WILLIAMS MULLEN
Where Every Client is a Partner®

May 2009

Climate Change Regulation & Carbon Finance

Alert

EPA's Proposed Greenhouse Gas Endangerment Finding:
What it Means, Why You Should Care, and What's to Come

By CHANNING J. MARTIN

In an action that should come as a surprise to no one, EPA has issued a proposed finding that current and projected emission levels of carbon dioxide (CO_2) and five other greenhouse gases (collectively "GHGs") endanger the public health and welfare of current and future generations. President Obama's campaign platform called for regulation of such GHGs in some fashion, so the finding proposed by EPA Administrator Lisa Jackson on April 17 was expected. EPA will accept public comment on its proposal until June 23, 2009.

Background

EPA's proposed finding has its genesis in *Massachusetts v. EPA*, a case decided by the United States Supreme Court in April of 2007. There, Massachusetts and 11 other states sued EPA to challenge its denial of a petition to regulate GHG emissions from motor vehicles under § 202(a) of the Clean Air Act (CAA). Section 202 requires the EPA Administrator to set standards for "any air pollutant" from new motor vehicles which "in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." The states argued that EPA was wrong to conclude that it didn't have the authority to regulate GHGs as "air pollutants" under the CAA. The Supreme Court agreed, finding that GHGs fit well within "the Clean Air Act's sweeping definition of 'air pollutant.'"

The Court then remanded the case to EPA for further review and determination. It advised EPA that it could avoid regulating GHGs from motor vehicles only if it determined that GHGs do not contribute to climate change or if it provided some reasonable explanation for why it cannot or would not exercise its discretion to determine whether they do.

EPA took no action on the remand until almost a year and a half later when it issued an Advanced Notice of Proposed Rulemaking (ANPR) in late July 2008. The ANPR, issued by EPA under the Bush administration, reviewed the science of global warming and various possibilities for addressing GHG emission regulation under the CAA, but made no proposed finding of endangerment or indicate any intention to do so.

Things changed markedly under President Obama. Within a mere 77 days of his taking office, EPA issued its proposed endangerment finding. As described below, this action has far reaching consequences and marks the beginning of a cat-and-mouse game with Congress on stand-alone climate change legislation.

What did the Administrator determine?

To understand the proposed finding, you have to understand what § 202(a) of the Clean Air Act requires the Administrator to do. It requires

Key Contacts

William A. Anderson, II
202.327.5060
wanderson@williamsmullen.com

James R. Cannon, Jr.
202.293.8123
jcannon@williamsmullen.com

Amos C. Dawson, III
919.981.4010
adawson@williamsmullen.com

Jerry W. Kilgore
804.783.6933
jkilgore@williamsmullen.com

Channing J. Martin
804.783.6422
cmartin@williamsmullen.com

D. Cameron Prell
202.293.8112
cprell@williamsmullen.com

Robert F. Riley
202.293.8121
rriley@williamsmullen.com

Sean M. Sullivan
919.981.4312
ssullivan@williamsmullen.com

Michael J. Falencki*
202.327.5065
mfalencki@keelengroup.com

Matthew B. Keelen*
202.293.8120
mkeelen@keelengroup.com

*non-attorney professional

A Professional Corporation

www.williamsmullen.com

her to set standards applicable to the emission of any air pollutant from new motor vehicles if she makes both of the following determinations: First, in her judgment, may the "air *pollution*" under consideration (in this case, GHGs) "reasonably be anticipated" to endanger public health or welfare? Second, in her judgment, do emissions of one or more "air *pollutants*" from new motor vehicles "cause or contribute" to this air *pollution*? The distinction between pollution and pollutants is important. Air pollution is in the ambient air; air pollutants are what come out of a tailpipe. Also, note that the words used in the statute give the Administrator a great deal of flexibility in making these determinations. More on these things later.

So how did the Administrator answer each of the two questions?

The Proposed Endangerment Finding

First, Administrator Jackson determined that "the combined mix of six key directly-emitted and long-lived greenhouse gases, [being] carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride," is a form of "air pollution" that "together constitute the root cause of human-induced climate change." Next, she determined that "in her judgment," this form of air pollution could "reasonably be anticipated to endanger public health or welfare."

What effects on public health and welfare does the Administrator anticipate? First, the good news. The Administrator did not find that GHGs in the ambient air directly endanger "public health," acknowledging that they "do not cause direct adverse health effects such as respiratory or toxic effects." Nevertheless, although there is no definition of "public health" in the CAA, the Administrator said she was allowed to consider morbidity and acute and chronic health effects in reaching her determination, and that "concentrations of [GHGs] endanger public health through a wide variety of pathways." Without quantifying the effects, Administrator Jackson suggested that older adults are sensitive to hot temperatures which could lead to increases in mortality. She also suggested that climate related factors could result in an increase in the spread of several aeroallergens and food and water-borne pathogens.

Regarding the second step in her analysis, endangerment to welfare, the CAA defines "welfare" to include effects on such things as soils, water, crops, wildlife, vegetation, weather, visibility, personal comfort and well-being, and damage to property. The Administrator concluded that "current and projected levels of [GHGs] and resultant climate change are already adversely affecting, and will continue to adversely affect, public welfare within the meaning of the [CAA]." Some of the welfare effects she determined are extreme weather events and flooding, increased wildfires, greater runoff and erosion, increased disease and competition for scarce water resources, insect outbreaks, reductions in crop yields and livestock, increased crop failures, and adverse impacts on air and water quality.

There are undoubtedly some readers of this article who disagree that GHGs emissions endanger public health and welfare, or at least are not sure. The Administrator acknowledged that significant uncertainties in climate science exist and that "[p]rojecting the exact magnitude of a particular impact due to climate change is difficult." Nevertheless, she said Congress recognized "that there are inherent limitations and difficulties in information on public health and welfare, but nonetheless expected the Administrator to exercise her judgment based on the information available."

Congress did indeed give her wide discretion. The CAA does not require EPA to find that public health or welfare *will be* endangered by the form of air pollution at issue, only that public health or welfare is *reasonably anticipated* to be endangered by it. The Administrator took pains in her finding to note this distinction and that the Act allows her to exercise judgment by weighing the potential severity of the risks posed by climate change.

In protecting endangerment to public health and welfare, Administrator Jackson said she did not need to wait until actual harm has occurred. She said she was allowed "to act in conditions of uncertainty" to prevent catastrophic harm, and that her authority was not limited to "merely reacting to harm or to acting only when certainty has been achieved." Indeed, the Administrator said that "fail[ure] to look to the future or to less than certain risks" would be to avoid her statutory responsibilities to protect public health and welfare.

So if the question is did the Administrator exceed the bounds of her authority in making the endangerment finding, the answer is probably no. The CAA provides her plenty of leeway.

The Proposed Cause or Contribute Finding

The next determination Administrator Jackson was required to make under § 202(a) was whether emissions of one or more "air *pollutants*" from new motor vehicles "cause or contribute" to GHG air pollution. She proposed to define the air pollutant(s) from new motor vehicles that may cause or contribute to GHG air pollution as a single bundled air pollutant consisting of the collective class of the six GHGs mentioned above because "they share the same relevant properties regarding their effect on the global climate…."

As an aside, those who know their science may have noticed that only four of these six GHGs are emitted by motor vehicles. The other two - perfluorocarbons and sulfur hexafluoride - are not. The Administrator explained this action by saying it "is not unusual for a particular source category to emit only a subset of a class of substances that constitute a single air pollutant." (More on this later.)

The Administrator then made a number of comparisons of emissions from new motor vehicles to total global emissions of the six GHGs for the year 2005. Based on that data, she found that new motor vehicles represent 24 percent of total GHG emissions in the United States (the second largest GHG-emitting sector behind electric utilities) and represent 4.3 percent of the total global GHG emissions. She therefore determined that, in her judgment, the combined contribution of the four GHGs emitted by new motor vehicles "causes or contributes" to the air pollution previously discussed.

Similarly to the endangerment finding, the CAA does not require the Administrator to determine that GHGs emitted by motor vehicles *cause* the "air pollution" that endangers public health and welfare, only that they *contribute* to it.

What happens once the proposed finding is final?

Once the proposed finding, i.e., the proposed rule, is made final - something that is all but assured - EPA will be *required* by § 202(a) of the CAA to propose standards for GHG emissions from all new motor vehicles. EPA says it expects to propose those standards "several months from now." After those standards are proposed, another lengthy rulemaking process will be triggered. It will likely be sometime in 2010 before any such standards become final. If that happens (as opposed to GHGs being regulated instead under stand-alone GHG legislation), that's when things will really get interesting.

Yes, GHGs would be regulated from new motor vehicles, but that's only part of this policymaking mosaic. Because the six GHGs would be "air pollutants" regulated under the CAA, those pollutants also *would be required* to be regulated under the New Source Review ("NSR") program for major stationary sources. (A stationary source is a building, structure, facility or installation). The emissions threshold at which stationary sources are deemed "major" and thus regulated under the NSR program depends on whether the source is located in an air quality attainment area or unclassifiable area, or is located in a non-attainment area. Unless and until EPA promulgates a National Ambient Air Quality Standard for

GHG "air pollutants," the emissions threshold would be 100 tons per year ("tpy") for certain listed source categories, such as industrial facilities and processing plants, and 250 tpy for all other stationary sources. If EPA continues on this course, any proposed new stationary source that meets or exceeds these thresholds would have to obtain a Prevention of Significant Deterioration ("PSD") permit before commencing construction. In addition, Best Available Control Technology ("BACT") would be required to control the emissions.

If you think that only large industrial sources would be required to obtain PSD permits, guess again. It's ridiculously easy to emit 250 tpy of GHGs. In fact, many *office buildings* emit far more than that just from their heating systems. What about modifications to existing major sources of GHGs, *e.g.*, replacing the heating system in an office building? Because no PSD "significant net emissions increase" level has been established by EPA for this pollutant, if the modification made to the major source causes the source to have the potential-to-emit just one more molecule of GHGs, a permit is required before the modification may be made.

As previously noted, motor vehicles emit only four of the six GHGs that make up the "air pollutant" proposed by the Administrator. So why does the definition cover six GHGs when motor vehicles emit only four? One explanation could be that this proposed definition is a Trojan horse that will allow EPA to extend regulation of these two additional GHGs to major stationary sources if and when these sources are required to obtain permits.

You probably get the picture. If EPA moves forward with promulgating GHG emission standards for new motor vehicles, a large number of businesses who have never had to obtain permits will have to do so. The significant costs to do so, not to mention the bureaucratic quagmire that could result from having to issue thousands of PSD permits, could be astronomical. All of this explains why almost no one wants to use the CAA to regulate GHGs. Even Administrator Jackson has expressed a preference for stand-alone climate change legislation.

What's next?

That's a good question. A high-stakes game of political chicken is now being played in Washington. Some say the Administrator's action is designed to convince members of Congress that if they don't pass stand-alone legislation such as the Waxman-Markey bill now being debated in the House, President Obama and EPA are going to regulate GHGs using the CAA. But while all parties involved seem to acknowledge that the CAA is ill-suited to regulate GHGs and that stand-alone legislation is preferred, there are still plenty of people who are concerned about the effects of the legislation, specifically its effects on the economy. There are also myriad political, industry and environmental interests at work full-time on every aspect of climate change legislation, with each pulling in almost as many different directions.

Needless to say, Congress has its work cut out for it, and the Administrator's action only adds to the pressure. Stay tuned; we'll keep you advised.

74 Fed. Reg. 18886 (April 24, 2009).

Channing J. Martin is chair of the Environmental Law Group at Williams Mullen and can be reached at 804.783.6422 or cmartin@williamsmullen.com.