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U.S. Climate Change Mitigation Efforts: The Story So Far & Looking Ahead

Challenged by the seemingly endless array of new stories and other reports regarding efforts to address climate change? This article attempts to cut through the chaff, summarizing recent federal regulatory, legislative and judicial activity on climate change and highlights our expectations for the future. While some restrictions on greenhouse gas emissions seem inevitable, and litigation may be heating up, a comprehensive national approach remains elusive in the U.S. and the only certainty is more delay.

EPA Actions to Date

In response to the Supreme Court decision in *Massachusetts v. EPA*,[1] the U.S. Environmental Protection Agency (EPA) this spring proposed to find that "current and projected levels of the mix of the six greenhouse gases endanger the public health and welfare of current and future generations." The six greenhouse gases (GHGs) at issue are carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). EPA also proposed to find that combined motor vehicle emissions of four of these GHGs[2] contribute to air pollution which may be reasonably anticipated to endanger public health and welfare.[3] Once the Agency finalizes these "endangerment" findings, it becomes obligated under Section 202(a) of the Clean Air Act (CAA or Act), to regulate GHG emissions from new motor vehicles.

The impact from EPA's endangerment finding is unlikely to be limited to motor vehicles, however, as any regulation of motor vehicle GHG emissions trigger requirements under the prevention of significant deterioration (PSD) and Title V permit programs applicable to stationary sources. In addition, several other sections of the Act have endangerment provisions similar to section 202(a)'s and could lead to the regulation of GHG emissions from stationary sources under:[4] (1) the national ambient air quality standards (NAAQS) of sections 108 and 109; (2) new source performance standards (NSPS) under section 111; or (3) hazardous air pollutant (HAP) regulations under section 112.

Proposed Restrictions on Motor Vehicles

Following up on the endangerment findings, on September 28, 2009, EPA and the National Highway Traffic Safety Administration (NHTSA) issued a joint proposal to establish GHG emission and corporate average fuel economy (CAFE) standards for light-duty vehicles.[5] The proposal would establish a national program that harmonizes EPA and NHTSA requirements, as well as those of California and other states using two sets of standards.

Pursuant to its endangerment finding, EPA is proposing to require that light-duty vehicle manufacturers limit combined average emissions of GHGs from their vehicles to 250 grams/mile of CO_2 equivalent (CO_2e) by model year 2016. In addition, NHTSA would set CAFE levels for these vehicles at 34.1 miles per gallon by model year 2016. Comments on this proposal are due to EPA by November 27, 2009.

PSD Tailoring Rule

Once the light-duty vehicle rule is finalized, the GHGs are "pollutants subject to regulation" and trigger Prevention of Significant Deterioration (PSD) and/or Title V permitting requirements for innumerable facilities.[6]

As EPA recognized, applying the existing major source applicability thresholds of 250 tons per year (tpy) (100 for certain source categories) per regulated pollutant for PSD pre-construction permits and 100 tpy for Title V operating permits to GHGs would lead to an "absurd result."

> If PSD and title V requirements apply at the applicability levels provided under the CAA, many small sources would be burdened by the costs of individualized PSD control technology requirements and permit applications. In addition, State permitting authorities would be paralyzed by enormous numbers of these permit applications; the numbers are orders of magnitude greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities.[7]

For example, boilers and other fuel burning sources in large box stores, office buildings, and many other facilities may emit over 100 tpy CO_2. Accordingly, the Agency on October 27, 2009, proposed to "tailor" the PSD and Title V programs to GHGs by phasing in the programs' applicability. During the first phase, lasting six years, sources emitting less than 25,000 tpy CO_2e or

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[1] 549 U.S. 497 (2007) (holding that EPA has authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1) and that EPA may not decline to issue emission standards for motor vehicles on the basis of policy considerations not enumerated in section 202(a)(1)).

[2] CO_2, CH_4, N_2O, and HFCs (the other GHGs are not emitted by motor vehicles and their engines).

[3] Proposed *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 18,886, 18,907 (April 24, 2009).

[4] *See Regulating Greenhouse Gas Emissions Under the Clean Air Act, Advanced Notice of Proposed Rulemaking,* 73 Fed. Reg. 44,354, 44,367-44,371 (July 30, 2008).

[5] *Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 74 Fed. Reg. 49454 (Sept. 28, 2009).

[6] 42 U.S.C. § 7475.

[7] *Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292, 55,294 (October 27, 2009).

10,000 tpy CO_2e would be exempted from GHG-related PSD and Title V requirements.

EPA's proposal would represent only a temporary reprieve for exempted facilities, however, as the Agency is committing, within 5 years of promulgating the first phase, to conduct a study of permitting authorities' ability to administer their PSD and Title V programs. Within a year after completing the study, EPA would initiate a rulemaking on the second phase of the tailoring rule, either to confirm the first-phase permitting levels or to cover more facilities. Comments on the tailoring proposal are due to EPA by December 28, 2009, a rather short deadline for such a potentially enormous impact.

GHG Reporting Rule

In addition to the proposed EPA actions discussed above, the Agency recently finalized another critical component to regulating GHGs. On October 30, 2009, EPA issued its final Mandatory Greenhouse Gas Reporting Rule. The rule goes into effect on December 29, 2009, and requires covered facilities to begin recording GHG emissions on January 1, 2010. The first annual report is due to EPA by March 31, 2011 (for 2010 emissions).[8]

The reporting rule stems from a provision in the Consolidated Appropriations Act of 2008,[9] which directed that EPA require the reporting of "emissions resulting from upstream production and downstream sources." Upstream production sources covered by the final rule include producers and importers of fossil fuels such as petroleum, natural gas and coal-derived fuels, as well as producers and importers of industrial GHGs. Downstream sources Include:

- Facilities in 15 categories, including petroleum, cement, lime, petrochemical and titanium dioxide production, that must report their GHG emissions to EPA regardless of the amounts emitted;
- Any facility in seven listed source categories, including ferroalloy, glass, and hydrogen production, and pulp and paper manufacturing, that emit at least 25,000 tpy CO_2e in combined emissions from stationary fuel combustion, miscellaneous carbonate use, and any of the seven listed categories; and
- Any facility that has stationary fuel combustion units with a combined maximum-rated heat input capacity of at least 30 million British thermal units per hour (mmBtu/hr), and that emit at least 25,000 tpy CO_2e.

EPA is also requiring the reporting of GHG emissions from mobile sources, but not light-duty vehicles, such as cars and light trucks. Manufacturers of heavy-duty trucks, motorcycles, and off-road engines must report CO_2 emission rates for their products beginning with model year 2011. Depending on the engine type, methane and nitrous oxide reporting will begin with model years 2012 and 2013, respectively.

Several industries identified in the notice of proposed rulemaking have been removed from the final rule pending further consideration, including:

- Electronics manufacturing
- Ethanol production
- Fluorinated GHG production
- Food processing
- Magnesium production
- Oil and natural gas systems
- SF6 from electrical equipment
- Underground coal mines
- Industrial landfills
- Wastewater treatment
- Suppliers of coal

Recent reports suggest, however, that EPA will move quickly to capture several of these industries under a supplemental rulemaking, perhaps as early as 2010.

Climate Change Litigation

Although the climate change debate has raged for quite some time, litigation on the issue has increased only relatively recently.[10] The bulk of climate change cases to date have sought either to compel government regulation of GHGs,[11] or to prevent the government from acting, typically from granting permits.[12] Two recent decisions by the U.S. Court of Appeals for the Second and Fifth Circuits, however, have raised concerns that climate change-related litigation soon will proliferate.

***Connecticut v. American Elec. Power Co.*[13]**

On July 21, 2004, eight states (CA, CT, IA, NJ, NY, RI, VT, WI) and New York City filed suit against five electric utilities alleged to be the five largest emitters of CO_2 from coal-fired power plants in the U.S. The states sought to compel the companies to reduce their CO_2 emissions on federal and state common law theories of public nuisance. Three land trusts seeking to protect land they alleged is threatened by climate change, filed a similar suit against the same utilities (but with an added private nuisance claim), which was consolidated with the state suit.

The utilities sought to dismiss the lawsuits on various grounds, including that there is no federal common law cause of action for climate change. Even assuming the existence of such a cause of action, the defendants argued, Congress displaced the federal courts' authority in this area by enacting the CAA's comprehensive scheme of air pollution regulation. The utilities also argued that the plaintiffs lacked standing as they had failed to demonstrate an "injury in fact." Rather, the alleged injuries from climate change are in the indefinite future. Given that the utilities' emissions comprise a small portion of total global GHG emissions, plaintiffs failed to show that the utilities' conduct will directly cause the alleged injuries.

It was the defendants' political question argument, which the district court found compelling, dismissing the complaint on grounds that the claims presented required the "identification and balancing of economic, environmental, foreign policy, and national security interests" better left to the legislature than the courts. The Second Circuit disagreed and reversed the district court decision.

The circuit court examined each of the six factors that indicate the existence of a political question, and determined that none applied to the common law nuisance claims. In particular, the court found

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[8] *Mandatory Reporting of Greenhouse Gases*, 74 Fed. Reg. 56260 (Oct. 30, 2009).

[9] H.R. 2764, 110th Cong., Pub. L. 110-162 (Dec. 26, 2008).

[10] *See generally,* U.S. Congressional Research Service. *Climate Change Litigation: A Survey* (RL32764; Apr. 15, 2009), by Robert Meltz.

[11] The seminal example is *Massachusetts v. EPA*, but other cases include: *Coke Oven Environmental Task Force v. EPA*, No. 06-1131 (D.C. Cir. filed April 7, 2006); *New York v. EPA*, No. 08-1279 (D.C. Cir. filed August 25, 2008); *WildEarth Guardians v. Johnson*, No. 1:09 CV 00089 (D.D.C. filed January 14, 2009).

[12] *See e.g., Northwest Environmental Defense Center v. Owens Corning Corp.* 434 F. Supp. 2d 957 (D. Or. 2006).

[13] *Connecticut v. American Elec. Power Co.*, Nos. 05-5104-cv, 05-5119-cv, slip op. (2d Cir. Sept. 21, 2009).

unpersuasive the utilities' arguments that the lawsuits implicated "complex, inter-related and far reaching policy question" best left to the political branches:

> Nowhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far reaching solution to global climate change, a task that arguably falls within the purview of the political branches … Instead, they seek to limit emissions from six domestic coal-fired electricity plants on the ground that such emissions constitute a public nuisance that they allege has caused, is causing, and will continue to cause them injury.[14]

A decision by "a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct," would not establish a national or international emissions policy.[15] Nor was the court persuaded by the utilities' argument that climate change raised complex, unmanageable policy questions for the courts. Such an argument "is undermined by the fact that federal courts have successfully adjudicated complex common law public nuisance cases for over a century."[16] Similarly, the Second Circuit noted that:

> …the fact that the Clean Air Act ("CAA") or other air pollution statutes, as they now exist, do not provide Plaintiffs with the remedy they seek does not mean that Plaintiffs cannot bring an action and must wait for the political branches to craft a "comprehensive" global solution to global warming. Rather, Plaintiffs here may seek their remedies under the federal common law. They need not await an "initial policy determination" in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century.[17]

In a holding likely to generate more litigation, the Second Circuit also found that both the governmental and trust plaintiffs have standing to bring this lawsuit. The court found that the states have standing under their *parens patriae* authority to bring suit to protect the health and economic well-being of their citizens. More importantly, the court found the states and trust plaintiffs to have standing under Article III of the U.S. Constitution as property owners.

In this regard, the court found the current and future injuries alleged by the plaintiffs sufficient to satisfy the Article III injury-in-fact standard. California's claim that early melting snow packs reduced water supplies and caused destruction of its property due to flooding qualifies as a current injury-in-fact for Article III purposes. Such an injury is concrete, particularized, and actual or imminent, not conjectural or hypothetical as the injury is occurring now and is not speculative.[18]

The court also found both the future injuries the state and trusts plaintiffs predict to be "anything but speculation and conjecture:"

> "Rather, they are certain to occur because of the consequences, based on the laws of physics and chemistry, of the documented increased carbon dioxide in the atmosphere." There is no probability involved.[19]

Indeed, the court found plaintiff claims particularly compelling because the utilities "are currently emitting large amounts of carbon dioxide and will continue to do so in the future." The court also found that Plaintiffs sufficiently alleged that their current and future injuries are "fairly traceable" to utility defendants.

> For purposes of Article III standing they are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants' emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries.[20]

On November 4, 2009, the utilities filed a motion with the Second Circuit requesting either a panel rehearing or rehearing *en banc*.

Comer v. Murphy Oil USA, Inc.[21]

Less than a month after the *American Power* decision, the Fifth Circuit unanimously ruled that Mississippi Gulf Coast property owners have standing to bring a class action against oil refiners, chemical manufacturers and other industries for personal injury and property damages arising from hurricane Katrina. The complaint alleged that the companies' operation in the U.S. caused GHG emissions that "contributed to global warming, *viz.*, the increase in global surface air and water temperatures," which in turn contributed to the ferocity of Hurricane Katrina resulting in the destruction of private as well as public property.[22] Alleging Mississippi common-law claims of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy, the plaintiffs seek compensatory and punitive damages. The companies moved to dismiss the suit on grounds that the plaintiffs lacked standing and that their claims raised nonjusticiable political questions. The district court agreed and granted the defendants' motion, dismissing the class action.

The Fifth Circuit reversed, concluding that the property owners have standing to assert their public and private nuisance, trespass, and negligence claims, and that none of these claims present nonjusticiable political questions. The court said that the common law claims clearly satisfy Article III standing requirements as plaintiffs allege that they sustained actual, concrete injury in fact to their property, which can be redressed by the compensatory, and punitive damages they seek. In addition, it gave short shrift to the companies' arguments that plaintiffs have failed to show that the harms alleged are fairly traceable to their operations, saying such arguments are misplaced at this stage of the litigation. The Article III traceability requirement need not be as close as the proximate causation needed to succeed on the merits of a tort claim:

> Plaintiffs' complaint, relying on scientific reports, alleges a chain of causation between defendants' substantial emissions and plaintiffs' injuries, and while plaintiffs will be required to support these assertions at later stages in the litigation, at this pleading stage we must take these allegations as true.[23]

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[14] *Am. Elec. Power Co.* at 23 (citation omitted).

[15] *Id.* at 24.

[16] *Id.*

[17] *Id.* 32-33.

[18] *Id.* at 51.

[19] *Id.* at 55 (citing *United Transp. Union v. ICC*, 891 F.2d 908, 912, n.7 (D.C. Cir. 1989)

[20] *Id.* at 61.

[21] *Comer v. Murphy Oil USA*, No. 07-60756, slip op. (5th Cir. Oct. 16, 2009).

[22] *Id.* at 1.

[23] *Id.* at 9.

The court declined to find standing for the unjust enrichment, civil conspiracy, and fraudulent misrepresentation claims and dismissed these claims. The remaining question concerned whether the plaintiffs state common law claims of nuisance, trespass or negligence are justiciable:

> …they plainly have not been committed by the Constitution or federal laws or regulations to Congress or the president. There is no federal constitutional or statutory provision making such a commitment, and the defendants do not point to any provision that has such effect. The most that the defendants legitimately could argue is that in the future Congress may enact laws, or federal agencies may adopt regulations, so as to comprehensively govern greenhouse gas emissions and that such laws or regulations might preempt certain aspects of state common law tort claims.[24]

Thus, until Congress, the president, or a federal agency so acts, the court ruled that the common law tort claims raised by plaintiffs are justiciable, not political, "because there is no commitment of those issues exclusively to the political branches of the federal government by the Constitution itself or by federal statutes or regulations."

Congressional Bills in the Works-But Delayed

Although the U.S. House of Representative passed climate legislation earlier this summer, the outcome in the Senate remains in doubt.

American Clean Energy and Security Act of 2009

H.R. 2454, or the American Clean Energy and Security Act of 2009, passed June 26, 2009 by a vote of 219 to 212. The bill is quite comprehensive and includes provisions to

- Improve energy efficiency, including through grants, standards, rebates and other programs for lighting and commercial equipment, water-consuming products, buildings, industrial equipment, and healthcare facilities.
- Promote vehicle and fuel efficiency, including incentives for the development and production of plug-in and other advanced vehicles.
- Create an integrated energy efficiency and renewable electricity standard. Beginning in 2011, retail electricity suppliers would be required to increase the percentage of electricity demand met through the use renewable energy sources and energy efficiency up to 20% by 2020.
- Develop smart grid technologies, including for end-use products.

Title III of H.R. 2454 would amend the Clean Air Act by adding a new Title VII entitled the new Warming Pollution Reduction Program. Title VII would establish a cap-and-trade system to reduce GHG emissions from covered entities to 3% below 2005 levels by 2012, 17% by 2020, 42% by 2030; and 83% below 2005 levels by 2050. The act would apply to the six GHGs referenced above, nitrogen trifluoride (NF_3), and any other anthropogenic gas designated by EPA.

Entities required to obtain emission allowances under the cap and trade program would include electricity sources, stationary sources emitting over 25,000 tpy of GHGs, fuel and industrial gas producers and importers, local natural gas distribution companies, nitrogen trifluoride sources, and other specified sources. H.R. 2454 also would require EPA, to limit "black carbon" emissions two years after enactment.

The bill's economy-wide impact would be felt upstream by fuel and gas producers and importers, as well as downstream by electric generators, natural gas distributors and various industrial facilities. The House sought to protect consumers from higher energy prices by requiring that allowances be used exclusively for the benefit of energy consumers.

Clean Energy Jobs and American Power Act

Senators John Kerry and Barbara Boxer also introduced a climate bill on September 30, 2009. The proposed Clean Energy Jobs and American Power Act[25] would cut greenhouse emissions 20% by 2020. A Chairman's Mark of the bill, released on October 23rd, lowers the amount of total allowances that can be allocated, seemingly in large part because of Senate rules requiring deficit reduction.[26]

Critically, Senate Majority Leader, Harry Reid (D-Nevada) announced on November 18, 2009, that further Senate debate on climate change legislation would be postponed until spring of 2010. Given the current economic environment and its probable impact on the 2010 mid-term elections, the likelihood that Congress will tackle climate change before 2011 seems increasingly remote with healthcare reform legislation the current priority.

Looking Ahead . . . What to Expect

In a nutshell – more litigation is likely. At least in the Second and Fifth Circuits, the *American Elec. Power* and *Comer* decisions remove some critical barriers to plaintiffs seeking to hold companies liable for harm essentially caused by natural disasters. As the Fifth Circuit suggests, however, these two cases address gate-keeping aspects of litigation that are subject to a lesser standard of proof. While these plaintiffs have leapt over these initial hurdles, it remains to be seen whether plaintiffs will be able to support their claims at trial, including the existence of an individual corporate obligation to act even though individual action would be ineffective in resolving a global problem still unaddressed by the planet's various governments, including our own. That is small comfort, however, for those companies having to defend these suits.

Questions about EPA's ability to address GHG emissions under the Clean Air Act mostly would be resolved under either the House or Senate climate change bills. H.R. 2454 would add a new Title VIII to the Clean Air Act, which includes exclusions for GHGs from regulation under the NAAQS, PSD, HAP and Title V programs. The Senate bill is more constrained. For example, S. 1733 would not preempt regulations of GHGs under the PSD program, but would raise the threshold for GHGs to 25,000 tpy. In the absence of Congressional action on climate change, further litigation to compel EPA to act or prevent it from acting seems certain.

There have already been several suits requiring EPA to consider GHG emissions as part of its permitting process. We would expect to see challenges to EPA's new GHG rules as well. In this regard, Congressional action has always been a critical component of any U.S. approach to climate change because of the need to address Clean Air Act limitations on EPA's authority. For

[24] *Id.* at 18-19.

[25] S. 1733, 111th Cong.

[26] "Boxer Releases Chairman's Mark of Clean Energy Jobs and American Power Act," U.S. Senate Committee on Environment and Public Works (Oct. 23, 2009), http://www.epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases.

example, the D.C. Circuit's vacatur of an EPA cap-and-trade program to reduce the interstate transport of sulfur dioxide (SO_2), nitrogen oxide (NO_x), and mercury emissions has raised significant questions about EPA's ability to regulate GHG emissions in a similar manner without amendments to the Clean Air Act.[27]

EPA's Clean Air Interstate Rule (CAIR) imposed caps on SO_2 and NO_x emissions for an entire region and created an optional interstate trading program for each air pollutant, to which, in the absence of EPA-approved state implementation plan, all upwind sources became subject. The D.C. Circuit found CAIR's region-wide caps fundamentally flawed because CAIR did not connect emission reductions to any measure of a state's individual significant contributions. EPA defended its region-wide approach by stating that imposing emissions limits on each state would not achieve reductions in the most cost-effective manner. The court, however, rejected this, finding the budgets "distributed … simply in the interest of fairness" arbitrary or capricious. This ruling suggests that courts will be suspicious of cap-and-trade solutions under the Clean Air Act absent explicit congressional authorization, even when those solutions provide the least burdensome approach.

EPA's rationale for setting the tailoring rule threshold at 25,000 tons is also potentially vulnerable to a legal challenge. As we discussed above, the Agency argues that "administrative necessity" and the desire to avoid "absurd results" compel it to establish GHG applicability thresholds under the PSD program that are contrary to the plain language of the Act. The courts, however, apply these two judicial doctrines only in rare and exceptional circumstances and may not agree with EPA's assessment in this instance. Indeed, the D.C. Circuit has previously rejected EPA's administrative necessity argument for exempting small sources from PSD requirements.[28] Moreover, these "absurd results" simply question the Clean Air Act's suitability, as it currently stands, to regulate GHG emissions.

Not surprisingly, the climate change treaty negotiations scheduled to be held this December in Copenhagen also will be affected by the Senate's delay. In recent weeks, public statement by various world leaders, including President Obama, all sought to dampen expectations that a climate change agreement could be reached in Copenhagen. The failure of the U.S. to commit to specific carbon reduction targets has been a sticking point among treaty negotiators. With Senate action on national climate change legislation delayed until spring at the earliest, meaningful progress on a global treaty seems even more remote. Such a delay, however, is likely to be greeted by world leaders with a collective sigh of relief, albeit privately, given the current global economic downturn. Attention to climate change is nevertheless expected to increase in legislative, regulatory and judicial arenas.

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[27] *North Carolina v. EPA*, 531 F.3d 836 (DC Cir. Jul. 11, 2008)

[28] *Alabama Power v. Costle*, 636 F.2d 323, 357-361 (D.C. Cir. 1980).