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Climate Change: Recent Developments in Congress, the EPA, the Courts, and the States



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Introduction from the Editor

September and October 2009 have been an active time for climate change legal developments in the United States. In Congress, a climate bill was filed in the U.S. Senate as a companion to the

bill passed by the U.S. House of Representatives.

The U.S. Environmental Protection Agency ("EPA") issued the final greenhouse gas ("GHG") reporting rule regulating 10,000 GHG emission sources and a proposed rule that would regulate sources of GHG emissions in excess of 25,000 tons per year under the federal Clean Air Act.

In the courts, the U.S. Second Circuit Court of Appeals issued an opinion permitting several states and other parties to pursue a suit against several utilities to reduce greenhouse gases from their coal-fired power plants. The U.S. Fifth Circuit found that residents and owners of land and property along the Mississippi Gulf Coast have standing to pursue their public and private nuisance, trespass, and negligence claims against defendant operators of energy, fossil fuel, and chemical companies alleging that their GHG emissions increased the damages from Hurricane Katrina, and that none of these claims present nonjusticiable political questions. A citizens group has filed a suit in Texas trying to force the state environmental agency to regulate carbon dioxide ("CO₂") from power plants and other facilities.

Finally, at the state level, Pennsylvania, a coal state, issued a Climate Action Plan to re-

duce GHG emissions, one of 20 or more states to issue such a plan and engage in state and multi-state programs to regulate GHG emissions.

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Several states are already regulating or are planning to regulate greenhouse gas emissions, and, thus, the question at this point is to what extent mandatory reductions of greenhouse gas emissions will be imposed by the EPA or Congress on a national level.

Congress on a national level. While Congress is debating a climate bill, the EPA has initiated steps to establish a national regulatory system. If Congress acts, there may be a consistent nation-wide system that would prevent the EPA and the states from imposing their own divergent regulatory systems, and prevent, at least to some extent, the courts from imposing their own GHG reductions on an ad hoc basis under statutes or federal common law. If Congress does not act, then the requirements may vary across different states through state legislation, EPA regulation, by judicial fiat, or perhaps a confusing mixture of all of the above.

Through this issue of the Climate Change and Renewable Energy Newsletter we are providing a summary of the most recent legal developments in the climate change area.

Scott D. Deatherage, Climate Change and Renewable Energy Practice Group Leader.

Congress: Senators Kerry and Boxer File Senate Climate Bill

On September 30, 2009, Senators John Kerry and Barbara Boxer filed a climate bill entitled the “Clean Energy Jobs and American Power Act” (S.1733) (“Kerry-Boxer Bill”). On October 23, 2009, Senator Boxer, the Chair of the Environment and Public Works Committee, issued the “Chair’s Mark” that added further provisions and made changes to the original bill. The Kerry-Boxer Bill, in addition to addressing other energy-related issues such as energy efficiency, is designed to regulate greenhouse gas (“GHG”) emissions through a cap and trade program. On climate change issues, the Kerry-Boxer Bill largely follows the Waxman-Markey Bill passed by the House of Representatives with some key differences, discussed below. Senator Boxer, who is the Chair of the Senate Environment and Public Works Committee, announced that the Committee will hold three days of hearings beginning on October 27, and will schedule a full Committee markup of the Kerry-Boxer Bill as soon as possible thereafter, probably in the first two weeks of November.

In addition to GHG regulation, key issues that the Kerry-Boxer Bill addresses include:

- Funding of \$10 billion over ten years for technology deployment of carbon capture and sequestration for carbon dioxide (“CO₂”) emitted from coal-fired power plants;
- Promotion of natural gas as a “clean-burning” fossil fuel and incentives to reduce leaks from natural gas pipelines;
- Additional support for nuclear energy such as increased financing for loan guarantees and regulatory risk insurance; and
- Energy efficiency, more efficient power lines, and a smart grid.

As stated above, the section of the Kerry-Boxer Bill that would regulate GHG emissions largely follows the Waxman-Markey Bill. Some of the major differences are outlined below.

2020 Emissions Cap

The Kerry-Boxer Bill sets a stricter cap by year 2020 of 20 percent below 2005 levels for “Covered Entities” as opposed to 17 percent in the Waxman-Markey Bill.

Allocation of GHG Allowances

The Kerry-Boxer Bill originally left unaddressed the relative amounts of emission allowances that would be allocated without charge to Covered Entities and what amount would be auctioned. This is a critical issue in terms of the immediate impact on industries that generate significant GHG emissions, such as coal-fired power plants and oil refineries. The Chair’s Mark added an allocation provision that followed for the most part the Waxman-Markey Bill with some differences. Changes relating to oil refineries, as an example, are discussed below.

Allocation and Auction

The Chair’s Mark added the allocation system, that overall followed the Waxman-Markey Bill. Both provide a percentage of the allowances that would need to be used by Covered Entities to meet their compliance obligations (in addition to a percentage of offsets that may be used) to such programs as electricity, natural gas, and home heating oil consumers, low- and moderate income households, consumer rebates, energy efficiency, among others. Other programs provide a certain amount of free allowances for energy-intensive industries, oil refiners, and coal-fired power plants, including for carbon capture and storage. One of the key differences is the amount of allowances allocated to oil refineries. In the Waxman-Markey Bill, 2 percent of annual allowances were allocated to all oil refineries and an additional 0.25 percent to small refineries. In the Chair’s Mark, the provision was changed to provide 0.75 percent of annual allowances to all refineries with an additional 0.5 percent to medium-size refineries, and an additional 1.0 percent to small refineries. A small refinery allowance reserve would be established in both Bills. Small refiners are also given more time to comply with the requirements to reduce greenhouse gas emissions.

Cost Containment through Price Collar

The Kerry-Boxer Bill attempts to address the economic impact on industry (and the economy) in part through a “price collar.” In the allowance auctions, the sale price of allowances would have a minimum floor price of \$10 (in 2005 dollars, about \$11 in 2009 dollars) per metric ton of carbon dioxide equivalent (“CO₂e”), and a price ceiling of \$28 per ton of CO₂e in the reserve auction. The Waxman-Markey Bill provides for a \$10 (in 2009 dollars) floor for allowance auctions, but the price ceiling would be 160 percent above a rolling average of carbon market prices for the reserve auctions. The allowance prices would adjust each year at five percent above inflation, and the reserve prices would adjust upwardly each year as well.

Cost Containment through Offsets

Both the Kerry-Boxer and the Waxman-Markey Bills provide for cost containment by allowing two billion tons of CO₂ per year of emission offsets (or the use of reductions by a facility that has compliance obligations of reductions by a non-regulated facility or source). The Kerry-Boxer Bill is more strict in that it only allows 25 percent of the offsets to be imported from international GHG projects, while the Waxman-Markey Bill allowed one-half or one billion tons of international offsets to be used per year. Both bills allow these limits to be increased in certain circumstances where allowances or offset prices rise above certain thresholds or domestic offset availability is limited—up to 1.5 billion per year under the Waxman-Markey Bill and up to 1.25 billion under the Kerry-Boxer Bill.

Methane Emissions and Offsets

The Kerry-Boxer Bill allows certain methane emission sources (such as landfills and coal mine methane projects) that would be regulated under the Waxman-Markey Bill to escape regulation and act as GHG offset sources. This position tracks expectations that many of these sources would serve as offset sources as they have in international projects under the Kyoto Protocol.

EPA: EPA Issues Final GHG Reporting Rule and Proposes “Tailoring Rule” to Regulate Facilities That Emit Over 25,000 Tons Per Year of Greenhouse Gas Emissions

EPA GHG Reporting Rule

The EPA under the Obama Administration has moved forward with initial steps to establish a greenhouse gases (“GHG”) regulatory system. On September 22, 2009, the EPA issued its final GHG monitoring and reporting rule that will require as many as 10,000 facilities in the United States to measure their GHG emissions and start reporting them in early 2011 (“GHG Reporting Rule”).¹ Some industry groups had asked the EPA for a delay until 2011 to start monitoring and until 2012 to start reporting their GHG emissions, but the EPA chose not to delay implementation of the rule. Regulated facilities have only two and one-half months to prepare for the monitoring that they must begin January 1, 2010. This may be particularly challenging for those companies that must install or modify continuous emission monitors.

Under the GHG Reporting Rule, the EPA has adopted a substantial program of GHG monitoring and reporting with a publicly available registry. The program is “economy wide” and covers 80 percent or more of GHG emissions in the United States.

The EPA is in part implementing the GHG Reporting Rule to gather information for future regulatory and policy decisions. Thus, many of those sources that will be required to report under the GHG Reporting Rule may be regulated under a federal GHG cap and trade system being

discussed by Congress and the Obama Administration.

While the GHG Reporting Rule does not impose any reduction obligations, prior “reporting only” rules, such as the Toxic Release Reporting of SARA Title III, have shown that companies reporting emissions “manage what they measure.” In other words, once companies are required to publicly report their emissions, they begin to identify ways to reduce those emissions.

EPA Proposed Tailoring Rule

On September 30, 2009, the EPA announced its proposed “Tailoring Rule.”² This rule was developed to help address the issue of whether to regulate GHG emissions under the Clean Air Act (“CAA”) through the EPA or state programs (the states are delegated responsibility in most states to implement the CAA). The EPA’s concern was that using the general emission thresholds under the CAA, for example, 250 tons of emissions per year for certain pollutants, would apply permitting requirements to thousands of facilities, which would be unmanageable for the EPA and costly to regulated parties.

The import of this proposed rule is that it would impose the CAA’s New Source Review under the Prevention of Significant Deterioration program and Title V Operating Permit program requirements to sources that emit 25,000 tons or more

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of carbon dioxide equivalent (“CO₂e”) per year. Sources subject to the Tailoring Rule would be required to install Best Available Control Technology requirements to reduce GHG emissions. (The answer to the question of what technology to control GHG emissions would be available for particular types of industry sources remains unclear at this time. The EPA is holding meetings to consider this question.) Thus, the rule if finally adopted would create a GHG regulatory system under the CAA. These developing EPA rules may result in a “Command and Control” regulatory system, rather than the “Cap and Trade” system being considered in Congress, which provides a much more flexible approach and a market-based system for addressing GHG emissions.

Courts: Second and Fifth Circuits Open Up Climate Change Cases under Public Nuisance and Tort Doctrines and Citizens Group Sues to Force Texas Agency to Regulate Greenhouse Gas Emissions

The courts have become a forum for states and environmental groups to attempt to impose restrictions through permits under state and federal statutes or to seek to have a court determine the level of reductions that significant emission sources must achieve under the public nuisance doctrine or other tort theories. In addition, plaintiffs are trying to sue greenhouse

gas (“GHG”) emitters asserting they are liable for damages allegedly caused by climate change.

Connecticut v. AEP

On September 21, 2009, the U.S. Court of Appeals for the Second Circuit issued an opinion in *State of Connecticut*

v. American Electric Power Company Inc.,³ that allows eight states, New York City, and three land trusts to continue nuisance claims against five electrical power companies, including American Electric Power Company Inc. The district court had dismissed the case, concluding that setting emission caps was “an undertaking for the political branches, which were charged

with the identification and balancing of economic, environmental, foreign policy, and national security interests.²⁴ The Second Circuit, however, ruled that the plaintiffs had not in fact brought a claim that constitutes a political question, but rather had simply presented a claim of common law nuisance that “does not establish a *national* or *international* emissions policy.”²⁵

A substantial portion of the Second Circuit’s opinion was devoted to whether the plaintiffs had standing to bring their claims of nuisance. The court ultimately concluded that the plaintiffs had standing because they had alleged an injury in fact, presented a causal connection between the injury and the conduct complained of, and established that their injury will likely be redressed by a favorable decision.⁶

In terms of redressability, the Second Circuit compared the prospect of the plaintiff’s request that the utilities reduce their carbon dioxide emissions to the prospect of reducing motor vehicle emissions (considered by the Supreme Court in *Massachusetts v. EPA*⁷) for support of its conclusion that the plaintiffs’ injury was redressable. In doing so, the Second Circuit cited the Supreme Court’s reasoning in *Massachusetts v. EPA* that although “regulation of motor vehicle emissions would not by itself *reverse* global warming, . . . it was sufficient for the redressability inquiry to show that the requested remedy would *slow* or *reduce* it.”⁸

The utilities also argued that the plaintiffs’ claims were displaced by federal

statutes. The court acknowledged that the EPA may have statutory authority under the Clean Air Act (“CAA”) to regulate GHG emissions, but determined that the EPA has not yet done so with respect to stationary sources (as opposed to mobile sources, for which the EPA has already proposed an endangerment finding, a preliminary step to regulation of greenhouse gases from these sources).⁹

Comer v. Murphy Oil

On October 16, 2009 in *Comer v. Murphy Oil USA*, the U.S. Court of Appeals for the Fifth Circuit found that residents and owners of land and property along the Mississippi Gulf Coast have standing to pursue their public and private nuisance, trespass, and negligence claims against defendant operators of energy, fossil fuel, and chemical companies, and that none of these claims present nonjusticiable political questions.¹⁰ The plaintiffs sought monetary damages for destruction of both private property and public property useful to them due to rising sea levels and to the increased ferocity of Hurricane Katrina, which they claimed defendants contributed to through their GHG emission.

To arrive at its decision, the Fifth Circuit cited the Supreme Court’s holding in *Massachusetts v. EPA*,¹¹ which alluded to the existence both of a causal link between man-made GHG emissions and global warming, and between a warmer climate

and rising ocean temperatures with the strength of hurricanes. Regarding the traceability test for purposes of standing, the court acknowledged that plaintiffs must show only that “injuries may be fairly traceable to actions that *contribute* to, rather than *solely* or *materially cause*, greenhouse gas emissions and global warming.”¹²

The Fifth Circuit also ruled that the claims do not present political questions. The common law tort claims of nuisance, trespass, and negligence were determined to be justiciable because “they have plainly not been committed by the Constitution or federal laws or regulations to Congress or the President.”¹³

This case and others like it would still face substantial causation challenges in terms of proving a particular defendant is liable for any damages.

Public Citizen v. TCEQ

On October 6, 2009, Public Citizen, Inc., a citizens group, filed a lawsuit against the Texas Commission on Environmental Quality (“TCEQ”) alleging that the agency had violated the Texas Clean Air Act by not regulating CO₂ from permitted sources.¹⁴ The suit seeks to require the TCEQ to impose CO₂ emission limits on several proposed coal-fired power plants whose proponents were seeking permits to construct. The case is apparently modeled after the *Massachusetts v. EPA* case, but bases its claims on the Texas Clean Air Act

States: Coal State Pennsylvania Issues GHG Reduction Goals

On October 14, 2009, Pennsylvania Governor Edward Rendell announced the state’s Climate Change Action Plan (“Plan”),¹⁵ which was released on October 10, 2009 for a 30-day public comment period. The Plan calls for a 30 percent reduction (below year 2000 levels) of greenhouse gas (“GHG”) emissions by 2020, which is far more than the requirements of either the Kerry-Boxer or the Waxman-Markey Bill, although the 52 recommendations in the Plan would reportedly result in greater reductions in emissions of up to 36 percent.

Along with other federal and state energy and climate change actions, such as the Alternative Energy Portfolio Standard,

electricity conservation measures approved by Act 129, the 2008 Biofuel Development and In-state Production Incentive Act, the Diesel-powered Motor Vehicle Idling Act, and the Pennsylvania Clean Vehicles Program, the Pennsylvania Climate Change Action Plan states that the potential exists to reduce annual GHG emissions by as much as 42 percent, or more than 120 million tons. The Governor claims that by the year 2020 the Plan will result in 65,000 new full-time jobs and more than \$6 billion of new revenue to the state’s economy.

Pennsylvania is one of 20 or more states that have developed climate action plans.¹⁶ In addition, numerous states have developed or are developing climate change

laws. In 2003, ten northeastern states adopted the Regional Greenhouse Gas Initiative¹⁷ that regulates carbon dioxide (“CO₂”) emissions from power plants. In 2006, California adopted a climate change bill that is currently being implemented to regulate GHG emissions on an “economy wide” basis.¹⁸ In addition, California and several western states are jointly developing the Western Climate Initiative¹⁹ and the Midwestern states are working on the Midwestern Greenhouse Gas Reduction Accord.²⁰ Florida is also considering both joining one or more of these multi-state climate and GHG regulatory systems and passing climate change legislation.

In Conclusion...

The developments at the national and sub-national level of greenhouse gas (“GHG”) regulatory programs indicates that a GHG regulatory system of some sort exists and will continue to exist in the United States. As a result, many companies have already been measuring and reducing or evaluating potential reductions

in GHG emissions. As GHG monitoring and reporting is shifting from a voluntary to a mandatory program for many facilities and companies, understanding the impact of these emissions and the liabilities and assets that may emerge as a result is critical for regulated entities. For those sources where emissions can be reduced, preserving

those reductions in the form of allowances or offsets may provide a cost reduction or additional revenue opportunity. Keeping an eye on the regulatory developments in this area is imperative for those companies that may be regulated under current or future state and federal climate change regulations.

Footnotes

¹ Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. ___ (Final Rule issued Sept. 22, 2009) (to be codified at 40 C.F.R. pts. 86, 87, 89, 90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1051, 1054, and 1065), available at <http://www.epa.gov/climatechange/emissions/downloads/FinalMandatoryGHGPreamble.pdf> (Preamble) and <http://www.epa.gov/climatechange/emissions/downloads/FinalMandatoryGHGReportingRule.pdf> (Rule Text).

² Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. ___ (Proposed Rule issued Sept. 30, 2009) (to be codified at 40 C.F.R. § 52.21 and 40 C.F.R. pt. 71, as applicable), available at <http://www.epa.gov/nsr/documents/GHGTailoringProposal.pdf>.

³ Nos. 05-5104-cv, 05-5119-cv, 2009 U.S. App. LEXIS 20873 (2d. Cir. Sept. 21, 2009).

⁴ *Id.* at *17-18 (quoting *Connecticut v. American Electric Power Company Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005)) (internal quotation marks omitted).

⁵ *Id.* at *32.

⁶ See *id.* at *55-105.

⁷ 549 U.S. 497 (2007).

⁸ *Connecticut v. American Electric Power Company Inc.*, Nos. 05-5104-cv, 05-5119-cv, 2009 U.S. App. LEXIS 20873, at *103 (2d. Cir. Sept. 21, 2009) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007)) (internal quotation marks omitted). “Even if emissions increase elsewhere, the magnitude of Plaintiffs’ injuries will be less if Defendants’ emissions are reduced than they would be without a remedy.” *Id.* at *104.

⁹ *Id.* at *193-198.

¹⁰ *Comer v. Murphy Oil USA*, No. 07-60756, 2009 U.S. App. LEXIS 22774 (5th Cir. Oct. 16, 2009), 549 U.S. 497 (2007).

¹¹ *Comer*, 2009 U.S. App. LEXIS 22774, at *25.

¹² *Id.* at *37.

¹³ *Public Citizen, Inc. v. Texas Commission on Environmental Quality*, No. D-1-GN-09-003426 (Dist. Ct., Travis County, Tex. filed Oct. 6, 2009).

¹⁴ Pennsylvania Climate Change Action Plan (Oct. 9, 2009), <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-76933/7000-BK-DEP4263.pdf>.

¹⁵ <http://www.climatestrategies.us/> (last visited Oct. 26, 2009).

¹⁶ See <http://www.rggi.org/home>.

¹⁷ See <http://www.climatechange.ca.gov/>.

¹⁸ See <http://www.westernclimateinitiative.org/>.

¹⁹ See <http://www.midwesternaccord.org/index.html>.

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