



JONES DAY  
**COMMENTARY**

## EPA'S EXPECTED ENDANGERMENT FINDING FOR GREENHOUSE GAS EMISSIONS: THE IMPLICATIONS

With Earth Day scheduled for April 22, 2009, the Obama administration apparently intends to make a profound statement five days before, on April 16, 2009, with regard to the necessary actions that the federal government must take to address climate change—two years after the U.S. Supreme Court rejected the Bush administration's position in *Massachusetts v. EPA*, 549 U.S. 497 (2007)—that greenhouse gas emissions (“GHGs”) were not subject to regulation under the federal Clean Air Act. In the ways of Washington, as well as a nod to the administration's new transparency in government, the world has learned of this significant climatic development not through any official agency announcement or press release, but instead after details of the federal government's plan were “leaked” to the press<sup>1</sup>

Specifically, the Environmental Protection Agency (“EPA”) has sent to the White House Office of Management and Budget (“OMB”) a proposed rule on an endangerment finding for greenhouse gases that could result in regulation of greenhouse gas emissions under the Clean Air Act. EPA has been considering, in response to the U.S. Supreme Court ruling in *Massachusetts v. EPA*, the question of whether emissions from motor vehicles endanger health and the environment due to their contribution to climate change. A finding of endangerment would lead to regulation of GHGs from motor vehicles under the Clean Air Act, and indirectly to regulation of GHGs from stationary sources. According to the OMB website, EPA submitted a document to the OMB on March 20 called, “Proposal for Endangerment Finding for Greenhouse

1. See Darren Samuelsohn, “Leaked EPA Document Shows Greenhouse Gas Endangerment Finding on Fast Track” (*Greenwire*, Mar. 10, 2009), available at <http://www.nytimes.com/gwire/2009/03/10/greenwire-epa-document-shows-endangerment-finding-on-fas-10053.html>.

Gases Under the Clean Air Act.” Thus, the EPA, to some, appears to have reached the end of what seems like a long front walk that began more than 10 years ago with the petition to regulate GHGs under section 202 of the Clean Air Act.

## ***MASSACHUSETTS v. EPA***

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S. Supreme Court held that greenhouse gases are “air pollutants” within the meaning of the Clean Air Act, and that the Act gives EPA authority to regulate them. In addition, the Court held that EPA could not refuse to exercise this authority by citing policy considerations not enumerated in the statute or by referring generally to the scientific uncertainty remaining with respect to climate change.

The case arose under Title II of the Act, sections 202-250, 42 U.S.C. §§ 7521-7590, which establishes a regulatory framework for controlling pollution from motor vehicles and other mobile sources. The International Center for Technology Assessment Petition was submitted pursuant to section 202(a)(1), 42 U.S.C. § 7521(a)(1). That provision authorizes EPA to prescribe regulations establishing standards for “the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the EPA Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” *Id.* If the Administrator makes an affirmative endangerment finding, he or she would then be required to regulate such emissions, but the Act confers significant discretion on the Agency in deciding how such regulations would be crafted and when they should take effect. See 42 U.S.C. § 7521(a)(2) (any potential regulation under section 202(a)(1) “shall take effect after such period as the Administrator finds necessary to permit the development and the requisite technology, giving appropriate consideration to the cost of compliance within such period”); *Massachusetts v. EPA*, 549 U.S. at 533 (recognizing that if EPA makes a positive “endangerment” finding under section 202, it “no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies”).

The Court made two significant conclusions about EPA’s obligations on remand. First, it held that EPA must regulate greenhouse gases from motor vehicles if the agency finds that they may reasonably be anticipated to endanger public health or

welfare. (“If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles.” *Massachusetts v. EPA*, 549 U.S. at 533.) Second, to avoid regulating greenhouse gases, EPA must make one of two findings. Either the agency must find that greenhouse gases may not reasonably be anticipated to endanger public health or welfare, or it must conclude that there is not enough information to make a decision on endangerment. (“EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do . . . . If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so . . . . The statutory question is whether sufficient information exists to make an endangerment finding.” *Id.* at 533-34.) As then Georgetown University Law Professor Lisa Heinzerling (now the Chief Climate Change Advisor to EPA Administrator Lisa Jackson) explained at a hearing before the Select Committee on Energy Independence and Global Warming, “the Court’s decision in *Massachusetts v. EPA* thus directed EPA to follow the scientific evidence on climate change wherever it leads and to regulate greenhouse gas emissions from motor vehicles if that scientific evidence shows endangerment.” *Hearing on Massachusetts v. EPA Part II: Implications of the Supreme Court Decision Before the H. Select Comm. on Energy Independence and Global Warming*, (Mar. 13, 2008) (statement of Lisa Heinzerling, Professor of Law, Georgetown University Law Center), available at <http://globalwarming.house.gov/tools/assets/files/0426.pdf>.

Indeed, according to Heinzerling’s March 13, 2008, testimony, former EPA Administrator Stephen Johnson effectively concluded that evidence showed an endangerment in February 2008, when he issued the formal explanation of his previously announced decision to deny California a waiver for its program regulating GHGs from motor vehicles. That decision, according to Professor Heinzerling, contains a long discussion of the possible effect of greenhouse gases on climate and the effect of climate change on public health and welfare. See California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New

Motor Vehicles, 73 Fed. Reg. 12, 156 (Mar. 6, 2008). Thus, it seems that the EPA under President Obama has unequivocally reached the same conclusion that outgoing EPA Administrator Johnson implicitly did. Whether EPA's scientific conclusions on the endangerment are irrefutable remains to be seen. In any event, one thing seems reasonably certain: Those findings will not go unchallenged by a number of interested stakeholders.

## THE REGULATORY AND OTHER IMPLICATIONS OF THE ENDANGERMENT FINDING

While the near-term implications of EPA's planned endangerment finding are limited, the longer term ones may not be. In the near term, the announcement will not simultaneously propose any specific GHG standards. Instead, it will trigger a 60-day public comment period that will be announced in the Federal Register. Given the at-times heated public debate about climate change over the past decade, as indicated by the comments submitted in connection with EPA's July 11, 2008, Advance Notice of Public Rulemaking seeking comment on a large number of issues concerning regulation of GHGs under the Clean Air Act, one can reasonably assume that there will be a substantial number of comments submitted to the agency by organizations on both sides of the debate.

The longer term implications may be more substantial given the structure of the Clean Air Act. The Clean Air Act directs the EPA Administrator to regulate numerous sources of air pollution once he or she has found that an air pollutant emitted by them may reasonably be anticipated to endanger public health or welfare. In *Massachusetts v. EPA*, the Supreme Court explicitly held that regulation of motor vehicles under section 202 of the Clean Air Act must follow once the EPA Administrator makes such an endangerment finding. 549 U.S. at 533. The same is true for many other sources of air pollution.

Section 111(b)(1)(A) of the Clean Air Act, for example, provides that the EPA Administrator "shall" include on a list a category of stationary sources "if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Section 111(b)(1)(B) requires the Administrator to regulate new sources included on this list. 42 U.S.C.

§ 7411(b)(1)(B). Section 111(d) requires the Administrator, acting in concert with the States, to regulate existing sources included on this list. 42 U.S.C. § 7411(d).

In addition, section 231(a)(2)(A) provides that the Administrator "shall" issue proposed standards for "the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7571(a)(2)(A). Currently pending before EPA are two petitions asking EPA to regulate GHGs from aircraft. (California filed one petition, which is available at [http://cdn.sfgate.com/gate/pictures/2007/12/05/ga\\_aircraftpet6.pdf](http://cdn.sfgate.com/gate/pictures/2007/12/05/ga_aircraftpet6.pdf). Environmental groups filed another, available at [http://cdn.sfgate.com/gate/pictures/2007/12/05/ga\\_aircraftghgpet.pdf](http://cdn.sfgate.com/gate/pictures/2007/12/05/ga_aircraftghgpet.pdf).) Provisions regarding the regulation of fuels (42 U.S.C. § 7545(c)(1)(A)) and nonroad engines (42 U.S.C. § 7547(a)(4)) provide somewhat more discretion to the Administrator because they state that he "may" rather than "shall" regulate after a finding of endangerment. But the Administrator will need to take into account his finding of endangerment in explaining his course of action under these provisions. A petition to regulate greenhouse gases from nonroad engines is pending with EPA. (The petition is available at [http://ag.ca.gov/cms\\_\\_pdfs/press/N1474\\_Petition.pdf](http://ag.ca.gov/cms__pdfs/press/N1474_Petition.pdf).)

These petitioners (and those in other contexts) will certainly seize upon the expected endangerment finding by EPA in the hopes of spurring EPA to make similar endangerment findings for other provisions of the Clean Air Act.

Finally, as a number of commenters have already suggested, the expected endangerment finding will be used as leverage by the Obama administration as it gets ready for international negotiations in December 2009 in Copenhagen. It will presumably allow the administration to show the United States' unequivocal commitment to addressing climate change at the time that it seeks to persuade China, and other countries, of the need to do the same—without the necessity of having a comprehensive federal cap-and-trade piece of legislation passed. Given early reaction to the American Clean Energy and Security Act of 2009, cosponsored by Reps. Henry Waxman (D. Calif.) and Ed Markey (D. Mass.), by Senator Durbin (D. Ill.) (and others) as to whether that proposal can ever become law, EPA's endangerment finding might be all the President has to use as leverage.

## LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

**Kevin P. Holewinski**

1.202.879.3797

[kpholewinski@jonesday.com](mailto:kpholewinski@jonesday.com)

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