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ENVIRONMENTAL LAW UPDATE:

Greenhouse Gas Regulation, Litigation and Legislation

October 2009

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GHG Regulation: (1) Mobile Source GHG Rule; (2) Mandatory Greenhouse Gas Reporting Rule, (3) GHG "Tailoring Rule" to set 25,000 CO2e as Clean Air Act (CAA) Major Source Threshold for Prevention of Significant Deterioration Threshold and Clean Air Act Title V Operating Permit Threshold

On September 15, 2009, EPA then took action on the rule at the center of the Supreme Court's its landmark decision, *Massachusetts v. EPA*, 549 U.S. 497 (2007), and proposed new greenhouse gas emission standards in the form of new fuel efficiency standards for light vehicles. See 74 Fed. Reg. 49454 (Sept. 28, 2009), available at: http://edocket.access.gpo.gov/2009/pdf/E9-22516.pdf. Upon promulgation, this new regulation will be the first CAA "emission standard or limitation" subjecting greenhouse gases to regulation under the CAA. The significance of this first actual regulation of greenhouse gases cannot be overstated, as it will, as a matter of law, trigger the CAA Prevention of Significant Deterioration (PSD) and Title V Operating Permit sections of the CAA for greenhouse gases. The imminent promulgation of this first greenhouse gas emission standard or limitation under the CAA prompted EPA to propose a specific "Tailoring Rule" limiting the impact of the PSD and Title V programs to larger sources of greenhouse gas than the statutory thresholds of 250 and 100 tons per year, as discussed below.

On September 22, 2009, EPA finalized its mandatory reporting rule proposed on April 10. http://www.epa.gov/climatechange/emissions/ghgrulemaking.html. As reported earlier, EPA was required to adopt this greenhouse gas reporting rule by a 2008 Appropriations Act, but EPA relied on the CAA Section 114 as the statutory basis for this rule. Section 114 is the section used to request information for enforcement evaluations or policy making. The reporting rule does not impose CAA permitting requirements, but it is enforceable as a CAA requirement. Because the rule is analogous to a request for information

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The rule requires all facilities that meet the following source categories to report pursuant to the rule; Adipic Acid Production; Aluminum Production; Ammonia Manufacturing; Cement Production; Electricity Generation facilities that report CO2 emissions year round through 40 CFR part 75; HCFC-22 Production; HFC-23 Destruction Processes that are not collocated with a HCFC-22 production facility and that destroy more than 2.14 metric tons of HFC-23 per year; Lime Manufacturing; Manure Management Systems with combined CH4 and N2O emissions in amounts equivalent to 25,000 metric tons CO2e per year or more; Municipal Solid Waste Landfills that generate CH4 in amounts equivalent to 25,000 metric tons CO2e per year or more; Nitric Acid Production Petrochemical Production; Petroleum Refineries; Phosphoric Acid Production; Silicon Carbide Production; Soda Ash Production; Titanium Dioxide Production. The following source categories report if the facilities meet the definition of the following source categories and emit greenhouse gases in excess of 25,000 metric tons of carbon dioxide equivalents or "MTCO2e": Ferroalloy Production; Glass Production; Hydrogen Production; Iron and Steel Production; Lead Production; Pulp and Paper Manufacturing; Zinc Production. Stationary source combustion sources report if the maximum rated heat input capacity is equal or greater than 30 mmBtu/hr, and the emissions exceed 25,000 MTCO2e. The rule also requires reporting by suppliers of fossil fuels and industrial gases, in addition to some mobile source requirements. The final rule should be effective on January 1, 2010, with monitoring required through 2010, and GHG emission reports submitted by March 31, 2011.

In the final rule, EPA made many changes from the proposed rule. First, EPA reduced the number of source and supply categories, reserving the following source and supply categories which are **not required to report at this time**: Electronics manufacturing; Oil and natural gas systems; Ethanol production; SF6 from electrical equipment; Fluorinated GHG production; Underground coal mines; Food processing; Wastewater treatment; Industrial landfills; Suppliers of coal; Magnesium production.

EPA also added a mechanism for facilities and suppliers to cease annual reporting by reducing their GHG emissions. Specifically, facilities and suppliers can cease reporting after 5 consecutive years of emissions below 25,000 metric tons CO2e/year, after 3 consecutive years of emissions below 15,000 metric tons CO2e/year, and then also if the GHG-emitting processes or operations are shut down. Regarding monitoring methods, EPA added a provision to allow use of Best Available Monitoring Methods in lieu of the required monitoring methods for January - March 2010. Facilities can request a date extension beyond March 2010, but EPA will not approve any requests for an extension beyond 2010. Significantly, EPA added calibration requirements for flow meters and other monitoring devices including a five percent accuracy specification. Regarding reporting and recordkeeping, EPA added provision to require submittal of revised annual GHG reports if needed to correct errors. EPA also hanged the general records retention period from 5 years to 3 years.

Entities impacted by the rule are urged to begin preparations to monitor GHG emissions pursuant to the general provisions and any applicable subparts. If a reporter intends to use of Best Available Monitoring Methods after April 1, 2010, the BAMM request is due thirty days after the anticipated December 31, 2009 effective date of the rule, i.e., most likely prior to January 31, 2010. At this time, the reporter should consider submitting a "Certificate of Representation" naming the reporters "Designated Representative" initially to ensure that the EPA will properly process the

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BAMM request given that the rule states that EPA will not process any submittal under the reporting rule without having first received the Certificate of Representation.

On September 30, 2009, EPA proposed a Clean Air Act "Tailoring Rule," intended to limit the impact of the mobile source standards proposed on September 15, 2009 from automatically triggering Clean Air Act Prevention of Significant Deterioration and Title V Operating Permit requirements for greenhouse gas emissions at the 250 ton per year and 100 ton per year major stationary source thresholds. With the "tailoring rule," EPA proposes to adopt the 25,000 ton per year of CO2e, with 10,000 to 25,000 significant increases for major modifications. Unlike the Mandatory Greenhouse Gas Reporting Rule, the Tailoring Rule does not, itself, impose new limitations, but scales back the "absurd consequence" of the automatic application of PSD and Title V 250 and 100 ton per year thresholds to greenhouse gas emissions from stationary sources. The implications of both the mobile source rule and the tailoring rule include the specter of the PSD programs "Best Available Control Technology" as defined by 40 C.F.R. § 52.21, as well as all the other CAA "potential to emit" and other rigorous compliance challenges, to greenhouse gas emissions. The Tailoring Rule is not yet published in the Federal Register, but is posted on EPA's website and is available here: http://www.epa.gov/NSR/documents/GHGTailoringProposal.pdf .

LITIGATION

On September 21, 2009, the U.S. Court of Appeals for the Second Circuit issued its decision in *Connecticut v. American Electric Power*. The Second Circuit held that, without current greenhouse gas regulation, there is no "political question defense" to federal common law claims of public nuisance by municipalities, states and land trusts against public utilities for their greenhouse gas emissions where the federal government has chosen to **not regulate** greenhouse gas emissions. With this decision, the Second Circuit seemed to stretch the U.S. Constitution Article III standing requirements of injury, causation and redressability consistent with the Supreme Court in Massachusetts v. EPA, finding that: (1) melting snowpack is sufficient demonstration of discrete injury; (2) the fact that other injury is "imminent" because it has been set in motion due to high concentrations of greenhouse gases in the atmosphere; (3) fairly traceable causation existed even though other countries emit carbon dioxide and that the plaintiff could not demonstrate that it was the public utility defendant's carbon dioxide emissions that actually caused the plaintiff's harm, or (4) redressibility existed even though reducing the public utility's carbon dioxide emissions could not completely remedy, or even partially remedy in any observable way, the plaintiff's damages. While this decision may become moot if greenhouse gas regulation of stationary sources is adopted, either by EPA with Clean Air Act regulation, or by Congress through Kerry-Boxer, or some version of it, this decision is recognized as a landscape changing decision with the potential to impact all major stationary source emitters of greenhouse gases. This decision is available at: http://www.ca2.uscourts.gov/decisions/isysquery/d61f676c-fe65-4781-9551-c10d17104dba/1/doc/05-5104-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/d61f676c-fe65-4781-9551-c10d17104dba/1/hilite/

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LEGISLATION

In September 2009, the Senate introduced its "Clean Energy Jobs and American Power Act" or "Kerry-Boxer," a Senate sister bill to the House H.R. 2454, "American Clean Energy and Security Act of 2009." The bills are similar, however, the Senate version has many major gaps. For example, unlike Waxman-Markey, upon release, Kerry-Boxer did not contain the Clean Air Act permitting exemption. The Senate is not expected to act on Kerry-Boxer this year. For Kerry-Boxer, see: http://kerry.senate.gov/cleanenergyjobsandamericanpower/intro.cfm . For Waxman-Markey, see: http://www.govtrack.us/congress/bill.xpd?bill=h111-2454.

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