrative Procedure Act to review the science behind the finding.

Assuming that the litigation does not succeed, another virtual certainty is the finalization of EPA’s mobile source standard, which was jointly proposed with the National Highway Safety Administration. The agency, auto makers, environmental activists and the state of California struck a deal on mobile source emissions so finalization of this rule, probably in March, is extremely likely.

Other impacts are more speculative, such as the impact on the climate change negotiations in Copenhagen. EPA Administrator Jackson has insisted that the December 7 issuance of this finding was not related to the negotiations in Copenhagen, which began two days later. Most observers greeted this assertion with considerable skepticism since it is obviously intended to bolster the United States’ position in the negotiations. Whether it will do so is another question, beyond the scope of this Alert.

The finding’s impact on the legislative process is somewhat uncertain also. The House of Representatives passed its version of “cap and trade” legislation to control GHG emissions this past summer, and many House members, especially Democrats, are not eager to vote again on this issue, given the widely-held belief that it will harm the American economy. Meanwhile, the Senate continues to attempt to develop a bill which can serve as a basis for its consideration of climate change legislation. The conventional wisdom has been that the endangerment finding will create leverage for the Administration and EPA to pressure Congress into taking action since the Clean Air Act is widely seen as an unsuitable means of regulating GHG emissions. However, many in Congress want to avoid voting or voting again on legislation that is likely to prove unpopular. As a consequence, they may insist on “deferring” to the EPA since it is already taking action. Time will tell how this plays out as the Senate appears to be moving very slowly so that 2011 is likely the earliest that legislation will be adopted, if climate change legislation is ultimately enacted.

The fate of EPA’s proposed tailoring regulation (NPR) for stationary sources is not as predictable as that of the mobile source regulation. This NPR attempts to limit regulation of stationary sources to those which emit more than 25,000 tons of GHG per year; if adopted, it would impose Best Available Control Technology on all new and modified sources that fall within this category. The EPA is reportedly moving very slowly on finalizing this regulation

This client alert provides only general information and should not be relied upon as legal advice. For more information, contact your Patton Boggs LLP attorney or the author listed below.

Timothy A. Vanderver, Jr.
tvanderver@pattonboggs.com
202.457.6074

Gordon Arbuckle
garbuckle@pattonboggs.com
202.457.6090

WWW.PATTONBOGGS.COM

for a number of reasons, including questions about leverage on Congress and concerns about litigation over the regulation. With the endangerment finding, however, EPA may be subject to pressures to move the stationary source regulation more quickly.

The endangerment finding has already spurred calls for EPA to develop a National Ambient Air Quality Standard (NAAQS) for GHGs. Establishment of an NAAQS is the first step toward the comprehensive regulation of all stationary sources that emit GHGs in excess of the relevant threshold. While Administrator Jackson has stated that the endangerment finding does not require such a regulatory action, strong views to the contrary have been expressed.

The combination of international climate change negotiations, the legislative process and regulatory developments and litigation thereon raise the specter that no GHG reduction scheme will be developed in the foreseeable future. Such a possibility would bring litigation to the fore, assuming that the decisions of the U.S. Courts of Appeal for the Second and Fifth Circuits (discussed in our [November 6 Alert](#)) are upheld. Further, the endangerment finding should strengthen plaintiffs' cases since EPA -- the federal agency responsible for environmental protection -- has now formally found that GHG emissions threaten public health and welfare. That should give plaintiffs a leg up in proving injury from such emissions.

In sum, it seems quite likely that things will get worse on the climate change front for GHG emitters before they get better.

WASHINGTON DC | NORTHERN VIRGINIA | NEW JERSEY | NEW YORK | DALLAS | DENVER | ANCHORAGE | DOHA, QATAR |
ABU DHABI, U.A.E.