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EPA Finalizes Endangerment Finding: One Step Closer To the Regulation of Greenhouse Gas Emissions

On December 7, 2009, the U.S. Environmental Protection Agency (EPA) finalized a formal agency finding that greenhouse gas emissions from manmade sources endanger public health and welfare. The endangerment finding is the agency's long-awaited response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, in which the Court first held that greenhouse gas emissions are "air pollutants" under the Clean Air Act, and that EPA therefore has the statutory authority to regulate such emissions.

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EPA's action consists of a two-part finding. First, the EPA Administrator finds that current and projected atmospheric concentrations of six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) threaten public health and welfare. Second, the Administrator finds that the combined emissions of these six greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution that threatens public health and welfare. Climate change skeptics will no doubt challenge EPA's scientific basis for both of these findings. Indeed, within hours of the agency's announcement, at least one interest group, the Competitive Enterprise Institute, stated its intention to challenge the EPA's findings in court.

It is important to note that EPA's endangerment finding, standing alone, does not impose regulations on the emissions of greenhouse gases. Rather, it is simply a statutory prerequisite to regulation under the Clean Air Act. Lisa Jackson, EPA's Administrator, has repeatedly taken this position in testimony before Congress over the past several months. Notwithstanding its limited statutory import, however, there is no question that the issuance of the endangerment finding signals that the agency's regulation of greenhouse gas emissions is imminent.

EPA has already proposed to exercise this authority by establishing greenhouse gas emission standards for cars and light-duty trucks. These standards, which were proposed in September 2009, are expected to become final in the spring of 2010. Once finalized,



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these greenhouse gas emission standards—although designed solely for mobile sources—will have a cascading effect throughout other Clean Air Act programs. Most notably, EPA has stated that the issuance of final greenhouse gas standards for cars and light-duty trucks will bring greenhouse gas emissions within the scope of the Clean Air Act’s stationary source permitting programs. Other EPA proposals, including its “PSD tailoring rule” proposal, clearly anticipate this triggering effect.

Many believe EPA has no intention of exercising its statutory authority to regulate greenhouse gas emissions, but instead is simply taking steps to keep the pressure on Congress to pass comprehensive federal climate change legislation. This theory makes sense, especially considering that EPA, industry, and most segments of the interested public are all generally in consensus that the Clean Air Act, as it stands today, is not the most appropriate statutory vehicle to address the unique challenges posed by greenhouse gas emissions. The drafters of the Waxman-Markey bill, the federal climate change legislation passed by the U.S. House of Representatives in June 2009, no doubt agree, as that bill proposes to explicitly exempt greenhouse gases from many existing Clean Air Act programs.

It would be ill-advised at this stage, however, to dismiss EPA’s endangerment finding and proposed greenhouse gas emission standards for cars and light-duty trucks as mere posturing. The fact remains that if Congress does not intervene, EPA is on a clear course towards actions that would impose regulations on greenhouse gas emissions from a whole host of sources in a matter of months. Moreover, the latest drafts of climate change legislation in the Senate do not contain the same exemption as the Waxman-Markey bill, perhaps indicating that even if Congress were to pass a climate change bill in early 2010, it would not necessarily de-rail EPA’s current path towards greenhouse gas regulation utilizing the Clean Air Act.

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