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• Dec. 28, 2009

## **EPA Regulation of Greenhouse Gases To Have Limited Effect on State EPA**

**Endangerment finding is consistent with path California has taken with AB32, other existing environmental laws**

By KARI HAMANAKA

CREJ Staff Writer

A finding by the U.S. Environmental Protection Agency on the threat of greenhouse gases to the public could pave the way for more stringent federal regulation of emissions under the Clean Air Act.

While the endangerment finding, announced at a Dec. 7 press conference with EPA Administrator Lisa P. Jackson, does nothing to enact any specific regulation, it provides the EPA with the legal basis for regulation in the future.

"This long-overdue finding cements 2009's place in history as the year when the United States government began seriously addressing the challenge of greenhouse gas pollution and seizing the opportunity of clean energy reform," Jackson said during the press conference.

The announcement set off a flurry of reactions, including concern about its long-term effect on real estate and business. Others tempered those fears with reminders that California leads the nation when it comes to greenhouse gas regulations.

At least in the short term, the endangerment finding allows the EPA to move forward on standards it has been developing with the U.S. Department of Transportation for light-duty vehicles. The agency also has been looking at ways of regulating refineries and other industrial users deemed large emitters of pollutants.

Specifically, the finding covers six greenhouse gases, including carbon dioxide, methane and hydrofluorocarbons.

As environmental organizations such as the Sierra Club and Natural Resources Defense Council applauded the endangerment finding, at least one group has said it will file a lawsuit to block it.

A Washington D.C.-based nonprofit, the Competitive Enterprise Institute, filed a petition Dec. 2 asking that the proceeding and public comment period on the finding be reopened. The request was made in light of e-mails and other documentation released in November related to the science behind climate change.

"The purpose of this filing is to put EPA on notice that new information has very recently been released whose content is so grave that it may well destroy EPA's basis for an endangerment finding," the petition reads.

The precursor to the finding was a 2007 U.S. Supreme Court case in which Massachusetts and several other states sued the EPA for not regulating greenhouse gas emissions from new motor vehicles and engines under the Clean Air Act.

The Supreme Court ultimately ruled that the EPA's reason for not regulating had to be substantiated by a finding that would either prove greenhouse gas emissions are an endangerment or not.

"It's been sitting out there and everyone's been expecting it, but there hadn't been any final approval," said Buzz Hines, a partner in the environmental law department at **Farella Braun + Martel LLP's** San Francisco office. "The endangerment finding is now official and on the books, so things then move on from that point. That's the legal significance of it."

Stephen Velyvis, senior counsel in **Miller Starr Regalia's** Walnut Creek office, said those next steps mean the development of regulations.

"The finding is important because it's the first and crucial step under the Clean Air Act in regulating greenhouse gases," Velyvis said. "They can now move on to the next step, which is developing regulations to control the impact of greenhouse gases."

### **Consistency with AB32**

The endangerment announcement came just as climate change seemed to be on the mind of the entire world. The same day of the EPA press conference, the United Nations kicked off its climate change conference in Copenhagen.

Some have found the timing of the endangerment finding interesting given the stalled federal climate change legislation.

"Obama has lost a lot of political capital with the recession, the stimulus and the health care bill," Velyvis said. "Most are saying there will be no federal greenhouse gas emissions bill, so Obama is saying I'll just regulate through the EPA."

While the EPA endangerment finding and the federal climate change legislation are moving in the same direction, they are running on different tracks. As opposed to creating a new rule, this finding allows for regulation through the existing Clean Air Act.

"The practical significance of [the finding] is that when it was originally issued earlier this year it signified to the industry and the regulated community, the environmentalists and the administration, as well, that the EPA was prepared to move on climate change independent of legislation," Hines said.

From the perspective of California industry, the endangerment finding could mean a little or a lot to business - depending on who is asked that question.

Realistically, in a regulatory system that prides itself for ruling greenhouse gases with an iron fist, some say the EPA announcement only places the federal government in line with California.

"What you have now with the finding is that it is consistent and in line with the various measures that California has taken through AB32 [Assembly Bill 32, the Global Warming Solutions Act of 2006]," Hines said. "It's also consistent with the measure that California sought to take and was allowed to take in instituting motor vehicle standards regulating the discharge of greenhouse gases."

And in some ways, the EPA announcement simply backs what California already has been doing, Hines said.

"From a development perspective, those requirements on the local and state level are going to be of continued concern and this [finding] just supports what the state's doing in the context of motor vehicle emissions and in the AB32 realm," Hines said. "It supports the efforts of the state to look carefully at development to ensure it's being created in such a way that it's not going to further hamper the environment and create greenhouse gases and thereby affect climate change."

Ultimately, will real estate developers see a sudden shift in how they do business? According to Hines, that

is not likely.

"I don't think by virtue of the announcement that it necessarily changes the landscape that real estate developers are used to dealing with currently and future concerns about increased costs and regulatory hurdles, because those things are already there," Hines said.

Velyvis agreed and added that even if a climate change law at the federal level passed it most likely would not be as strict as California's.

"If you look at what's existing in California, there is a regulatory structure that is clamping down, and that's going to remain," Velyvis said. "The question I have is if there is a federal law, does it completely preempt the field and preclude California from doing what it has been doing?"

### Questions and Concerns

If a federal climate change law was passed, Velyvis questioned how it might work with California's existing laws and how any potential conflict would be addressed.

"I think California likes to say we are the leader and would fight hard in Congress to make sure it's not going to be precluded from being a leader," Velyvis said.

But Velyvis pointed to water laws as a good example of state and federal laws working together in the way of the federal Clean Water Act and California's Porter-Cologne Water Quality Control Act.

"They do act in tandem, and the state is allowed to be more restrictive in regulating water," Velyvis said. "I would assume that would happen in the case of clean air."

As of right now, it is anyone's guess what this finding could lead to. From the perspective of some in the real estate industry, the immediate concern is how this announcement will impact the recovery.

Ruby Simpson, president of Upland-based **Simpson Commercial Properties** and president of the Inland Empire chapter of **Commercial Real Estate Women**, said it will delay the recovery.

"There are many people, and I am one of them, who believe that having clean air and clean water benefits everyone," Simpson said. "There isn't anyone around who wants to see dead fish floating in the river, so then the question becomes just how onerous are we willing to accept some of these issues, and who should be making the decision as to how things like carbon dioxide are to be controlled?"

Even with some saying the endangerment finding is a precursor to regulations on only heavy polluters, Simpson said there will be a trickle-down effect.

"What is going to impact large industrial emissions producers will eventually impact everyone," she said. "At what point do hospital emissions start coming into play? These are questions that need to be realistically studied, and my perception is that the EPA is overstepping the original intention of the establishment of the EPA."

Mary Sullivan, of Riverside-based **Sullivan Consulting Services**, added that specific implications of this endangerment finding are unclear, providing greater cause for concern.

"In the real estate industry, sometimes it's the unknowns that are a little bit more cause for concern than clearly dictated issues," Sullivan said.

As for whether some in the industry feel having regulations such as AB32 in place make the EPA finding any easier to digest, Sullivan argued the rollout of AB32 itself is not even clear at this time given the law's lengthy implementation process.

"It's [the finding] possibly another regulatory layer to digest, understand and communicate to our clients, cities and economic development groups that are all trying to attract business," Sullivan said.

While there is the Competitive Enterprise Institute's legal challenge to the finding, there could be additional challenges from regulated industries such as the large industrial users.

"We'll see how far it goes," Velyvis said of the finding. "It could be mired in litigation, and that's why Obama would rather address it in a new climate change law because doing it under the Clean Air Act will be a long haul. I see nothing changing in how California addresses this in the future absent a big change in the governor's office."

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