
COMMENTS

Of the

WASHINGTON LEGAL FOUNDATION

To the

ENVIRONMENTAL PROTECTION AGENCY

Concerning

**PROPOSED ENDANGERMENT FINDING
AND CAUSE OR CONTRIBUTION FINDING
FOR GREENHOUSE GAS EMISSIONS
UNDER SECTION 202(a)
OF THE CLEAN AIR ACT**

Docket No. EPA-HQ-OAR-2009-0171

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Comments on EPA's Proposed Endangerment Finding and Cause or Contribute Finding for Greenhouse Gas Emissions Under Section 202(a) of the Clean Air Act

Submitted by the Washington Legal Foundation

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The Washington Legal Foundation (WLF) appreciates the opportunity to comment on the proposal by the U.S. Environmental Protection Agency (EPA) to issue an Endangerment Finding for greenhouse gases (GHGs) under Section 202(a) of the Clean Air Act. *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act; Proposed Rule*, 74 Fed. Reg. 16448 (Apr. 10, 2009). ***For the reasons set forth below, WLF strongly urges EPA to clarify that an Endangerment Finding is not intended to encourage or to be used as evidence in tort lawsuits seeking to enjoin or penalize GHG emissions.***

EPA Proposal

EPA proposes to find that what EPA describes as elevated atmospheric concentrations of six GHGs, including carbon dioxide (CO₂), constitutes “air pollution” that “may reasonably be anticipated to endanger public health and welfare.” EPA’s proposal would also find that four of those GHG that are emitted by motor vehicles cause or contribute to this air pollution. As EPA states, if it makes such Endangerment Finding, EPA would be legally obligated under Section 202(a) of the Clean Air Act to regulate GHG emissions from new motor vehicles.

The effect of an Endangerment Finding, however, will not be limited to new automobiles. As EPA indicated in its Advance Notice of Proposed Rulemaking (ANPR) on this subject, the same or very similar Endangerment Finding language in Section 202(a) is set forth in other Clean Air Act provisions governing many other kinds of stationary and mobile sources. *See Regulating Greenhouse Gas Emissions under the Clean Air Act, Advance Notice of Proposed Rulemaking*, 73 Fed. Reg. 44354 (Jul. 30, 2008). Logically, if EPA finds that GHG emissions from new motor vehicles endanger the public health or welfare, then EPA must make the same finding as to the GHG emissions of numerous other significant sources. EPA will therefore be obligated to regulate those sources as well. As a result, EPA unquestionably is about to embark on a course in which it will determine that most significant sources of GHG emissions throughout the economy pose a danger to public health and welfare and must be regulated.

WLF's Interest

The WLF is concerned that EPA’s proposal may have the unintended consequence of encouraging tort lawsuits against companies that emit GHGs, and particularly the hundreds of thousands of businesses whose operations result in the emission of CO₂. The WLF therefore has an interest in EPA’s proposal – the mission of the WLF is to work towards maintaining a proper balance in the courts and to help the United States government strengthen America’s free

enterprise system by promoting free market principles, limited and accountable government, individual rights, business civil liberties, and legal ethics. One of WLF's primary goals is to educate policy-makers and the public through extensive communications outreach, including the submission of comments such as those provided below.

Tort Lawsuits

WLF's chief concern as to an EPA Endangerment Finding is that it could potentially encourage a flood of lawsuits against companies that emit greenhouse gases claiming that such activities constitute "negligence" or a "nuisance." At least five "global warming" tort cases have already been filed and, with the exception of one case that has yet to be decided, all have been rejected by the courts. Those cases are briefly described below for context and reference:

- *Connecticut v. AEP*: In 2004, eight states sued five major electric utility companies over GHG emissions from numerous power plants, seeking an injunction for GHG emission reductions. The plaintiffs claimed the defendant's emissions caused warming temperatures that had resulted in damage to the states' environment. In September 2005, the District Court for the Southern District of New York rejected the claim as an inappropriate attempt to bring a political question before the court. The case was appealed and remains pending in the U.S. Court of Appeals for the Second Circuit.
- *Comer v. Murphy Oil*: Property owners in Mississippi sued numerous coal and oil companies, alleging that the companies' activities caused global warming and thereby "were a proximate and direct cause of the increase in the destructive capacity of hurricane Katrina." The plaintiffs sought money damages for losses sustained during the hurricane by relying on a number of tort theories, including negligence and nuisance. All of the Plaintiffs' claims were rejected by the U.S. District Court for the Southern District of Mississippi after holding that the plaintiffs lacked standing. The court also noted that the case would inappropriately require it to balance economic, environmental, foreign policy, and national security interests. Specifically, the court noted that such policy decisions are best left to the executive and to the legislative branches of the government, who are not only in the best position to make those decisions but are constitutionally empowered to do so. The case has been appealed to the U.S. Circuit Court of Appeals for the Fifth Circuit.
- *Native Village of Kivalina v. ExxonMobil Corp.*: The Native Village of Kivalina, an Inupiat community located on a six-mile long barrier island off the northeast coast of Alaska, filed a lawsuit against dozens of oil, utility, and mining companies, alleging that their actions caused global warming. According to the complaint, warmer temperatures have delayed the seasonal ice formations that normally protect the small barrier island from winter storms. The village claims that, without that ice, the risk of erosion and flooding will force it to relocate to the Alaskan mainland. The lawsuit seeks to recover up to \$400 million for the cost of the relocation, alleging that the defendants' activities and emissions have resulted in a public nuisance. The case remains pending before the District Court for the Northern District of California.

- *California v. General Motors Corp.*: In 2006, the Attorney General for California sued the six largest automakers alleging that the emissions from the cars they produced contributed to global warming. California sought billions of dollars for the alleged damages sustained, including a reduction of the water supply, increased flooding, increased erosion along the coastline, and the increased risk and intensity of wildfires. The District Court for the Northern District of California dismissed the case on the grounds that the suit raised non-justiciable political questions, but an appeal remains pending at the U.S. Circuit Court of Appeals for the Ninth Circuit, albeit California requested this week that its appeal be dismissed.
- *Korsinsky v. EPA*: Gersh Korsinsky, a *pro se* plaintiff, sued various governmental agencies for the alleged “public nuisance” of “global warming.” The plaintiff alleged that the defendant’s actions have caused him to become mentally ill and their actions will increase the risk of drinking water contamination. The United States District Court for the Southern District of New York dismissed the plaintiff’s complaint after holding that the plaintiff lacked any injury sufficient to confer standing, and the United States Court of Appeals for the Second Circuit affirmed.

As these cases illustrate, companies that emit GHGs are being sued for otherwise legal activities on the theory that the emissions from those activities contribute to what is described as the tort of global climate change. Even though all of these cases that have reached decision have been rejected thus far, WLF remains concerned that potential plaintiffs may try to use an EPA Endangerment Finding as support in these and other lawsuits.

WLF does not believe that an EPA Endangerment Finding would, in fact, constitute valid legal evidence in these lawsuits because tort law standards are very different from the standard for an Endangerment Finding under the Clean Air Act. As set forth in EPA’s proposal, an Endangerment Finding is based on a very broad and precautionary standard. The Administrator says that she will decide whether “in [her] judgment” GHGs “*may* reasonably be anticipated to endanger public health or welfare.” See Section 202(a)(1) of the Clean Air Act (42 U.S.C. § 7521(a)(1)). Under this standard, and unlike a court applying tort law, the Administrator will not determine whether any actual harm has occurred to a particular party or assign any responsibility for such harm to specific activities of an individual company.

Congress, not Courts in Tort Lawsuits, Should Determine U.S. Climate Change Policy

Nevertheless, despite this difference in standards, it can easily be understood that plaintiffs’ lawyers will seek to bootstrap an EPA Endangerment Finding into a basis for bringing tort lawsuits. Such a result is not desirable from a public policy perspective, as it will interfere with any climate change regulatory program that EPA may adopt under the Clean Air Act or that Congress may enact in legislation that it currently is considering.

Potential climate change regulation is one of the most-important policy issues in the United States because of its potentially extremely broad reach into all sectors of the economy. As stated by the Intergovernmental Panel on Climate Change (“IPCC”), a source on which EPA’s Endangerment Finding proposal relies extensively, “[e]missions of GHGs are associated

with an extraordinary array of human activities.” IPCC, *Climate Change 2001: Mitigation* (“IPCC 2001”), at 608, *available at* <http://www.ipcc.ch/>. This is because the nation and the world run on fossil fuel, with 85 percent of domestic energy being fossil fuel-based, and because CO₂ is the inevitable byproduct of the combustion of fossil fuels. As EPA itself has stated, “[v]irtually every sector of the U.S. economy is either directly or indirectly a source of GHG emissions.” ANPR, 73 Fed. Reg. at 52928. Because of its wide impact, climate change regulation could be extremely costly economically, with most cost estimates of the various bills in Congress running to more than a hundred billion dollars each year.

Given the huge effect climate change regulation will have throughout the economy, Congress, not the courts in tort lawsuits, should be the governmental body that makes the numerous policy choices that must be made to fashion an appropriate program. Addressing climate change is fundamentally a legislative issue that should be decided by the People’s elected representatives. Only Congress can balance the overriding economic and environmental issues involved, and only Congress can balance the differing economic effects that climate change regulation poses for different regions of the country and different sectors of the economy. Moreover, only Congress can address the U.S. interest in addressing climate change within an international framework as will be necessary if an effective approach is to be developed.

In contrast, individual state and federal court judges are not equipped to address these broad climate change issues in the context of general tort law. Judges in lawsuits are concerned only with addressing the rights of individual litigants. Judges are not lawmakers; they only interpret the law as promulgated by state legislatures or by Congress or as developed through common law.

The climate change tort lawsuits, however, ask the courts to determine important climate change policy. For instance, in some of the lawsuits, the courts were asked to issue injunctive relief ordering the defendant companies to reduce their GHG emissions. Even the lawsuits seeking damages, if successful, would ultimately compel the defendant companies to reduce their GHG emissions. But the amount various sectors of the economy should reduce their emissions is a fundamental question of climate change policy that should be determined by Congress, not judges.

These concerns should motivate EPA to clarify that an Endangerment Finding is not intended to create evidence that could be used in tort lawsuits. Apart from the policy reasons just discussed, climate change tort lawsuits, if successful, would interfere with EPA’s ability to regulate GHGs under the Clean Air Act, a path EPA now seems determined to embark on. Although the WLF does not agree that EPA should regulate GHG emissions under the Clean Air Act, if EPA does so it will be governed by legislative policy set forth in that statute requiring the agency to balance a wide variety of interests. For instance, under Section 202(a), the Administrator must balance economic, environmental and technology concerns in developing motor vehicle emission limitations. The same will be the case if EPA proceeds against stationary sources under Section 111 or against other sources under a variety of other Clean Air Act programs. As importantly, in any regulatory process that EPA undertakes, and in contrast to tort lawsuits, the public at large will have an opportunity to participate in both a finding of endangerment and in the development of regulations.

Tort lawsuits will interfere with EPA's ability to balance the legislative factors and craft appropriate Clean Air Act regulations for GHGs. For instance, EPA appears highly likely to promulgate New Source Performance Standards under Section 111 that will be applicable to CO2 emissions by electric utility sources. Tort judgments against these utilities will interfere with EPA's weighing of economic and environmental factors in determining the appropriate level of controls for these sources. Tort judgments would at least be duplicative of EPA standards, and could require sources to adopt a completely different set of control requirements. If Congress does not enact its own climate change program, and the Clean Air Act becomes the de facto mechanism for setting climate change policy, then EPA, acting under that statute, should be the sole regulator. Judges acting in tort lawsuits should not be able to impose a different layer of controls.

In sum, the WLF urges EPA to confirm that an Endangerment Finding is not intended to encourage or to be used as evidence in global climate change tort lawsuits.

Respectfully submitted,

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