

# SPRINGBOARD

LEGAL TRENDS AND ANALYSIS

SPRING 2009

## FEDERAL GREENHOUSE GAS REGULATIONS ADVANCE WITH FEDERAL CLIMATE CHANGE LEGISLATION ON THE HORIZON

Within the first hundred days of the Obama administration, EPA has taken an important first step toward regulating (GHG) emissions by issuing a proposed finding that GHG emissions endanger public health and welfare. EPA also has proposed regulations that would mandate greenhouse gas (GHG) reporting by thousands of facilities and fuel suppliers throughout the United States. These actions set the stage for federal regulation of GHGs, either under the existing Clean Air Act or under a newly-enacted and more flexible cap-and-trade law. The threat of EPA regulation under the existing Clean Air Act is providing Congress with a greater sense of urgency to step in before EPA acts on its own.

Proposed Endangerment Finding. On April 17, 2009, just over two years after the Supreme Court held in MA v. EPA, 549 U.S. 497 (2007), that EPA could not avoid its statutory duty to determine whether GHGs should be regulated under the Clean Air Act, EPA issued a draft regulation proposing to find that GHGs endanger public health and welfare. An advanced notice of public rulemaking issued by EPA in July 2008 (towards the end of the Presidency of George W. Bush) essentially avoided making an endangerment finding, but EPA has now confronted the issue directly and reached a blunt

conclusion: "The case for finding that greenhouse gases in the atmosphere endanger public health and welfare is compelling and, indeed, overwhelming." Relying on analysis of the Nobel Prize-winning Intergovernmental Panel on Climate Change (IPCC), and on the US Climate Change Science Program (CCSP), EPA's proposed rule concludes that GHG emissions present an endangerment that is worthy of regulatory attention under the Clean Air Act. Public hearings on the EPA's proposed finding are scheduled on May 18 in Arlington, VA and on May 21 in Seattle, WA. The comment period will close 60 days after the proposed rule has been published in the Federal Register.

Proposed GHG Reporting Rule. Just one week before announcing its proposed endangerment finding, EPA published proposed regulations that would mandate GHG reporting for thousands of facilities and source categories, for suppliers of certain fuels and gases, and for manufacturers of mobile sources and engines. 74 FR 16488 (April 10, 2009). Previously, GHG reporting has been largely a voluntary affair. The proposed rule would require reporting from a number of sources, including:

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- Electricity generating facilities that are subject to the Acid Rain Program or that contain generating units that collectively emit 25,000 metric tons or more of GHGs per year;
- Aluminum production facilities;
- Cement production facilities;
- Electronics manufacturing facilities that exceed certain annual production capacities;
- Petroleum refineries;
- Petrochemical facilities;
- Certain underground coal mines; and
- Certain municipal landfills.

The proposed rule also would require reporting by facilities that emit 25,000 metric tons or more of GHGs per year. Sources with boilers that have an aggregate maximum rated heat input capacity of 30 million Btus per hour or greater also could be subject to reporting. In addition, reporting would be required for suppliers of coal, coal-based liquid fuels, natural gas, and certain other gases, and also for manufacturers of certain mobile sources and engines.

Entities covered by the rule would be required to begin collecting data on January 1, 2010 and to first report such data to the EPA on March 31, 2011. Public comment on the EPA's proposed reporting rule closes on June 9, 2009. It is anticipated that data reported under the rule will be utilized to design and implement federal GHG regulations.

GHG Regulation Under the Clean Air Act. Once EPA finalizes its endangerment finding, it is widely anticipated to begin proposing regulation of GHGs under the existing Clean Air Act, starting with mobile sources (which were directly at issue in MA v. EPA). EPA also is expected to regulate GHG emissions from stationary sources such as power plants and industrial facilities. Considerable concern has been expressed about how the Clean Air Act's provisions would be made to apply to GHGs and whether the Act is sufficiently flexible to permit cost-effective regulation. For example, it is anticipated that EPA will develop GHG-specific New Source Performance Standards (NSPS) for power plants, industrial boilers, and refineries. EPA also could develop Best Available Control Technology (BACT) requirements for GHGs that would be triggered by a Prevention of Significant Deterioration (PSD) permit. EPA also might develop National Ambient Air Quality Standards (NAAQS) for GHGs under the Clean Air Act that could trigger revisions to State Implementation Plans (SIPs).

Proposed Federal GHG Legislation. In late March 2009, Congressmen Waxman and Markey introduced a discussion draft of the American Clean Energy and Security Act of 2009 (for a useful summary of the proposed legislation, see [www.pewclimate.org](http://www.pewclimate.org)). Almost 700 pages long, the discussion draft represents a comprehensive effort to address climate change by promoting alternative energy and establishing a flexible cap-and-trade system for GHGs. A number of specified sources would be covered, including large stationary sources emitting more than 25,000 metric tons per year of GHGs, as well as certain refiners and importers of petroleum fuels. Emission caps for covered entities would start at 3% below 2005 levels in 2012, and drop to 83% below 2005 levels by 2050. The proposed legislation would largely displace EPA's ability to impose command-and-control type regulations for GHGs under the existing Clean Air Act, and also would impose a 5-year moratorium on state and regional GHG programs. It is expected that some form of this legislation could pass the House of Representatives during the present term of Congress, although its fate in the Senate (where 60 votes are needed for enactment) is less clear. Industry is increasingly mindful, however, that if Congress does not act, EPA will step into the void and may regulate in a manner that would be less desirable than a legislative solution framed by Congress that is more sensitive to economic concerns.

The Future of GHG Regulation. EPA's recent actions confirm that the relevant question is not whether GHG regulation can be expected, but when and in what form. Companies with significant carbon footprints will either be regulated directly through the existing Clean Air Act or be subject to a national cap-and-trade regime. Depending on whether Congress exercises its preemption authority, they may or may not also be subject to regional and state requirements. Even companies that are not ultimately subject to GHG regulation will likely be impacted by higher fuel costs resulting from future regulation. As concrete proposals develop, it will be increasingly important for businesses to monitor the impact of proposed GHG laws and regulations on their operations, to participate in rulemakings when the anticipated impact could be material, and to begin planning for a carbon-constrained future by analyzing whether it would be prudent to invest in energy efficiency projects.

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## **NEW YORK CITY PROPOSES NEW LEGISLATION TO GREEN OLDER BUILDINGS**

In late April 2009, New York City Mayor Michael Bloomberg and Council Speaker Christine Quinn announced the “Greener, Greater Buildings Plan” (“Plan”), a comprehensive legislative and policy-based initiative aimed at reducing energy consumption and associated greenhouse gas emissions in the City. If approved, starting in 2013, the Plan would implement significant changes applicable to existing building stock, including the requirement that owners of certain existing commercial and residential buildings regularly analyze their buildings’ energy efficiency and make upgrades that would pay for themselves within five years.

The Plan has several components, one of which would create a New York City Energy Code that would require conformity with the latest energy efficiency standards in the event that any renovation – not just a “major” renovation – is undertaken. The Plan also would require buildings over 50,000 square feet to undertake an energy audit each decade, and to make any retrofitting improvements, such as to lighting systems, windows, or pipe insulation, that would pay for themselves in energy savings within five years. Owners of buildings over 50,000 square feet also would be required to participate in the U.S. Environmental Protection Agency’s “benchmarking” program, which aims to evaluate a building’s energy and water efficiency, and identify potential improvements thereto.

The City estimates that the Plan would force private building improvements amounting to \$2.9 billion. Building owners demonstrating a financial need would be eligible to apply for assistance from a revolving loan fund to be established under the Plan and funded by federal stimulus money.

Approximately 80% of New York City's carbon emissions are generated by energy consumption in buildings, at a cost of \$15 billion annually. The City estimates that the Plan would reduce annual citywide carbon emissions by 5%, or 3 million tons of carbon dioxide per year, and would save property owners about \$750 million per year in energy costs. **SPR**