

# CLIMATE CHANGE

## A HEAT WAVE OF NEW FEDERAL REGULATION AND LEGISLATION

*Climate change lies at the intersection of the nation's environmental, energy, and economic agendas, and addressing this important concern poses a multitude of unique issues for policymakers in the Obama administration and in Congress. Among them are whether existing statutory authorities, such as the Clean Air Act and the Energy Policy and Conservation Act, should provide the framework for regulatory action or whether new legislation would be more suitable, and what role should be left for the individual states in addressing this national and global concern. Addressing these questions has been the first environmental priority of the new administration and Congress and will likely dominate the agenda for years to come.*

By Raymond B. Ludwiszewski and Charles H. Haake

**E**nvironmental law presents an ever-changing landscape of laws, regulations, and risk of litigation. Often this landscape is set by the environmental priorities of the time. At the inception of the environmental movement in the late 1960s and early 1970s, the nation's focus was set on securing the cleanliness and healthfulness of our air and water. These laudable goals spawned bedrock environmental laws such as the Clean Air Act and the Clean Water Act. The 1980s saw an increased awareness and concern over the depletion of the earth's ozone layer, which engendered the Montreal Protocol and specific provisions in the Clean Air Act amendments of 1990 to reduce the emissions of substances attributing to the phenomenon.

Today, global climate change has moved to the forefront of environmental concerns. And, even though we are in the nascency of the Obama administration, it is clear that addressing climate change and reducing emissions of greenhouse gases is the new administration's top environmental priority. President Obama has established a new post in the White House for a climate change "czarina" and named Carol Browner, the former administrator of the Environmental Protection Agency (EPA), to the position. Key positions in EPA have been filled by individuals who have been vocal advocates of more stringent limitations on greenhouse gas emissions. Congress has also experienced a shift in power to those who are more aggressive in tack-

ling climate change, such as Henry Waxman, who last year displaced John Dingell as chairman of the powerful House Energy and Commerce Committee, and Edward Markey, who now heads the Subcommittee on Energy and Environment as well as the House Select Committee on Energy Independence and Global Warming. All these developments foretell a Congress and a presidential administration that will be active in the area of climate change; many initiatives are already under way. Legal practitioners and businesses will need to adapt quickly to this changing legal and regulatory landscape.

### **The EPA Recently Made an Endangerment Finding for Greenhouse Gases in Response to *Massachusetts v. EPA***

Any discussion of the regulation of greenhouse gas emissions as a way to address climate change must begin with the Supreme Court's landmark decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). That case arose from a petition filed by the International Center for Technology Assessment and a number of other organizations requesting that the EPA regulate the emissions of carbon dioxide and other greenhouse gases that come from new motor vehicles, as provided by § 202(a) of the Clean Air Act. 42 U.S.C. § 7521(a). The EPA denied that petition, concluding that the Clean Air Act does not authorize the agency to issue mandatory regulations to address global climate

change and that, even if the act did, it would be inappropriate to do so at this time. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (Sept. 8, 2003).

The U.S. Supreme Court reversed the EPA's decision and remanded the matter back to the agency. The Court held that carbon dioxide falls within the broad definition of "air pollutant" under the Clean Air Act, and that § 202(a)(1) of the act therefore authorizes the EPA to regulate carbon dioxide emissions from new motor vehicles. *Massachusetts*, 127 S. Ct. at 1459–1460. The Court further held that the EPA had abused its discretion by relying on extrastatutory policy considerations in deciding not to regulate. The Court remanded the matter back to the EPA for the agency to go through the regulatory process that is required under the Clean Air Act, which starts with an "endangerment finding"—that is, a finding that such emissions "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The Court's ultimate holding was therefore very narrow. The Court did not "reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding." *Id.* at 1463. These questions now rest squarely with the EPA.

In July 2008, the Bush administration took the first step in complying with the Supreme Court's mandate when the EPA issued an Advanced Notice of Proposed Rulemaking for Regulating Greenhouse Gas Emissions Under the Clean Air Act (ANPRM), 73 Fed. Reg. 44,354 (July 30, 2008). That notice, however, was essentially a scoping document, which did not propose to make a finding of endangerment or to outline any regulatory program to control greenhouse gas emissions from any source. Rather, the document merely opened these issues up for discussion and sought comment on how an endangerment finding could be made and how the existing authorities under the Clean Air Act could be—or, for that matter, could *not* be—used to regulate greenhouse gas emissions from both mobile and stationary sources. Given the timing and the complexity of the notice, the Bush administration was effectively leaving it to its successor to finalize this process and make the difficult policy decisions concerning whether and how to regulate greenhouse gas emissions under the Clean Air Act.

The transition from the Bush administration to the Obama administration yielded a heightened vigor to address climate change and to tackle the mandate that came from the ruling in *Massachusetts v. EPA*. In her introductory memo to the EPA's staff, the new administrator, Lisa Jackson, pledged that the agency "will move ahead to comply with the Supreme Court's decision recognizing EPA's obligation to address climate change under the Clean Air Act." True to Administrator Jackson's word, on April 17, the EPA issued its proposed findings that greenhouse gas emissions from motor vehicles—including carbon dioxide—endanger the public health and welfare. This proposed finding, which relies heavily on recent assessments of the U.S. Climate Change Science Program and the Intergovernmental Panel on Climate Change, is based on the EPA's assessment of increases in morbidity and mortality resulting from an

increase in the number and intensity of severe heat waves as well as enhanced risks of respiratory infection, asthma aggravation, and premature death because of worsened regional ozone, which is exacerbated by increased temperatures. In making its proposed finding of endangerment, the EPA also pointed to the impact of climate change on the severity of storms, especially along the Gulf and Atlantic coasts, and on the intensity of precipitation events. The agency also proposed to lump carbon dioxide together with five other greenhouse gases, including methane and nitrous oxide, in order to provide greater flexibility in the agency's regulatory approach. These findings are not final; they will go through an additional round of public comments. Given the Obama administration's current direction, however, it seems unlikely that the EPA will fail to finalize the requisite endangerment finding.

### **The EPA and the Department of Transportation are Coordinating on National Motor Vehicle Greenhouse Gas Emissions and Fuel Economy Standards**

Significantly, the EPA's proposal is merely a finding of endangerment and stops short of proposing a regulatory program to address greenhouse gas emissions from motor vehicles. This latter step is complicated by the overlap the EPA's emissions program will inevitably have with the federal Corporate Average Fuel Economy (CAFE) program, which is administered by the National Highway Traffic Safety Administration (NHTSA), an arm of the U.S. Department of Transportation. As the NHTSA has stated in numerous contexts, "a tailpipe carbon dioxide regulation and a fuel economy regulation are essentially equivalent: they each in effect regulate fuel economy."<sup>1</sup> Science has long recognized that there is a direct relationship between fuel consumption and carbon dioxide emissions. "Based on its content (carbon and hydrogen), as a matter of basic chemistry, the burning of a gallon of gasoline produces about 20 pounds of CO<sub>2</sub>" irrespective of the type of engine that burns that fuel or any pollution control devices on that engine.<sup>2</sup> Thus, any EPA standards setting a gram-per-mile carbon dioxide emissions limit would effectively regulate the amount of fuel that vehicles may burn.

Fuel economy is regulated under the Energy Policy and Conservation Act (EPCA) of 1975, as amended by the Energy Independence and Security (EISA) Act of 2007. Under EISA, the combined average fuel economy of cars and light trucks of all vehicles sold in the United States must reach at least 35 miles per gallon by 2020; to achieve that goal, the NHTSA is charged with enacting fuel economy regulations for each model year beginning with the 2011 model year. 49 U.S.C. § 32902(b). The NHTSA sets CAFE standard for each model year at the "maximum feasible average fuel economy level," taking into consideration "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f). Because of the EPCA's requirement that fuel economy standards be set no later than 18 months prior to the applicable model year (which can begin as early as January of the preceding calendar year), the NHTSA

recently promulgated fuel economy standards for the 2011 model year. These regulations can best be viewed as a stopgap while the NHTSA crafts more comprehensive standards for the 2012 model year and beyond. Because those regulations will have to be promulgated by March 2010, a notice of proposed rulemaking is expected to be issued by the NHTSA by this fall.

In *Massachusetts v. EPA*, the Supreme Court made it clear that the fact “that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities.” *Massachusetts*, 127 S. Ct. at 1462. Consequently, the Court held that, although the obligations of the EPA and the Department of Transportation may overlap, “there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.” *Id.*

Recognizing this overlap and consistent with *Massachusetts v. EPA*, the Obama Administration published on May 19 a notice of intent to conduct joint rulemaking between the EPA and the NHTSA to establish coordinated standards for the control of emissions of greenhouse gases and for fuel economy. These standards, if adopted, would attempt to harmonize the separate mandates of the Clean Air Act and EPCA while fulfilling the requirements of both statutes. The notice of intent states that a joint rulemaking will be initiated “in the near future;” given the lead time requirements in the EPCA and the Clean Air Act, a notice of proposed rulemaking can be expected this summer.

### **The EPA Is Reconsidering Whether California May Regulate GHG Emissions from Motor Vehicles**

There is an additional complicating factor confronting the Environmental Protection Agency as it develops a federal regulatory program for greenhouse gas emissions from motor vehicles. The EPA is currently deciding whether the state of California may proceed with its own automotive greenhouse gas/fleet average fuel economy regulatory program consistent with § 209 of the Clean Air Act. Under § 209(a), individual states are generally pre-empted from “adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles.” 42 U.S.C. § 7543(a). However, § 209(b) of the act requires the EPA to “waive” Clean Air Act pre-emption for California standards if California determines that its standards are at least as protective as federal standards are and if the EPA fails to find that either (1) California’s protectiveness determination was “arbitrary and capricious,” (2) California “does not need such State standards to meet compelling and extraordinary conditions,” or (3) the California standards are “are not consistent with” § 202(a) of the Clean Air Act. 42 U.S.C. § 7543(b). Under § 177 of the Clean Air Act, other states may adopt and enforce California’s standards for which a waiver has been granted.

Under the auspices of Assembly Bill 1493, which was passed by California in 2002, California finalized regulations limiting the average amount of greenhouse gases that may be emitted from new model year 2009 passenger cars, minivans, SUVs, and pickup trucks sold in California in 2009 and beyond. See CAL. HEALTH & SAFETY CODE § 43018.5(a). These regulations set increasingly stringent fleetwide av-

erage limits of “carbon dioxide equivalent” emissions—a combination of four substances, weighted by their global warming potential: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons from air conditioning systems. CALIF. CODE REGS. tit. 13, § 1961.1. Thirteen other states have adopted California’s program.<sup>3</sup> In December 2005, California submitted its standards to the EPA for a waiver of pre-emption under § 209(b) of the Clean Air Act.

During the Bush administration’s tenure, the EPA denied the waiver under the “compelling and extraordinary” prong found in § 209(b), 42 U.S.C. § 7543(b)(1)(B).<sup>4</sup> The EPA cited two alternative bases for denying the waiver under this provision. First, the agency concluded that “section 209(b) was intended to allow California to promulgate state standards applicable to emissions from new motor vehicles to address pollution problems that are local or regional,” but not “to address global climate change problems.”<sup>5</sup> Alternatively, the EPA found that “the effects of climate change in California are [not] compelling and extraordinary compared to the effects in the rest of the country.”<sup>6</sup> Given that these findings were sufficient to deny the waiver, the EPA did not address whether the other criteria listed in § 209(b) have been met, or whether the California regulations conflict with the EPCA, a matter on which the Environmental Protection Agency specifically requested comment.

Predictably, California—joined by various environmental groups and other states—promptly filed an action challenging the denial of the waiver. This lawsuit, however, has been overtaken by political events and has been stayed. As a candidate, President Obama voiced his disagreement with the EPA’s decision to deny the waiver and promised that, if he was elected, his administration would swiftly reconsider the decision. Consequently, almost immediately after President Obama’s inauguration, California asked the EPA to reconsider its denial of the waiver, and the agency wasted little time in granting that request.<sup>7</sup> In order to promote swift action on the reconsideration, Congress added § 242 to the Omnibus Appropriations Act of 2009 requiring the EPA to decide the reconsideration by June 30, 2009. The EPA has already conducted a public hearing on the reconsideration request, and the public comment period closed on April 6. All indications point to a decision by the EPA on reconsideration of the waiver before the end of 2009.

Given the Obama administration’s clearly expressed position on California’s waiver request, it is unlikely that the EPA will reaffirm the Bush administration’s determination that California does not “need” its greenhouse gas regulations “to meet compelling and extraordinary conditions.” However, before the EPA can grant a waiver, the agency must make the other findings required under § 209(b):

- The EPA will have to decide whether the standards that California has set are at least as protective as applicable federal standards are. Deciding this question may not be as simple as comparing California’s standards to the currently nonexistent EPA greenhouse gas emissions standards. Because of the well-recognized link between greenhouse gas emissions and fuel economy, the EPA may need to

consider how California's regulations compare with the national CAFE standards in terms of their effectiveness in reducing overall greenhouse gas emissions.

- The EPA will have to determine whether California's standards are consistent with § 202(a) of the Clean Air Act—in other words, whether they provide enough lead time “to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.” 42 U.S.C. § 7521(a)(2). Given that the EPA has already denied California's application for a waiver and that the first two years covered by the California regulations—the 2009 and 2010 model years—are already underway, the question of sufficient lead time poses a particularly thorny issue for the EPA.
- Because of the relationship between fuel economy and greenhouse gas emissions and the inevitable overlap California's standards would have with the CAFE program if allowed to proceed, the EPA's decision on the waiver may require the agency to consider whether any potential conflict between the California regulations and EPCA are relevant to the EPA's consideration of the waiver.
- Finally, because the new presidential administration will be painstakingly coordinating a national fuel economy/greenhouse gas program for new cars between the NHTSA and the EPA, this effort may put into doubt the policy wisdom of authorizing a California program established in 2004 to govern these important issues for 40 percent of the U.S. auto market.

### **The NHTSA Is Reconsidering its Previously Expressed Views on Pre-emption of California's Regulations Governing Greenhouse Gas Emissions from Motor Vehicles**

To the extent that the Environmental Protection Agency considers whether California's regulations conflict with the federal fuel economy program, the agency will have to make its decision against the backdrop of the findings of its sister agency, the National Highway Traffic Safety Administration. Dating back to 2002, the NHTSA has repeatedly published determinations that the Energy Policy and Conservation Act expressly and implicitly pre-empts state emissions regulations that effectively regulate the fuel economy of motor vehicles—such as regulations governing greenhouse gas emissions.<sup>8</sup> Like the Clean Air Act, the EPCA contains an express pre-emption clause that provides that states “may not adopt or enforce a law or regulation related to fuel economy standards.” 49 U.S.C. § 32919(a). However, unlike the Clean Air Act, the express pre-emption provision in the EPCA does not contain any waiver for California. The NHTSA has determined that “[a] State requirement limiting CO<sub>2</sub> emissions is such a law or regulation [related to fuel economy standards] because it has the direct effect of regulating fuel consumption.”<sup>9</sup> The NHTSA has also concluded that state regulations dealing with greenhouse gas emissions “would frustrate the objectives of Congress in establishing the CAFE program and conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA.”<sup>10</sup>

In the Bush administration's notice of proposed rulemaking for CAFE standards for the 2011 through 2015 model years, the NHTSA proposed taking the added step of summarizing its position on pre-emption in appendixes to be added to the parts in the Code of Federal Regulations setting forth the CAFE standards for passenger cars and light trucks.<sup>11</sup> Citing the economic turmoil in the automobile industry, however, the NHTSA did not finalize these rules while the Bush administration was in power. As one of his first acts in office, President Obama pulled the pre-emption language from the proposed rule and required the NHTSA—in connection with future CAFE rulemaking—to “consider whether any provisions regarding preemption are consistent with the EISA, the Supreme Court's decision in *Massachusetts v. EPA* and other relevant provisions of law and the policies underlying them.”<sup>12</sup> Unable to complete this work in time for the NHTSA's March 30 publication of CAFE standards for the 2011 model year, the NHTSA is currently undertaking that reconsideration.

It is likely that the agency's views on pre-emption will need to address the opinions of two federal district courts presiding over pre-emption challenges to California's regulations. These courts have held that California's regulations governing greenhouse gas emissions are not subject to federal pre-emption if the EPA grants a waiver under § 209(b) of the Clean Air Act. *Green Mountain Chrysler Plymouth v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007); *Central Valley Chrysler-Jeep Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Ca. 2007). Both of these actions are on appeal to the Second Circuit and the Ninth Circuit, respectively. The NHTSA has made its view clear that these cases were wrongly decided. In the appeal pending in the Second Circuit, the Department of Justice filed an amicus curiae brief arguing that the Vermont district court's pre-emption opinion is “deeply flawed.”<sup>13</sup> Also, in the NHTSA's notice of proposed rulemaking for MY2011–2015 CAFE standards, the agency explained why it “disagree[s] with the two district court rulings” on pre-emption.<sup>14</sup> In light of the NHTSA's oft-repeated pronouncements that states' greenhouse gas regulations are pre-empted under the EPCA and conflict with the federal fuel economy program, any shift in position will require the agency to provide a reasoned explanation for its reversal.

### **An Endangerment Finding Under the Clean Air Act Could Lead to Wide-Ranging Regulations Under the Clean Air Act**

Although the endangerment finding discussed above was limited to greenhouse gas emissions from motor vehicles, the finding will inevitably lead to further action by the EPA to regulate emissions from a wide range of sources under other parts of the Clean Air Act. Even if the EPA prefers to proceed cautiously on enacting such regulations in light of the current economic climate, the agency's hand may be forced by petitions from environmental advocates. For example, since *Massachusetts v. EPA* was decided, the EPA has received a number of rulemaking petitions asking the agency to regulate greenhouse gases from a number of sources, such as oceangoing vessels, aircraft, and lawn and garden equipment.

Arguably, the EPA's endangerment finding for motor vehicles triggers a nondiscretionary duty for the agency to promulgate regulations governing greenhouse gas emissions under other parts of the act where an "endangerment finding" is also the triggering event. For example, the EPA is required to establish national ambient air quality standards (NAAQS) when the agency determines that emissions of an air pollutant "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). The primary NAAQS sets a limit on the concentration of the regulated pollutant in the ambient air at a level adequate to protect the public health (including an adequate margin of safety). The secondary standard protects public welfare and is set at a level that is the same as or stricter than the primary standards. These standards—or more stringent standards adopted by the states—are implemented through federally approved state implementation plans.

Even though the Environmental Protection Agency has not publicly stated that it intends to establish an air quality standard for carbon dioxide, the agency may be forced to do so if it makes an endangerment finding for motor vehicles—an action that would present the EPA with enormous regulatory challenges. State and regional compliance with a NAAQS is judged from the perspective of pollutant concentration in the ambient air. However, because concentrations of greenhouse gases do not vary from state to state, the EPA would have great difficulty distinguishing "attainment" from "nonattainment" areas. If, for example, the NAAQS for greenhouse gases is set at a level below the current global atmospheric concentration, the EPA could be required to list all states as nonattainment areas, and a state would be powerless to achieve "attainment" status through its own efforts. A failure to reach a determination of "attainment" can have significant consequences for a state, such as a denial of federal funds for highway improvements.

Similarly, the New Source Performance Standards under the act are initiated by an endangerment finding, but that finding is focused on sources, not on pollutants. The administrator of the EPA must list "categories of stationary sources ... if in his judgment [those sources cause, or contribute] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7411(b)(1)(A), and must then adopt standards of performance reflecting "the degree of emission reduction achievable through application of the best system of emission reduction" for those sources. 42 U.S.C. § 7411(a)(1). Given the holding in *Massachusetts v. EPA* that carbon dioxide and other greenhouse gases are "air pollutants" under the Clean Air Act, if the EPA makes an endangerment finding for those *substances*, the New Source Performance Standards program may require the EPA to enact greenhouse gas emissions standards for new *categories* of stationary sources to the extent that they emit significant amounts of carbon dioxide.

The EPA could try to weave these disparate requirements under the Clean Air Act into a single nationwide cap-and-trade program. In President Obama's fiscal year 2010 budget, the administration indicated that this may be

its preferred course, stating that it "will work expeditiously ... to develop an economy-wide emissions reduction program to reduce greenhouse gas emissions" and that "[t]his program will be implemented through a cap-and-trade system." The EPA took the first step toward such a program when it proposed the nation's first national system for reporting emissions of carbon dioxide and other greenhouse gases produced by major sources in the United States.<sup>15</sup>

The EPA's past efforts to establish cap-and-trade programs under the Clean Air Act—such as the Clean Air Interstate Rule and the Clean Air Mercury Rule—have been met with resistance in the courts, however. The Clean Air Mercury Rule, one of the first cap-and-trade programs under § 111 of the Clean Air Act was overturned in February 2008 by the D.C. Circuit—albeit for reasons independent of the use of cap-and-trade under that section of the act. *State of New Jersey v. Env'tl. Prot. Agency*, 517 F.3d 574 (2008). More recently, that same court also vacated the EPA's Clean Air Interstate Rule, explaining that, among other things, "EPA's approach—regionwide caps with no state-specific quantitative contribution determinations or emissions requirements—is fundamentally flawed." *North Carolina v. Env'tl. Prot. Agency*, 531 F.3d 896 (2008). Consequently, to the extent that the EPA seeks to establish a greenhouse gas cap-and-trade program under the existing Clean Air Act authorities, the agency will have to learn from these past efforts and craft a program that will survive legal scrutiny.

### **The EPA Appears Poised to Consider Carbon Dioxide Emissions Under the Prevention of Significant Deterioration Program**

Even if the EPA does not act swiftly to regulate greenhouse gas emissions under other parts of the Clean Air Act, the agency faces the immediate question of whether carbon dioxide emissions are covered under the act's provisions for the Prevention of Significant Deterioration (PSD) program and the related New Source Review (NSR) program. NSR requirements, which vary based on whether the source is located in an attainment or a nonattainment area, require preconstruction review and permitting for each "major emitting facility," 42 U.S.C. § 7479(a), and require the "best available control technology" for "each pollutant subject to regulation under the Act." *Id.* § 7475(a)(4).

The issue before the EPA is whether carbon dioxide is currently "subject to regulation" under the Clean Air Act. If it is, any new or modified source will have to include the best technology to control the emission of carbon dioxide. Citing provisions in the Clean Air Act mandating the monitoring of carbon dioxide emissions, one state court has held that carbon dioxide is a "pollutant subject to regulation under the [Clean Air] Act" and therefore "a PSD permit cannot [be] issue[d] for [the new or modified facility] without CO<sub>2</sub> emissions limitations based on a BACT analysis." *Friends of the Chattahoochee Inc. v. Couch*, Case No. 2008 CV 146398 (Ga. Super. Ct. June 30, 2008). In December 2008, then-EPA Administrator Stephen Johnson issued an interpretive memorandum to resolve a split within the EPA regions on this question. In that memo, he determined that the term "regulated pollutant" applies only to "each pollutant subject to either a

provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant,” and does not include “pollutants for which EPA regulations only require monitoring or reporting.”<sup>16</sup> Accordingly, a new or modified major facility is not required to install the best available control technology for carbon dioxide unless and until the EPA makes an endangerment finding for carbon dioxide and also issues regulations establishing controls for carbon dioxide.

The Sierra Club and other parties petitioned the EPA for reconsideration of this decision. Upon taking over the agency in 2009, the new administrator, Lisa Jackson, promptly granted the petition for reconsideration “in order to allow for public comment on the issues raised in the [Johnson] memorandum.” Administrator Jackson further noted in her letter that, in light of the reconsideration, the Johnson memorandum does not reflect the EPA’s final word on the subject, adding that states are free to require BACT analysis or carbon dioxide under their states’ implementation plans.

To date, the Environmental Protection Agency has not taken further action on this question and has not opened any public comment on reconsideration of Johnson’s memorandum. Conceivably, the agency has figured that the question will no longer be relevant once the EPA establishes regulations for carbon dioxide emissions from motor vehicles, which the agency is poised to do. It is equally plausible, however, that the EPA is wrestling with the regulatory problems that would arise if carbon dioxide is subject to the New Source Review program’s requirements. The Clean Air Act defines the term “stationary sources” broadly to include “any building, structure, facility or installation” that emits or may emit a pollutant. 42 U.S.C. § 7411(a)(3). A source is considered “major” (and thus subject to NSR requirements) if it has the potential to emit at least 250 tons per year of a regulated pollutant or, if included on the EPA’s select list of source categories, at least 100 tons per year of a regulated pollutant. 42 U.S.C. § 7479(1) (defining “major emitting facility”).

The issue the EPA faces is that, for carbon dioxide, the 100 to 250 tons per year threshold (which is set by statute) is so low that it will dramatically expand the number of facilities that are regulated. Office and apartment buildings, hotels, shopping malls, college facilities, and hospitals could become subject to the Clean Air Act permitting process for the first time. By way of example, the average office building in New York City emits 20 pounds of carbon dioxide per square foot. This average would indicate that any building that has more than 25,000 square feet heated by a natural gas boiler would be a major stationary source of carbon dioxide. The EPA estimates that applying this threshold could increase the number of sources subject to the New Source Review requirements tenfold, and that the agency would be faced between 2,000 and 3,000 permit applications per year.<sup>17</sup> Since the EPA has recognized this potential regulatory nightmare, any decision to apply PSD requirements to carbon dioxide emissions will have to discuss how the EPA intends to address the flood of anticipated applications for Clean Air Act permits.

## **Congress Has Pledged to Act Swiftly to Enact a Comprehensive Climate Change Bill**

Perhaps recognizing that the existing regulatory programs under the Clean Air Act are ill-suited for regulating greenhouse gas emissions, a press release issued by the EPA refers to its endangerment finding under § 202(a) almost begrudgingly as a “required regulatory process” and states that “both President Obama and Administrator Jackson have repeatedly indicated their preference for comprehensive legislation to address this issue and create the framework for a clean energy economy.” The new leadership in Congress appears to share this sentiment, pressing forward aggressively on such legislation. Shortly after taking over as chairman of the House Energy and Commerce Committee, Rep. Henry Waxman (D-Calif.) pledged to move “quickly and decisively” on climate change and set a goal of passing climate legislation out of his committee before Memorial Day. The House of Representatives took the first step toward this goal on March 31, when it released a 648-page draft of a climate change and energy bill, co-sponsored by Rep. Waxman and Rep. Ed Markey (D-Mass.) and dubbed “The American Clean Energy and Security Act of 2009.”

The heart of the Waxman-Markey Bill provides for the addition of a new Title VII to the Clean Air Act establishing a greenhouse gas cap-and-trade system that would reduce greenhouse gas emissions to 20 percent below 2005 levels by 2020, and to 83 percent below 2005 levels by 2050. The cap would apply to any “covered entity,” which is defined to include, among others, any source of electricity; any stationary source that produces at least 25,000 tons per year of carbon dioxide equivalent emissions; and any source in specific industrial sectors such as petroleum refiners, aluminum producers, and cement producers. The bill would allow covered entities to increase their emissions above their allowances by purchasing offsets and limits the total amount of offsets allowed at two billion tons per year. The bill is silent on one of the most contentious issues, however: whether allowances will be auctioned or granted to the covered entities. Significantly, the draft bill attempts to fix the problem of applying some of the other—ill-fitting—portions of the Clean Air Act to greenhouse gases: the bill would exempt greenhouse gases from being listed as criteria pollutants under § 108, being listed as hazardous air pollutants under § 112, or being subject to the PSD program or to Title V permitting requirements.

A separate title of the draft bill dealing with “clean energy” would require electricity suppliers to meet a certain percentage of their load—starting with 6 percent in 2012 and gradually rising to 25 percent in 2025—with electricity generated from renewable resources. This title also encourages carbon sequestration technologies for coal-fired power plants, includes a new low-carbon transportation fuel standard to promote advanced biofuels and other low-carbon transportation fuels, and promotes a “smart grid” for the transmission of electricity. Other titles of the draft bill are designed to promote energy efficiency across all sectors of the economy and to ease the economic impact to businesses and consumers as the nation transitions to a low-carbon economy.

Rep. Waxman has signaled that he intends to abide by his goal of passing the bill out of the Energy and Commerce Committee by Memorial Day, and House Speaker Nancy Pelosi (D-Calif.) has reiterated her commitment to take up climate legislation in the full House later this year. However, passage of this bill (or one that is similar) is not a foregone conclusion. This time last year, a similar climate change bill sponsored by Sen. John Warner (D-Va.) and Sen. Joe Lieberman (I-Conn.) fell six votes short of gaining cloture in the Senate and died. The draft Waxman-Markey Bill, however, appears to have broader support. For example, the initiative was “hailed” as a “strong starting point” by the U.S. Climate Action Partnership, a broad-based coalition including environmental groups such as the Natural Resources Defense Council and the Environmental Defense Fund, as well as by members of various industries, such as automakers, energy companies, and chemical manufacturers. Broad support from stakeholders, coupled with strong commitments from legislators, could increase the likelihood that Congress will pass some form of the draft bill and present it to President Obama for signature.

### Conclusion

Consequently, the EPA’s proposed endangerment finding appears to be part of the political process that will lead to federal legislation addressing climate change on a national level. The Obama administration recognizes that, under *Massachusetts v. EPA*, it has no choice but to get the regulatory snowball rolling and to make an endangerment finding for motor vehicles. Once the White House does so, the Environmental Protection Agency may confront a non-discretionary obligation to regulate greenhouse gas emissions under other parts of the Clean Air Act in ways that will have wide-ranging consequences for businesses and consumers alike. The prospect of such an unwieldy regulatory program may cause all stakeholders to coalesce in support of new legislation specifically designed to address the unique problems posed by global climate change. **TFL**

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### Endnotes

<sup>1</sup>National Highway Traffic Safety Administration, Comment: “Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule,” 73 Fed. Reg. 44,354, 44,363 (June 30, 2008).

<sup>2</sup>Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 Fed. Reg. 17,566, 17,659 (Apr. 6, 2006).

<sup>3</sup>These states are Arizona, Connecticut, Maine, Maryland, Massachusetts, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. Combined, California and these states account for more than 40 percent of the market for new vehicles.

<sup>4</sup>Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

<sup>5</sup>*Id.* at 12,156–157.

<sup>6</sup>*Id.* at 12,157.

<sup>7</sup>California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption, 74 Fed. Reg. 7040 (Feb. 12, 2009).

<sup>8</sup>*See*, for example, Light Truck Average Fuel Economy Standards Model Years 2005–07, 67 Fed. Reg. 77,015, 77,025 (Dec. 16, 2002); Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, at 17,670.

<sup>9</sup>Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, at 17,654.

<sup>10</sup>*Id.* at 17,667.

<sup>11</sup>Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011–2015; Proposed Rule, 73 Fed. Reg. 24,352, 24,479 (May 8, 2008).

<sup>12</sup>Memorandum to the Secretary of Transportation [and] the Administrator of the National Highway Traffic Safety Administration, 74 Fed. Reg. 4907 (Jan. 28, 2009).

<sup>13</sup>The Department of Justice also argued that the appeal is not ripe because no § 209(b) waiver has been granted and the regulations are therefore not enforceable.

<sup>14</sup>Proposed CAFE Rule, 73 Fed. Reg. at 24,478.

<sup>15</sup>*See* Public Hearings for the Mandatory Reporting Rule for Greenhouse Gases, 74 Fed. Reg. 12,782 (March 25, 2009).

<sup>16</sup>*See* EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program (Dec. 18, 2008) at 1.

<sup>17</sup>Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. at 44,499.