GHG Endangerment Finding Redux

Why reconsider the GHG Endangerment Finding?

- The President has no faith in the 2009 finding, believes regulation under that finding is inappropriate, has directed reconsideration as a primary element in his EPA Action Plan, is expected to direct reconsideration in his forthcoming executive orders on climate, and is expected to direct EPA to grant any petitions seeking reconsideration.
- Letters from House and Senate leadership are being prepared and will ask the Administrator to reconsider the finding.
- EPA has already received two petitions for reconsideration.
- If the reconsideration finds no endangerment, it automatically provides the authority needed to withdraw several high-cost, low-value rules (which we will need in order to meet the 2:1 reg and 1:1 cost requirements in the regulatory reform executive order), something that will save enormous amounts of time and effort in place of reconsidering each of those rules under notice and comment rulemaking.
- The Inspector General held that the 2009 finding was improperly done, a finding the Obama administration simply ignored.
- Climate science completed since the 2009 finding significantly undercuts the finding.
- The Clean Air Act §202(a)(1) specifically authorizes revision of the finding.
- EPA has concluded that the rules emerging from the finding will have no significant effect on climate (as measured by average global temperature) and thus do not significantly contribute to the GHG pollution needed to cause or contribute to endangerment.
- EPA currently expends approximately $100 million a year on climate activities grounded on the finding, funds that otherwise could be used to ameliorate traditional environmental harms.

How would EPA go about the reconsideration?

- In conducting its reconsideration of the finding, EPA will follow the procedures established under CAA § 307.
- EPA can only survive legal challenges to a new finding if it has a reasonable basis for its decision. The Agency's decision will be rejected and remanded if any of the following are found:
    - EPA offered no reasons for its finding;
    - EPA offered an explanation for its decision that runs counter to the evidence before the agency;
    - EPA used an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise;
    - There is inadequate data upon which EPA could make a decision;
    - The finding is based upon scientific study's conclusions which are more limited than the finding and which cannot be validly extended to support the finding;
    - EPA used procedures to reach a final determination that reflect arbitrary and capricious

action.

- EPA must build a record of its decision-making process that can withstand judicial review and create public confidence in the process and its outcome.
- EPA has the tools to apply a 100 percent transparent process through "e-regulation" and use of available internet communication opportunities.
    - The process of making a finding consists of multiple decision points. EPA would seek comment on each decision point in appropriate sequential order through both a web page and the e-regulation system, allowing those making comments on the web page to also enter their comments into the official administrative record.
    - EPA would use the Federal Register to notify the public of each new decision point on which it seeks comment.
- EPA would identify the new endangerment finding as a "Highly Influential Scientific Assessment" which requires the Agency to rigorously apply its Information Quality Act guidelines, and conduct its own peer review.
- EPA would only rely on information, data and studies where the original data upon which assessment is based is available to the public and in the administrative record. EPA would not rely on any study whose authors refuse to provide the underlying data, including computer code used to evaluate and analyze the data.
- EPA would rely exclusively on data and not on opinion or conclusions, regardless of how authoritative the source.
- EPA would begin by examining and taking comment on the meaning of the phrase "which in his [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."
- The Agency would then seek information necessary to apply the phrase as parsed, building lines of evidence with regard to each phrase and strictly applying the Information Quality Act guidance and Peer Review process to vet all data and determine the scientific basis for data summarizations and proposed findings.
- The Agency would obtain contractor support to help develop the scientific lines of evidence and would either rely on an existing FACA panel or create one or more new ones to ensure adequate independent peer review. The open public process (crowd sourcing) would also serve to provide independent peer review.
- The Agency would regularly brief the Administrator and Congressional committees on the progress of the reconsideration and invite scientific groups to fully participate in the findings process.
- Upon completion of its analyses and data summarization, and pursuant to § 307(d) of the Clean Air Act, the Agency would prepare a proposed finding, take further comment and make a final finding.
- Because of the highly influential nature of the finding and its ramifications world-wide, EPA will build its technical support document and respond to comments made on each section of the document during development of the finding, thus minimizing the need to further respond to comments at the proposal stage.