

Thursday, April 23, 2009

Environmental Update: EPA Proposes Finding That Greenhouse Gas Emissions Endanger Public Health

By Phillip F. Fargotstein and Scott H. Thomas

On April 17, 2009, EPA announced it intends to propose a finding that greenhouse gases (carbon dioxide, methane, nitrous oxide and hydro floral carbons, chlorofluorocarbons and sulfur hexafluoride) ("GHG") endanger public health and welfare because of their effect on increasing temperatures and climate change. The proposed finding also concludes that GHG emissions from motor vehicles contribute to the mix of GHGs in the atmosphere and those emissions endanger public health and welfare. EPA intends to publish the findings in the Federal Register, which will start a 60-day formal comment period. If the proposed findings become final, it will allow EPA to issue rules limiting emissions of GHGs from new motor vehicles. Such a finding could also lead EPA to reconsider an earlier petition filed by California requesting approval of California Clean Car Standards that set GHG emissions limits for new motor vehicles in California. Eleven other states including Arizona have already adopted the California Clean Car Standards but cannot enforce the new standards until EPA grants California the necessary approval.

Background

In 1999 EPA was petitioned to issue rules regulating emissions of GHG from motor vehicles. EPA rejected the petition on the bases that GHGs were not "pollutants" under the Clean Air Act and several policy reasons. The Supreme Court in *Mass. v. EPA*, 549 U.S. 497 (2007) overturned the EPA rejection of the petition. The Supreme Court held that GHGs were pollutants under the Clean Air Act and remanded the matter to EPA for a determination whether GHGs endangered public health and the environment, which is a prerequisite to regulating GHGs under the Clean Air Act.

In July 2008, EPA published an advance notice of proposed rulemaking on regulating GHG emissions under the Clean Air Act. (73 FR 44354) (ANPR) That notice sought comment on many of the same issues addressed in the draft findings relating to motor vehicle GHG emissions. It also sought comment on the advisability of regulating GHG emissions from both mobile and stationary sources under the Clean Air Act. EPA is still evaluating the comments it received relating to the ANPR.

Bases for Motor Vehicle GHG Findings

The Clean Air Act requires EPA to issue standards to control the emission of any air pollutant from any class or classes of new motor vehicles which "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." Under the Clean Air Act and the Supreme Court's remand in *Mass. v. EPA*, before EPA can regulate GHG it must make the requisite findings. In the draft findings EPA concludes that the total body of scientific evidence provides compelling support for a positive finding of both public health and welfare endangerment. The draft also indicates that atmospheric levels of GHGs are the unambiguous result of human emissions and are very likely the cause of observed increases in average temperatures and other climatic changes.

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The draft findings indicate that it is intended to address only GHG from new motor vehicles. Thus, the draft rule does not address the question whether and how stationary sources that emit GHGs should be regulated under the Clean Air Act. Whether GHG emissions from stationary sources will be regulated under the Clean Air Act or under other GHG programs (such as a carbon tax or cap and trade program that is the subject of pending federal legislation) is uncertain at this time.

Public Hearings

EPA is scheduling public hearings on the draft findings on May 18, 2009, in Arlington, Virginia, and May 21, 2009, in Seattle, Washington.

If you have any questions concerning this rulemaking, please contact Phillip F. Fargotstein or Scott Thomas.

Phillip F. Fargotstein is a litigator with significant experience in environmental and toxic tort litigation, as well as medical malpractice defense. He helped draft the 1992 Arizona Comprehensive Air Quality Act and frequently represents industrial clients on air quality compliance, permitting, and enforcement issues and appeals. Mr. Fargotstein also defends business and property owners on underground storage tank, air quality, and Clean Water Act enforcement actions and cost recovery actions under the Underground Storage Tank Act, state and federal Superfund statutes, and state common law. He also advises clients and has spoken frequently on climate change issues and developing regulatory programs to address climate change. From 1984 to 2000 he also advised Marine Corps facilities in California and Arizona on environmental issues. He earned his B.S. (1970) from the United States Naval Academy and his J.D. (1977) from Harvard Law School.

Scott H. Thomas practices environmental law with an emphasis on surface water and ground water quality issues (including NPDES permits, Section 404 dredge and fill permits, surface water quality standards, Arizona aquifer protection permits, and Safe Drinking Water Act issues). He also has experience in Superfund (and its Arizona equivalent, WQARF), solid and hazardous waste, underground storage tank, environmental due diligence, Endangered Species Act, and community right-to-know (EPCRA) matters. His practice focuses primarily on regulatory, compliance, administrative and legislative issues. He earned his B.A. (1984) and his J.D. (1988) from the University of Virginia.



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