

EPA's proposed endangerment finding serves as a spur to congressional action

BY ALLISON B. RUMSEY

Two years after the U.S. Supreme Court remanded *Massachusetts v. EPA*, 549 U.S. 497 (2007), to the Environmental Protection Agency (EPA) to determine if greenhouse gas (GHG) emissions endangered public health and welfare, EPA issued its proposed endangerment finding. The result was unsurprising but very consequential. In the April 17, 2009, *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 18,886 (Apr. 24, 2009), the EPA administrator made a two-step determination. First, the six key GHGs—carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride—constitute air pollution that may be reasonably anticipated to endanger public health and welfare. Second, the combined emissions of four of these six gases from new motor vehicles and motor vehicle engines “cause or contribute” to the atmospheric concentrations of these GHGs that contribute to climate change. Consequently, the administrator *must*, under the § 202(a) of the Clean Air Act (CAA), regulate new motor vehicle emissions (i.e., passenger cars, light-duty trucks, motorcycles, buses, and medium and heavy-duty trucks).

The proposed finding is the product of the Supreme Court's 2007 ruling in *Massachusetts v. EPA* in which Massachusetts, eleven other states, and others filed suit in 1999 to challenge EPA's denial of a petition to regulate GHGs from motor vehicles under § 202(a)(1) of the CAA. Under that provision, the EPA administrator is obligated to set standards for “any air pollutant” from new motor vehicles that, “in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” The Court held that because GHGs are “air pollutants” under the CAA, EPA has authority to regulate them if it determines that there is an endangerment to public health or welfare. Despite the Supreme Court's ruling, EPA took no public action for more than a year and then, in July 2008, issued a massive Advanced Notice of Proposed Rulemaking that reviewed various options under the CAA but did not advocate any action on climate change. Once President Obama was inaugurated in January 2009, however, things began moving quickly.

Air pollutant, public health, and welfare finding

The proposed endangerment finding starts a march toward federal regulation in the arena of climate change. The administrator proposes to treat carbon dioxide and the other five GHGs collectively as one air pollutant. The rationale for treating all six pollutants as one class is that they share characteristics, have been well studied, and “together constitute the root cause of human-induced climate change.” Although the six GHGs are grouped together, the administrator emphasizes that she has the authority and flexibility to set standards that control emissions both as a group and individually. Interestingly, the new motor vehicle engines to be regulated under § 202(a) emit only four of the six GHGs (not perfluorocarbons and sulfur hexafluoride). This indicates that EPA contemplates that future regulation of GHGs will extend beyond motor vehicle engines.

Other GHGs and aerosols that have warming effects are not included in the proposed definition of “air pollution” or

“pollutant.” Although the agency declined to include water vapor, ozone-depleting substances, tropospheric ozone, black carbon, and fluorinated ethers in the definition of “air pollution” for purposes of the endangerment finding, EPA stated that it currently is evaluating the complex role of black carbon in climate change and indicated that it plans to regulate black carbon from marine and aviation sources in a separate action.

“Welfare” is broadly defined in § 302(h) of the CAA to include impacts on an array of things, including soils, water, crops, vegetation, wildlife, weather, economic values, personal comfort and well-being, and damage to property, among others. While there are expected to be beneficial impacts from warming temperatures—for example, an increased growing season in some areas—EPA concludes that, on the whole, the impacts will be detrimental.

Interestingly, EPA notes that it expects the ambient concentrations of these GHGs to remain below levels causing direct public health effects. While increased levels of GHGs will not directly impact public health—such as through respiratory or toxic effects—the administrator rejects the view that there must be a direct cause and effect connection between GHGs and public health. Instead, she casts the net more broadly, finding that there may be a variety of pathways through which climate change affects public health. Some of the effects noted are more frequent extreme weather events, air quality impacts, heat waves, the increased spread of disease and waterborne pathogens, and changes in the distribution of vegetation that will lead to an increase in allergenic illnesses.

In the view of the administrator, current and projected levels of GHGs are now and will continue to adversely affect public health and welfare.

Endangerment and cause or contribute finding

After reviewing the great body of scientific evidence on climate change and weighing the severity and likelihood of possible harms and projecting future trends, the administrator concludes that the immediate and future impacts of climate change, including death due to heat waves, increases in regional ozone, expanded ranges of disease, wildfires, and harm to water resources, agriculture, wildlife, and ecosystems, may reasonably be expected to affect public health and welfare within the meaning of the CAA. Further, the administrator determines that the six key GHGs “cause or contribute,” or will “cause or contribute,” to climate change.

The administrator based her conclusion on several key findings. First, while acknowledging that there may be some unknowns, the great weight of the large body of scientific data strongly supports a conclusion that GHGs are the principal driver of climate change. Second, the statutory language itself does not require absolute certainty, but only that air pollution “in her judgment” “may reasonably be anticipated” to harm human health and welfare. According to the proposed finding, this language allows the administrator to use her discretion in evaluating the body of science and to move proactively to prevent harm. Third, again relying on the statutory language “cause or contribute,” the administrator rejects the contention that EPA may act only if the emissions are the sole or major cause of the air pollution. In her view, the term “con-

tribute” supports agency action that will solve only a piece of the problem. Unlike other CAA provisions, there is no requirement of “significant” contribution. Acknowledging that a truly trivial or de minimis contribution might not be sufficient to authorize EPA action and that the agency does not know with any precision what fraction of the concentration of GHGs in the atmosphere is due to motor vehicle engines, the administrator used emissions as a “perfectly reasonable proxy for contributions to atmospheric concentrations.” Calculating that motor vehicle engines contributed to nearly 24 percent of total GHG emissions domestically and 4 percent globally during 2005, the administrator found that these quantities were sufficient to trigger regulation.

Implications of the endangerment finding

Despite the fanfare with which the proposed finding was received, the proposed endangerment finding does not, in and of itself, impose any immediate obligations on industry. However, it is the first step to regulation by EPA of motor vehicle emissions under the CAA. Moreover, it is a signal to Congress and industry that EPA is moving forward on climate change and may take action pursuant to its various authorities under the CAA on a range of fronts, if Congress does not act first with comprehensive climate and energy legislation.

EPA did not indicate what its time table for issuing regulations would be or what approach the agency would follow to reduce motor vehicle emissions. The alternative approaches could include mandating certain technologies, establishing GHG emission limits per mile, or requiring use of low-carbon fuel, among others.

Although the endangerment finding impacts only the regulation of motor vehicles, it is seen as a prelude to regulation of GHGs in a wide variety of other contexts. Sections of the CAA applicable to fuels, fuel additives, nonroad engines, and aircraft engines include endangerment language triggering regulation of pollutants. Other CAA provisions—for example, § 108(a)(1)(A) (establishing National Ambient Air Quality Pollutants) and § 111(b)(1)(A) (stationary sources)—contain similar endangerment language; thus an endangerment finding under § 202(a) makes it difficult for EPA to avoid such findings under these other provisions, leading us down the road to

stationary source regulation. Further, while EPA states that a “final positive endangerment finding would not make the air pollutant . . . a regulated pollutant under the Prevention of Significant Deterioration Program,” the finding may signal the agency’s thinking on the possible inclusion of carbon dioxide limits in its revision of the New Source Performance Standards for electric generating facilities, including coal-fired power plants.

Current signals indicate that, notwithstanding the endangerment finding, the Obama administration will try to draw together a single uniform national standard for each class of motor vehicles as part of its auto industry bailout package, combining the CAA emissions standard, the California emissions standard, and CAFE standards.

Next steps

In a departure from other rulemakings under § 202(a), EPA is not simultaneously making an endangerment finding and proposing standards on motor vehicles. Instead, EPA opened the proposed endangerment finding to public comment for sixty days to June 23, 2009, and will issue regulations addressing GHG emissions from motor vehicles only after reviewing and evaluating comments.

Meanwhile, Congress is actively debating comprehensive GHG regulation that may well supersede the current EPA rulemaking activities. EPA also has issued a Proposed Mandatory Reporting of Greenhouse Gases. This proposed regulation would require all sectors, including motor vehicle manufacturers, to report GHG emissions over 25,000 tons of carbon equivalent a year. The level at which mandatory reporting is required is expected to be the trigger for entry into any eventual comprehensive congressional GHG legislation. Thus the rulemaking is serving both as a spur to force Congress to act and as a backstop in case it does not.

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