



**ZAG/S&W LLP CLIMATE-RELATED BUSINESS & TECHNOLOGY GROUP  
CLIENT ADVISORY**

## **EPA Issues Final Finding that Greenhouse Gas Emissions Endanger Public Health and the Environment**

### **Finding Likely to Impact a Broad Range of GHG Emitters**

On December 7, 2009, the U.S. Environmental Protection Agency (EPA) announced its final finding that emissions of six greenhouse gases (GHGs) – carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride – endanger public health and the environment. The finding allows EPA to regulate GHG emissions from cars and light trucks and other mobile and stationary sources under the Clean Air Act, regardless of whether Congress enacts climate change legislation.

EPA published a proposed finding in April 2009, 74 Fed. Reg. 18,886 (Apr. 24, 2009), and received over 400,000 public comments. The final finding will be effective 30 days after publication in the Federal Register.

EPA has concluded as part of its endangerment finding that harmful effects of GHGs linked to climate change include hotter and longer heat waves; increases in ground-level ozone concentrations; increases in tick-borne diseases, food- and waterborne pathogens, and airborne allergens from weeds and trees; rising sea levels; more droughts from reduced snow-packs; more wildfires and insect outbreaks; damage to ecosystems; and exacerbation of problems that raise humanitarian, trade, and national security problems for the United States overseas.

#### **Effects of Finding Are Expected to be Widespread**

In addition to setting the stage for EPA regulation of GHG emissions, the endangerment finding may expose companies that emit GHGs to increased litigation risk and heightened disclosure requirements.

Recently, both the Second and Fifth Circuit Courts of Appeal have reinstated cases involving common law tort claims based on actions alleged to have caused climate change, which had been dismissed by

#### **IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:**

Jerome C. Muys, Jr.  
202.370.3920  
jmuys@zag-sw.com

Jeffrey M. Karp  
202.370.3921  
jkarp@zag-sw.com

L. Elise Dieterich  
202.370.3925  
edieterich@zag-sw.com

Victor N. Baltera  
617.338.2945  
vbaltera@zag-sw.com

Laura Ford Brust  
202.370.3923  
lbrust@zag-sw.com

**WASHINGTON, DC**  
ZAG/S&W LLP  
1666 K Street, NW  
Washington, DC 20006

**BOSTON**  
ZAG/S&W LLP  
One Post Office Square  
Boston, MA 02109

**NEW YORK**  
ZAG/S&W LLP  
1290 Avenue of the Americas  
New York, NY 10104

**ISRAEL**  
Zysman, Aharoni, Gayer &  
Ady Kaplan & Co. / S&W LLP  
41-45 Rothschild Blvd., Beit Zion  
Tel Aviv, 65784 Israel

the district courts. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009); *Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855 (5th Cir. 2009). In *Connecticut v. Am. Elec. Power Co.*, eight states, the City of New York and three environmental organizations filed federal common law nuisance claims against five utilities based on their emissions of GHGs. *Comer v. Murphy Oil* involves a putative class of Mississippi coastal residents who asserted public and private nuisance, trespass and negligence claims under Mississippi law against a number of energy, oil and refining and chemical manufacturing companies, claiming that their activities contributed to climate change and increased the damage caused by Hurricane Katrina. In both cases, the Courts cited the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), as supporting the plaintiffs' arguments for reinstatement of the cases. It is likely that plaintiffs will rely on EPA's endangerment finding as further support for these types of common law damages claims.

EPA's finding also may cause insurers to more closely scrutinize a company's risks related to its GHG emissions, before providing or renewing coverage. Many insurers already consider climate-related exposures such as risks to physical assets from the increased intensity and frequency of severe weather events (prolonged droughts, floods, and storms) and sea level rise; potential supply chain disruptions; energy price volatility; and the likelihood of government regulation. EPA's determination that GHG emissions endanger public health and the environment will undoubtedly prompt additional underwriting questions from savvy insurers.

In a similar vein, there has been increased pressure on the U.S. Securities and Exchange Commission (SEC) to require disclosure of companies' GHG emissions and related risks in, for example, 10-K and 10-Q reports. Current securities laws require companies to disclose the material current and anticipated effects of compliance with environmental laws, as well as known trends and uncertainties that are material to their business. See Items 101 and 303 of Regulation S-K, 17 C.F.R. §§ 229.101 and 303. As recently as November 23, 2009, a group of major investors and environmental groups filed a

supplement to a petition originally filed in 2007 requesting that the SEC require companies to state their climate-related risks, including, but not limited to, potential effects on physical assets and costs of complying with legislation and/or regulations, when reporting other financial risks.

As we reported in our September 2009 Advisory, EPA also has promulgated rules requiring large GHG emitters to monitor and report to EPA annually their GHG emissions. Several states, including California, Florida, Massachusetts, New Jersey, and New York, already have GHG monitoring and reporting regulations in place.

\* \* \*

If you have questions about the endangerment finding's effect on your business, please contact any member of Sullivan & Worcester's Climate-Related Business & Technology Group.

*December 2009*