



# GREENHOUSE GAS UPDATE: TRANSPORTATION

MAY 2009

Following is an Update on the latest legal developments related to the regulation of greenhouse gas (GHG) emissions from motor vehicles and fuels in the United States. The topics addressed in this Update are:

- EPA's proposed GHG endangerment finding
- Draft climate change legislation (Waxman/Markey Bill)
- EPA's proposed GHG reporting regulation

Previous Updates on GHG legal developments can be obtained from the Wallace King website, [www.wallaceking.com](http://www.wallaceking.com), or by contacting us at the numbers provided below.

## **EPA Proposes GHG Endangerment / Cause or Contribute Findings Under Title II of Clean Air Act**

On April 24, 2009 EPA proposed a finding, pursuant to section 202(a) of the Clean Air Act (CAA), that GHG emissions from new motor vehicles and motor vehicle engines are contributing to air pollution which is endangering the public health and welfare. 74 *Fed. Reg.* 18886 (April 24, 2009). The proposal is significant in that if the Agency finalizes the finding (and absent an intervening act by Congress), it would be compelled to regulate GHG emissions from a host of mobile sources under the CAA, including cars, light-duty trucks, heavy-duty trucks, and, most likely, non-road engines and equipment as well.<sup>1</sup>

The proposal responds to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, in which the Court concluded among other things that certain GHG constitute "air pollutants" under the Clean Air Act, and that EPA was obligated to make a determination as to whether emissions of these gases from vehicles "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 549 U.S. 497 (U.S.), *see*

---

The Administrator signed a proposal with two distinct findings regarding greenhouse gases under section 202(a) of the Clean Air Act:

### THE ENDANGERMENT FINDING AND THE CAUSE OR CONTRIBUTE FINDING

EPA WEBSITE  
<http://epa.gov/climatechange/endangerment.html>

---

*also* CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1). EPA's proposed finding considers emissions of a "mix" of six greenhouse gases in defining what constitutes the relevant "air pollution" referenced in

---

<sup>1</sup> Section 202(a)(1) states, in relevant part, that the EPA Administrator "shall by regulation prescribe... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Similarly, Section 213 of the Clean Air Act requires EPA to make a determination as to whether emissions from non-road engines "cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Although Section 213 arguably requires a separate finding, it is unlikely EPA would reach a different finding with respect to GHG from non-road sources.

Section 202. These are: carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>). In its proposed finding, EPA concluded: “It is the Administrator’s judgment that the total body of scientific evidence compellingly supports a positive endangerment finding for both public health and welfare.” 74 *Fed. Reg.* 18886, 18888. The proposal analyzes: (1) the contribution of these GHG to global warming and climate change; (2) the impact of climate change on public health; and (3) the impact of climate change on public welfare.

As noted above, the practical impact of EPA’s finding, if finalized, will be to force the Agency to regulate emissions of GHG from mobile sources. Because Section 202 places a mandatory obligation on EPA to develop standards for motor vehicle emissions for which an endangerment finding has been made, the only way EPA could avoid this obligation would be new legislation. In this respect, the Obama Administration is placing pressure on Congress to act on GHG legislation, as many believe that the CAA is not the appropriate legal mechanism for addressing climate change. Opposition to regulating GHG emissions from stationary sources under the CAA is more strident with respect to stationary sources than mobile sources, as the stationary-source provisions of the CAA are considered by many to be an inappropriate vehicle for regulating ubiquitous and widely distributed gases (such as CO<sub>2</sub>). EPA’s proposal does not address stationary sources, and the Agency would have to make a separate, but essentially identical, finding under Section 108(a)(1) of the Act to regulate GHG emissions from these sources. There is a strong argument that if EPA finalizes its finding with respect to mobile sources, the Agency would be compelled to make the same finding with respect to GHG emissions from stationary sources.

EPA is accepting public comments on its proposed endangerment finding until **June 23, 2009**. For more information on submitting comments, or on

the proposal itself, contact Alec Zaccaroli, 202.204.1000.

## Waxman, Markey Release Discussion Draft of Climate Change Legislation

Reps. Henry Waxman and Edward Markey released draft legislation March 31 that would, among other things, implement sweeping measures designed to reduce GHG emissions from both mobile and stationary sources, including emissions from motor vehicles and motor vehicle fuels. The legislation, “The American Clean Energy and Security Act of 2009” (“ACES Legislation”), includes provisions that would establish low-carbon transportation fuel standards, harmonize federal and state (California) fuel efficiency standards, set up a cap and trade system for reducing GHG emissions from large stationary sources, and establish new GHG emission standards for smaller stationary sources. It also would address concerns regarding the potential regulation of stationary sources of GHG emissions under the CAA by exempting these sources from regulation under the statute. The legislation, however, would not exempt mobile sources of GHG emissions from regulation under the CAA.

Rep. Waxman is chair of the House Energy and Commerce Committee. Rep. Markey is chair of the House Energy and Commerce Subcommittee on Energy and the Environment. Rep. Waxman is attempting to fast-track the legislation through committee, with the intent of having it up for a vote by summer. The Obama Administration has set a goal of signing a comprehensive climate change bill into law by December 2009, in advance of the UN Climate Change Conference in Copenhagen.

The ACES Legislation has four components, dealing with clean energy, energy efficiency, reducing global warming pollution, and “transitioning to a clean energy economy.”

Provisions would affect vehicle, engine and fuel manufacturers, and include the following:

- EPA would be required to establish new low-carbon transportation fuel standards. The legislation would require EPA determine lifecycle GHG emissions for all transportation fuels and develop a fuel emission baseline based on 2005 emissions. This baseline would set a standard that transportation fuels could not exceed during the period 2014 – 2022. From 2023 forward, fuels would have to achieve annual average lifecycle GHG emissions that are at least 5 percent below the baseline. In 2030, the standard would be lowered to at least 10 percent below the baseline.
- Financial incentives for vehicle manufacturers to retool their facilities to produce more electric vehicles would be provided under the bill.
- The legislation would require establishment of federal GHG emissions standards for light-duty vehicles that harmonize standards established by EPA, the National Highway Traffic Safety Administration (NHTSA), and California. The standards would have to achieve emissions reductions that are at least as stringent as those achieved under California’s GHG law (AB 1493). In addition, the ACES bill does not preempt California from adopting its own GHG mobile source standards. As a result of these provisions, California would have considerable power to drive national GHG emission standards for motor vehicles.
- EPA would be required to set standards on GHG emissions from heavy-duty vehicles and engines by December 31, 2010, pursuant to the Agency’s authority under Section 202 of the CAA. The standards would be required to “achieve the greatest degree of emission reduction achievable based on the application of technology which the Administrator determines will be available at the

time such standards take effect, taking into consideration cost, energy, and safety factors associated with the application of such technology.” The bill would allow EPA to determine when such standards would take effect, based on the timing needed for “development and application of the requisite technology.” It is unclear whether EPA would remain subject to the 3-year lead-time and 4-year period of stability requirements currently contained in the CAA.

- Using the same criteria as that provided for heavy-duty on-highway engines, the legislation also requires EPA to establish GHG emissions standards for non-road, marine, and locomotive engines pursuant to its authority under Section 213 of the CAA. These standards would have to be promulgated by December 31, 2012. Similarly, EPA would be required to establish GHG emission limits for aircraft and aircraft engines by December 31, 2012, pursuant to its authority under Section 231 of the CAA.
- The legislation would require EPA to establish a program allowing averaging, banking and trading of GHG emission credits within or across classes of motor vehicles and engines, non-road vehicles and engines, and aircraft and aircraft engines.
- EPA would be authorized to carry out its existing “SmartWay Transportation Efficiency Program.” In addition, it directs EPA to develop measurement protocols to evaluate various GHG reduction technologies, develop a program to certify technologies, and undertake various other transportation efficiency measures.

The legislation also includes substantial requirements impacting stationary sources of GHG emissions, such as oil refineries, engine and vehicle manufacturing facilities, chemical facilities, and electric utilities. Most notably, it would establish a



market-based program for reducing GHG emissions from large industrial sources similar to that established under the CAA for acid rain. Under the program, covered sources would be allocated allowances which, collectively, could not exceed in aggregate the following levels: 3 percent below 2005 levels in 2012; 20 percent below 2005 levels in 2020; 42 percent below 2005 levels in 2030, and 83 percent below 2005 levels in 2050. Entities that emit less than 25,000 tons of GHG per year would not be subject to this program, but would have to meet separate standards promulgated pursuant to EPA's existing authority under the CAA. The legislation also would broaden the citizen suit provisions of the CAA considerably to allow for greater private enforcement of violations of GHG-related provisions. For more information, contact Alec Zacaroli, 202.204.1000.

### **Comment Deadline Approaching for GHG Reporting Rule**

The deadline for submitting comments on EPA's proposed GHG reporting regulation is **June 9, 2009**. The proposal would establish federal requirements for tracking and reporting GHG emissions from a wide variety of sources. For additional information on the proposal, please see Wallace King's March 16, 2009 Update.

If you have additional questions regarding the topics covered in this Update, or any additional issues related to GHG and climate change regulations and legal developments, please contact Alec Zacaroli or Julie Domike at 202.204.1000.

### **Julie R. Domike**

Partner

Building on nearly nine years with EPA Headquarters' Office of Enforcement and Compliance Assurance, since leaving EPA in 1996 Julie has engaged in a broad-based environmental law practice. Her practice encompasses a range of activities related to stationary sources including rulemaking, compliance counseling and permitting under Title V and New Source Review. On the mobile source side, she has worked on rulemaking, compliance counseling and engine certification, as well as fuels standards.

### **Alec C. Zacaroli**

Senior Counsel

Alec Zacaroli's practice involves both complex litigation, including environmental tort and product liability litigation, and regulatory counseling, primarily in the area of environmental law. Mr. Zacaroli specializes in Clean Air Act law, but also has experience litigating and counseling clients with respect to CERCLA, RCRA, the Clean Water Act, and other federal and state pollution-control laws.