



## Client Alert

### EPA Issues Proposed Endangerment Finding Under the Clean Air Act, Taking First Important Step Towards Regulating Greenhouse Gases

On April 17th, the week before Earth Day, the Obama Administration took the first important step towards addressing climate change through the regulation of greenhouse gases (“GHGs”) under the Clean Air Act (the “Act”) by releasing EPA’s Proposed Findings under Section 202(a) of the Act.<sup>1</sup> EPA proposes to find that the mix of atmospheric concentrations of carbon dioxide and five other GHGs, which EPA concludes “together constitute the root of the climate change problem,” constitutes air pollution that endangers both public health and welfare (the “**Endangerment Finding**”). It also proposes to find that combined emissions of four GHGs from motor vehicles contribute to the atmospheric concentration of the key GHGs and hence to the air pollution that endangers public health and welfare (the “**Cause or Contribute Finding**”). The Proposed Findings are in response to the Supreme Court’s April 2007 ruling in *Massachusetts v. EPA*, 549 US 497 (2007) which required EPA to either make a positive or negative endangerment finding with respect to GHG emissions from motor vehicles, or determine that the science is too uncertain to make a reasoned decision. Positive findings under Section 202(a) require the EPA Administrator to prescribe regulations and set standards applicable to GHG emissions from new motor vehicles. The Administrator has stated that proposed standards for the new motor vehicles will be issued within “several months.”<sup>2</sup>

Following their publication in the Federal Register, which is expected to occur shortly, there will be a 60-day comment period and two public hearings on the Proposed Findings.

Although the Proposed Findings relate specifically to Section 202(a) and the Cause or Contribute Finding addresses only the four GHG emissions from motor vehicles, there are several other provisions in the Act with similar if not identical endangerment language to Section 202(a). A finding of endangerment under one section of the Act does not by itself constitute a complete finding of endangerment under any other section, but there seems little doubt that if the Proposed Findings become final, regulation of GHGs under the Act will be expanded to other GHG sources over time. Other mobile sources that would likely face EPA regulation include aircraft and ocean vessels. GHG emissions from stationary sources, especially power generation sources, would also eventually become subject to regulation. The most direct and near-term effect of the Proposed Findings for fossil fuel-fired power plants may well arise from the prevention of significant deterioration (“**PSD**”) permitting process and its requirement for the use of Best Available Control Technology (“**BACT**”) to control “regulated pollutants.” This is an issue that is fresh in the Administrator’s mind given the November 2008 decision of the Environmental Appeals Board (“**EAB**”) in *Deseret Power* and then-Administrator Johnson’s December 2008 Memorandum addressing the issue. (We discuss this issue in more detail below.)

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<sup>1</sup> EPA, “Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act” April 17, 2009 [hereafter, *Proposed Findings*].

<sup>2</sup> *Proposed Findings* at 24.

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Irrespective of the Proposed Findings' potential effects in the near-term, the specter of the wholesale imposition of the Act's command-and-control regime on a vast number of GHG sources nationwide is likely to increase pressure on industry, states and other stakeholders to support the passage by Congress of more carefully-tailored GHG legislation. President Obama has signaled his preference for comprehensive national legislation regulating GHG emissions, including provision for a proposed cap-and-trade carbon market in his US\$3.5 trillion budget, and drafts of national climate change and GHG legislation are currently circulating in Congress.

*For related discussion of current proposed Climate Change legislation please see our parallel Client Alert: "Analysis of the Waxman-Markey Energy and Climate Change Discussion Draft."*

The Proposed Findings also occur against the larger backdrop of international negotiations to find a successor to the Kyoto Protocol. The Kyoto Protocol expires in 2012 and the United Nations has warned that unless agreement can be reached on the terms of a successor treaty by the end of 2009, there may not be enough time for a sufficient number of governments to ratify a new treaty so that it takes effect in 2012. With this deadline in mind, the Kyoto parties have laid out a "roadmap" for forging a new global response to climate change, a "roadmap" that ends with final negotiations in Copenhagen in December, 2009. As the Obama Administration prepares for these international negotiations, the Proposed Findings will likely enhance the Administration's credibility by allowing it to demonstrate its commitment to addressing climate change as it tries to convince countries such as China, India and Brazil to commit to limits on their GHG emissions. EPA's action may become even more important if Congress has not, by December's Copenhagen talks, adopted comprehensive national legislation.

### Background

EPA has been grappling with whether and how to regulate GHGs under the Act for some time now. In 2003, EPA denied a petition seeking regulation of GHGs from new motor vehicle sources, indicating at that time that it lacked authority under

the Act to regulate GHGs and it would be unwise to set GHG emission standards for motor vehicles. EPA's denial of the petition was upheld by the US Court of Appeals for the DC Circuit.

In April of 2007, the US Supreme Court reversed the Court of Appeals' decision in *Massachusetts v. EPA* and held that GHGs meet the definition of "air pollutant" within the meaning of the Act. The Court confirmed that EPA has statutory authority to regulate GHGs and directed the agency to either make a positive or negative endangerment finding with respect to GHG emissions from motor vehicles, or determine that the science is too uncertain to make a reasoned decision.

In response to the Supreme Court's decision, EPA issued an Advanced Notice of Proposed Rulemaking ("ANPR") in July 2008, outlining various proposals and options for regulating GHGs under the Act. However, at the same time, then-EPA Administrator Stephen Johnson made clear his belief that the Act was poorly designed for the efficient regulation of GHG emissions. Industry and various administrative agencies, in responding to the July 2008 ANPR, expressed concern that regulating GHGs under the Act would require EPA to regulate wide tracts of the economy including numerous sources of GHG emissions that are currently unregulated and do not fit the standard profile of federally-regulated emissions sources, such as residential apartment complexes and small commercial operations.

Lisa Jackson, the EPA Administrator appointed by President Obama, has taken the next step in responding to the Supreme Court's directive, by issuing the Proposed Findings.

### Scope of the Proposed Findings and the Likely Expansion of EPA's Regulation of GHGs

Under the specific language of Section 202(a)(1) of the Act, the Administrator is to determine whether the "emission of any air pollutant from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." Once she has made such a determination, the Administrator shall "by regulation prescribe standards applicable to the emission(s)."

In making her determination in the Proposed Findings, the Administrator is forceful and unequivocal. She concludes that “[i]n both magnitude and probability, climate change is an enormous problem.” She finds “the case for finding that GHGs in the atmosphere endanger public health and welfare is compelling and, indeed, overwhelming.”<sup>3</sup>

In the Proposed Findings, EPA defines both “air pollution” and “air pollutant” as the collective mix of six specific GHGs—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>”). EPA concludes that these “six greenhouse gases...together constitute the root of the climate change problem.” However EPA also indicates that even though it proposes to define “air pollutant” as the group of GHGs, it nevertheless retains the discretion to determine that one or more individual GHG comprising the group on its own can cause or contribute to the air pollution. The Administrator further acknowledges that even if she defines the air pollutant as the group of six key GHGs, she believes she nevertheless has the discretion to set standards that either control the emissions of the whole class, and/or control the emissions of individual GHGs, as constituents of the class. Only four of the specific GHGs in the defined group are emitted from new motor vehicles (CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O and HFCs). EPA proposes to find that these four GHGs cause or contribute to the air pollution (i.e. the threat of climate change) which endangers both public health and welfare.

Although the Proposed Findings were made under Section 202(a), which addresses only emissions from new motor vehicles, they will likely lead to similar endangerment findings under other provisions of the Act.

Similar endangerment language is found in Sections 108, 111, 112, 115, 211, 213, 231 and 615 of the Act. While many of these provisions contain language similar to that in Section 202(a), they are not all identical and some therefore require different

tests and thresholds. For example, Section 213(a)(4), relating to non-road engines and vehicles, requires a finding that emissions from that source have a significant contribution to the air pollution, rather than just a contribution. Furthermore, unlike Section 202(a), not all sections of the Act require EPA to take action following a positive endangerment finding. Like Section 202(a), some sections use language mandating regulation (e.g., Section 231(a) relating to aircraft) while others employ language merely authorizing regulation following a positive finding of endangerment (e.g., Section 213(a)(4) relating to non-road engines and vehicles). Pending petitions seeking endangerment findings under many of these sections are currently under consideration by EPA, and petitioners will no doubt seize on the Proposed Findings to spur EPA to make similar findings under those other sections.

Whether or not the Proposed Findings will be viewed as strong precedents for similar findings under other sections of the Act depends on the specific GHGs at hand, the statutory test in the other section(s) and the underlying facts. But, the fact that the Proposed Findings conclude that the mix of GHGs endanger public health and welfare means that under several provisions of the Act EPA would only need to find that GHG emissions from those specific sources “cause or contribute” to the threat of climate change.<sup>4</sup>

### Application to Stationary Sources of GHGs and the Potential Effect on PSD Permitting of Fossil Fuel-Fired Power Plants

If the Proposed Findings become final, and absent legislation preempting or amending the Act’s regulation of GHGs, stationary sources will likely find themselves subject to GHG regulation under other sections of the Act down the road. The Act provides three main pathways for regulating stationary sources of air pollutants. These include (i) national ambient

<sup>3</sup> *Proposed Findings* at 100 & 99.

<sup>4</sup> When making her cause or contribute finding, the Administrator placed significant weight on the fact that section 202(a) source categories contribute to 24 percent of total US GHG emissions. EPA suggests it has discretion in a cause or contribute finding to determine that an air pollutant does not contribute to the air pollution because, for example, it only amounts to a small percentage of the total US GHGs. EPA could possibly find that other source categories whose emissions contribute significantly less to US GHG emissions do not cause or contribute to the threat of climate change. Where the EPA sets the threshold for a cause or contribute finding likely could vary for each emission source.

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air quality standards and state plans for implementing those standards;<sup>5</sup> (ii) performance standards for “new” stationary sources;<sup>6</sup> and (iii) hazardous air pollutant standards for stationary sources.

The most direct and near-term effect of the Proposed Findings on fossil fuel-fired power plants, however, may well be under the Act’s PSD permitting provisions. This conclusion flows directly from the EAB’s November 2008 decision in *Deseret Power*, and the Administrator’s subsequent interpretation of the PSD BACT requirements.

*For a more detailed discussion of the Deseret decision please see our November 24, 2008 Client Alert “BACT to the Future: EPA’s Environmental Appeals Board Remands Question Whether Clean Air Act Limits CO<sub>2</sub> from Coal-Fired Power Project.”*

In *Deseret Power*, as part of its nationwide efforts to halt the development of new coal plants, the Sierra Club had challenged the PSD permit issued in August 2007 to Deseret Power Electric Cooperative for a waste coal-fired power plant on the grounds that EPA Region 8 erred by not requiring a BACT emission limit for CO<sub>2</sub>. Sierra Club argued that the Act prohibits the issuance of a PSD permit unless it includes best available control technology to control the emissions of pollutants “subject to regulation under this Act,” and that CO<sub>2</sub> was “subject to regulation” because other regulations under the Act required the monitoring and reporting of CO<sub>2</sub> emissions.

Region 8, which had issued the permit, contended that the Act did not require BACT for CO<sub>2</sub> because the phrase “subject to regulation under this Act” included only a pollutant subject to a statutory or regulatory provision requiring its actual control. Such an interpretation would leave out CO<sub>2</sub> because,

at the time, that pollutant was only subject to monitoring and reporting of emissions levels under EPA’s Part 75 regulations, and not subject to statutory or regulatory provisions that required its actual control.

In November 2008, EPA’s Environmental Appeals Board rejected the Region’s arguments, remanded the permit, and directed EPA to reconsider whether a CO<sub>2</sub> BACT emissions limit should be required before issuance of the permit. In response, Stephen Johnson, then Administrator of EPA, issued a December 2008 memorandum (the “Johnson Memorandum”) interpreting the phrase “regulated pollutants” for PSD purposes as excluding pollutants for which EPA regulations require only monitoring or reporting. Instead, the Johnson Memorandum interpreted the phrase “regulated pollutants” to include “each pollutant subject to either a provision in the Clean Air Act or regulation adopted by the EPA under the Clean Air Act that requires actual control of emissions of that pollutant.”<sup>7</sup>

The Proposed Findings address their potential effect on the PSD/BACT question. First the Administrator states (in less than clear language) that the Proposed Findings alone should not “at this time” trigger BACT requirements for fossil-fuel fired power plants: “At this time, a final positive endangerment finding would not make the air pollutant found to cause or contribute to air pollution that endangers a regulated pollutant under the CAA’s Prevention of Significant Deterioration (PSD) program.”<sup>8</sup> Referring to the December 2008 Johnson Memorandum, the Administrator next states: “EPA is reconsidering [the Johnson Memorandum] and will be seeking public comment on the issues raised in it. That proceeding, not this rulemaking, would be the appropriate venue for submitting comments on the issue of whether a final,

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5 The National Ambient Air Quality Standards provisions of the Act require EPA to adopt nationally uniform standards (the “NAAQS”) limiting levels of criteria pollutants in the ambient air. Primary standards are to be established at a level to protect public health with an adequate margin of safety. Section 108 of the Act employs similar endangerment language as Section 202(a) and provides that EPA “shall from time to time list each air pollutant (a) the emissions of which cause or contribute to air pollution which may reasonably be anticipated to endanger public health and welfare, and (b) the presence of which in the ambient air results from numerous diverse mobile or stationary sources.” Once an air pollutant is listed under Section 108, EPA must issue NAAQS for that pollutant.

6 The Act’s New Source Performance Standards provisions requires EPA to establish nationally uniform, technology-based standards controlling emissions from major new stationary sources of air pollution. Under Section 111(b)(1)(A) of the Act the Administrator shall include a source category in the list of sources subject to emissions performance standards if the source causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare.

7 EPA Memorandum from Stephen L. Johnson, Administrator, to Regional Administrators Re: EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program, December 18, 2008.

8 *Proposed Findings* at 106 n. 29

positive endangerment finding under section 202(a) of the Act should trigger the PSD program, and the implications of the definition of air pollutant in that endangerment finding on the PSD program.”<sup>9</sup>

The Proposed Findings, however, fail to address the question of whether once EPA actually adopts regulations to control GHGs (even if only with respect to mobile sources), GHGs will become “a regulated pollutant” for purposes of BACT applicability under the PSD permitting process. Those opposing the permitting of fossil fuel-fired power plants will no doubt argue that under the Johnson Memorandum’s interpretation, once CO<sub>2</sub> (or GHGs as a group) become regulated, the BACT requirement is triggered automatically.

The uncertainty the Proposed Findings add to the questions of whether fossil fuel-fired power projects must control CO<sub>2</sub> or other GHG emissions, what those controls might be, what specific agency action might trigger control requirements and when such action might occur, further clouds the permitting process.<sup>10</sup>

### Conclusion

The Proposed Findings signal the Obama Administration’s intent to begin regulating GHG emissions and to take significant steps to address the causes of climate change. While the specific GHG regulations and standards triggered by the Proposed Findings are yet to be promulgated, once final, they—and the Proposed Findings themselves—will have implications well beyond the regulation of GHG emissions from motor vehicles alone. Most observers, including EPA, agree that the Act, which was principally designed to regulate regional and local pollution with direct health effects, is ill-suited for the regulation of GHGs: a pollutant with indirect health effects, and the sources of which encompass a vast cross-section

of industry and human activity worldwide. The Act’s provisions are, in many respects, inflexible and the regulatory tools it provides EPA are based largely on command-and-control concepts. (EPA itself questions whether it has the authority to use more market-based approaches, such as a cap-and-trade mechanism, to more flexibly regulate GHGs broadly and across numerous and diverse sources.) EPA’s authority extends only to sources in the United States and its territories, and nearly all agree that it lacks the necessary tools to address what is, at bottom, a global problem requiring global solutions. Both President Obama and Administrator Lisa Jackson have signaled their preference for comprehensive national legislation to address climate change. It may be that the specter of the wholesale imposition of the Act’s command-and-control regime on the vast number of GHG sources nationwide is intended in part to increase pressure on industry, states and other stakeholders to support the passage by Congress of more carefully-tailored GHG legislation. In the meantime, the Proposed Findings send a strong signal to US stakeholders and the world that the Obama Administration is committed to addressing climate change.

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*The Firm’s Climate Change, Renewable Energy and Clean Technology practice group is following developments in this area closely, and regularly advises on this and other issues relating to climate change developments. In addition to the authors, please contact your White & Case LLP contacts with any questions about this memo.*

<sup>9</sup> *Id.*

<sup>10</sup> In addition to the strong likelihood of future regulation of GHG emissions from fossil fuel-fired power plants, there has been more recent bad news for coal-plant developers and owners: EPA has signaled its intention to develop new regulations for the storage of coal ash. In response to the massive coal ash spill last December in Kingston, Tennessee, EPA circulated formal and legally enforceable requests to electric utilities nationwide to provide information about their surface coal ash impoundments or any similar storage units. The requests were issued pursuant to the authority granted to EPA under Section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). EPA will also conduct on-site assessments of the structural integrity and vulnerabilities of such units, and order cleanups and repairs where needed. EPA is expected to release proposed new regulations for public comment prior to the end of the year. New regulations could increase the cost to store or dispose of coal ash.

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