

FEDERAL GOVERNMENT TAKES STEPS TOWARD REGULATION OF GREENHOUSE GASES

During the first half of 2009, the federal government has taken steps toward addressing climate change:

EPA's Proposed Mandatory Greenhouse Gas Reporting Rule

On April 10, 2009, EPA published in the Federal Register a proposed mandatory greenhouse gas reporting rule that would require certain U.S. emissions sources to submit annual reports to EPA detailing the source's greenhouse gas emissions. See *Mandatory Reporting of Greenhouse Gases*, 74 Fed. Reg. 68, 16448 (April 10, 2009). The proposed rule does not set emissions limitations on greenhouse gases, but requires facilities that emit 25,000 metric tons or more of greenhouse gases to report emissions to EPA. The rule encompasses the following greenhouse gases: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF₆), and other fluorinated gases. The information collected pursuant to the rule will provide EPA with accurate and up-to-date information necessary to further develop climate change policies and promulgate greenhouse gas regulations. The sixty-day public comment period on the proposed rule ended on June 9, 2009.

EPA's Proposed Endangerment and Cause or Contribute Findings

Also in April 2009—in response to the U.S. Supreme Court's landmark decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007)—EPA issued proposed endangerment and cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act. See *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 78, 18886 (April 24, 2009). Section 202(a) requires the Administrator to establish standards for emissions of "any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C.A. § 7521(a)(1). The Administrator proposes to find that the mix of six greenhouse gases found in the earth's atmosphere—carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆)—are air pollutants that "may reasonably be anticipated to endanger public health and welfare." *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 78, 18888 (April 24, 2009). Further, the Administrator proposes to find that emissions from new motor vehicles and new motor vehicle engines of four of these gases – carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons – contribute to this air pollution. The public comment period on the proposed findings ended on June 23, 2009.

The proposed findings rely heavily on scientific research conducted by the Intergovernmental Panel on Climate Change (IPCC) and the U.S. Climate Change Science Program (CCSP). This research suggests that the six greenhouse gases are present in the atmosphere in unprecedented levels and levels are expected to continue to rise in the near future. Moreover, EPA states that "[t]he scientific evidence is compelling that elevated concentrations of heat-trapping greenhouse gases are the root cause of recently observed climate change," which "is different from historic drivers of climate change, such as cyclical changes in the Earth's orbit, which have occurred over thousands of years." *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 78, 18896 (April 24, 2009). EPA believes that the six greenhouse gases are "the primary driver of the climate change problem," and risks associated with human-induced climate change are associated with these pollutants. *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 78, 18896 (April 24, 2009). A copy of EPA's April 17, 2009 technical support document is available at http://www.epa.gov/climatechange/endangerment/downloads/TSD_Endangerment.pdf.

Although the proposed endangerment and cause or contribute findings deal specifically with section 202(a) of the Clean Air Act, other provisions of the Clean Air Act, including those that address emissions from stationary sources, contain similar endangerment language. See, e.g., 42 U.S.C.A. § 7408(a)(1)(A) (requiring the Administrator to establish national ambient air quality standards for air pollutants the emissions of which “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare”). Thus the proposed findings may result in increased regulation of greenhouse gas emissions from both mobile and stationary sources.

Waxman-Markey Climate Bill

In June, the U.S. House of Representatives passed the American Clean Energy and Security Act of 2009 (H.R. 2454), a comprehensive energy bill that seeks to create clean-energy jobs, increase energy independence, and reduce global warming pollution. If signed into law, H.R. 2454 would establish an economy-wide cap and trade system for greenhouse gas emissions, which would gradually reduce greenhouse gas emissions to below 2005 levels. The bill was introduced by Congressmen Henry Waxman, Chairman of the House Energy and Commerce Subcommittee, and Ed Markey, head of the Subcommittee on Energy and the Environment, on May 15, 2009 and passed by a roll call vote of 219 to 212 on June 26. The bill is expected to reach the Senate floor sometime this fall.

According to EPA, H.R. 2454 would:

(1) advance energy efficiency and reduce reliance on oil; (2) stimulate innovation in clean coal technology ensure that coal remains an important part of the U.S. energy portfolio by capturing harmful greenhouse gas emissions before they enter the atmosphere; (3) accelerate the use of renewable sources of energy, including biomass, wind, solar, and geothermal; (4) create strong demand for a domestic manufacturing market for these next generation technologies that will enable American workers to serve in a central role in our clean energy transformation; and (5) play a critical role in the American economic recovery and job growth....

EPA Analysis of the Waxman-Markey Discussion Draft: The American Clean Energy and Security Act of 2009, Executive Summary (April 20, 2009) <http://www.epa.gov/climatechange/economics/pdfs/WaxmanMarkeyExecutiveSummary.pdf>. However, H.R. 2454 is not without its critics. Some environmentalists claim that the bill is not stringent enough to effectively address the nation's pollution problem, whereas other opponents are concerned about the potential costs of implementation. The full text of H.R. 2454 may be found at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-2454>.

Additional Items of Interest

Supreme Court Limits Liability Under CERCLA – On May 4, 2009, the U.S. Supreme Court decided *Burlington Northern and Sante Fe Railway Company v. United States*, 129 S. Ct. 1870 (2009), in which the Court limited CERCLA arranger liability to situations in which the party intends to “dispose” of a hazardous substance and upheld the district court’s apportionment of liability under CERCLA.

ADEM Creates List of Pre-Approved SEPs – The Alabama Department of Environmental Management (ADEM) is in the process of creating a Supplemental Environmental Project (SEP) bank that will contain a list of pre-approved beneficial environmental projects that entities may implement in order to offset a portion of assessed civil penalties. SEP bank guidelines and applications are available on ADEM's website, www.adem.alabama.gov.

EPA Proposes More Stringent Standards for NO₂ – EPA is proposing more stringent primary standards for nitrogen dioxide, which will include a one-hour NO₂ standard at a level between 80 and 100 parts per billion and an increase in NO₂ monitoring. The new standards seek to reduce exposure to high, short-term concentrations of NO₂.

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