

Environment, Energy and Sustainable Development



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USEPA ISSUES PROPOSAL THAT GREENHOUSE GAS EMISSIONS ENDANGER PUBLIC HEALTH AND WELFARE THEREBY TRIGGERING THEIR REGULATION UNDER THE CLEAN AIR ACT

On April 2, 2007, the United States Supreme Court issued its decision in Massachusetts v. EPA, 127 S.Ct. 1438 (2007), deciding that greenhouse gases (GHGs) are “air pollutants” as that term is defined in the Clean Air Act and, therefore, USEPA has the authority to regulate emissions of GHGs from the sources that were the subject of the case, new motor vehicles. The Court also held that USEPA can defer regulation of emissions of GHGs only if it determines that they do not contribute to climate change, or if USEPA provides a reasonable explanation for not making this determination one way or the other.

On April 17, 2009, USEPA issued a proposal to find that GHGs in the atmosphere, the presence of which is in large part the result of human activity, endanger public health and welfare of current and future generations in light of observed and anticipated effects caused by climate change. In addition, USEPA proposes

that emissions of certain GHGs from new motor vehicles contribute to GHGs in the atmosphere. Comments to the proposal can be submitted and hearings on the proposal will be held next month.

USEPA is making this proposal pursuant to Section 202(a) of the Clean Air Act regarding six key GHGs, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. In making this proposal, USEPA states that it is required under the law to protect public health and welfare and, in doing this, it need not wait until harm has occurred. Instead, it must act to prevent harm. And although USEPA recognizes uncertainties and limitations of scientific knowledge, it concludes that there is compelling scientific support for an endangerment determination for both public health and welfare. Although not typical, USEPA is not, at this time, also proposing control standards, explaining that those are

being developed and will be subject to separate comment and public hearing opportunities.

Even in light of this required regulatory process, the Obama administration has indicated that it prefers that issues associated with GHGs and their regulation instead be addressed in new comprehensive federal legislation, thereby avoiding potentially complex, cumbersome and additional sets of regulation under the Clean Air Act.



USEPA ISSUES DRAFT GREENHOUSE REPORTING REGULATIONS



Pursuant to December 26, 2007 federal funding legislation, H.R. 2764-285, USEPA is required to establish by mid-2009 a mandatory program for all sectors of the economy to report greenhouse gas (“GHG”) emissions. Draft rules were to be issued by the fall of 2008.

On March 10, 2009, USEPA announced that it would issue the draft regulations. Comments to the regulations must be

submitted within sixty days of their appearance in the Federal Register on April 10, 2009.

The facilities that are currently covered by the proposed regulations generally include facilities in a number of source and supply categories including those that annually emit, or involve annual emissions of, more than 25,000 metric tons of carbon dioxide or its equivalent. This involves reporting by facilities that emit GHGs, referred to as downstream reporting, as well as reporting by producers and suppliers of fossil fuels and manufacturers of vehicles and engines, referred to as upstream reporting. In fact, the bulk of the proposed regulations provides detail regarding the various source and supply categories, including as to reporting thresholds, calculating emissions, monitoring and quality control requirements, data reporting

requirements and record retention requirements. The proposed regulations provide, for the most part, for facilities to start collecting emissions data on January 1, 2010, and submit annual reports starting in 2011, though manufacturers of vehicles and engines would start reporting for model year 2011.

USEPA estimates that 85% to 90% of total GHG emissions in the United States, from about 13,000 facilities, will be covered by these proposed regulations.

Additional information may be obtained from the USEPA website, <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>, or you may contact our office.

ILLINOIS ADOPTS UNIFORM ENVIRONMENTAL COVENANTS ACT

The National Conference of Commissioners on Uniform State Laws prepared a draft Uniform Environmental Covenants Act (UECA) in order to establish rules for requirements associated with the long term use of remediated property. Such requirements can involve land use controls (LUC) or activity use limits (AUL), such as prohibiting use of the property for residential purposes, requiring monitoring or requiring an engineered barrier. The intent of this type of legislation is to make sure that the requirements placed on property remain effective and are enforceable over time, including as to future owners of the property. This is accomplished by way of an environmental covenant, an agreement entered into by interested parties that is recorded as part of the title to the property. It is thought that use of environmental covenants will

help provide certainty regarding, and promote development of, remediated properties.

Illinois is one of a number of states that has enacted an UECA. The Illinois UECA, which can be found at 765 ILCS 122, became effective January 1, 2009. The Illinois UECA defines an environmental covenant as a servitude arising under an environmental response project that imposes activity and use limitations. The environmental response must be one undertaken under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA) or a court or Illinois Pollution Control Board order pursuant to the Illinois Environmental Protection Act. An owner of real property may voluntarily enter into an environmental covenant,

becoming the grantor of the interest, with a government agency and, as appropriate, with what is referred to as a holder, another type of grantee of an environmental covenant. Even though entry of an environmental covenant is voluntary, failure to enter into one can result in disapproval of the environmental response project.

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