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Environmental & Safety Report

Three Major New Greenhouse Gas Developments Increase Likelihood of Near-Term Congressional and Regulatory Action

In the last three weeks, several significant judicial, legislative, and regulatory developments have taken place. Taken together, they increase the likelihood that Congress will pass some form of greenhouse gas (GHG) legislation in the relatively near future.

Second Circuit Court of Appeals Decision in Connecticut v. American Electric Power Company.

On September 21, 2009, the United States Court of Appeals for the Second Circuit handed down a decision in the case known as *Connecticut v. American Electric Power Company*. In that case, eight states (Connecticut, New York, New Jersey, Vermont, Rhode Island, Wisconsin, Iowa, and California), together with New York City and several major land trusts, brought legal action in federal court against a number of major coal-fired electricity generators. The plaintiffs asked the court to enjoin the electric utilities to cause them to limit the GHG emissions resulting from their burning of coal to produce electricity. Rather than being based upon the Clean Air Act or some other statute or regulation, the lawsuit relied upon the common law theory of nuisance. The plaintiff governments alleged that the GHG emissions from the defendant utilities presented a threat of unreasonable public harm in the form of adverse impacts to those governments and the health and property of their citizens, such as those likely to result from increased sea levels.

The federal district court granted an early motion to dismiss the lawsuit, finding that it presented a political rather than judicial question. The Second Circuit appeals court reversed the district court, allowing the lawsuit to proceed. As the lawsuit proceeds and if the plaintiffs are ultimately successful on the merits, the defendant utilities are now faced with the prospect of the court determining appropriate emission limits, controls, timetables, and penalties in the form of injunctive relief. The Second Circuit decision also opens the door for numerous other similar nuisance-based lawsuits by other public and private plaintiffs in other courts against other companies with significant GHG emissions.

The Court of Appeals in its opinion recognized that nuisance-based suits may be subject to dismissal if the government has acted to set what it deems to be appropriate regulations establishing the framework for reasonable and acceptable levels of emissions relative to reasonably acceptable impacts resulting from such emissions. Because the federal government has yet to occupy that field when it comes to GHG, however, the appeals court allowed the suit to proceed, while also holding the door open for a subsequent dismissal in the event that Congress or EPA acts on the GHG front.

U.S. Environmental Protection Agency Publishes Draft Greenhouse Gas Regulations under Clean Air Act

On September 30, 2009, the U.S. Environmental Protection Agency (EPA) issued a proposed rule that when finalized would render major emitters of GHG subject to the permitting and emissions control requirements of the Clean Air Act. It is anticipated that this rule will become final in March 2010 unless Congress acts in the meantime to pass GHG legislation that would override the applicability of the Clean Air Act to GHG.

Under the EPA proposed rule, all facilities that emit 25,000 tons per year of carbon dioxide or its equivalent will be required to obtain operating permits for such emissions. EPA estimates that approximately 14,000 facilities will be subject to such requirements. Although existing facilities will not be required to upgrade their air pollution controls to address GHG, new and expanded facilities would be required to do so using Best Available Control Technology (BACT). The tailoring rule does not address the particular BACT that would be required but suggests that it would be determined on a case-by-case basis. Comments on the proposed rule will be accepted for 60 days following publication of the proposed rule in the Federal Register.

Under an EPA rule finalized in September 2009, all facilities emitting 25,000 tons per year of carbon dioxide equivalent are required to begin monitoring and reporting such emissions on January 1, 2010, with annual reports due beginning in 2011. Facilities with aggregate maximum rated heat input capacity from all stationary fuel combustion units greater than 30 million British thermal units per hour (mmBtu/hr) will be subject to the reporting rule.

U.S. Senate begins consideration of Senate Bill 1733 (Boxer-Kerry Bill) following passage of H.R. 2454 this summer.

On September 30, 2009, Senators Boxer and Kerry introduced Senate Bill 1733 as a companion bill to H.R. 2454, which was passed by the House of Representatives in June 2009. The Senate bill is similar to the House bill in that it adopts a cap-and-trade approach to GHG management. Under such program, facilities that emit 25,000 tons per year of carbon dioxide equivalent will be required to obtain an "allowance" each year for each ton of carbon dioxide equivalent emission, with EPA issuing a reduced number of allowances each year in order to drive overall GHG reductions. To a limited extent, a facility may be able to purchase from others, domestically or internationally, an emission offset credit from a certified GHG reduction project as an alternative to acquiring an allowance. EPA has estimated that the market value of each allowance will be in the $11-15 range in 2012 and reach a $22-28 range by 2025.

Although the House and Senate bills contain different GHG reduction targets, the most significant difference between them is that while the House bill would serve to exempt GHG source facilities from the Clean Air Act requirements requiring emissions controls for new and expanded facilities, the Senate bill is silent on that front. It is anticipated that this silence will be the focus of negotiations within the legislative process.

What happens now?

While predicting the timing and machinations of congressional action is a nigh impossible task, it appears that these recent developments, combined with other factors, are likely to lead to passage of a Senate bill, that when massaged by a joint

House-Senate conference committee, will result in passage of GHG legislation by March 2010 creating a GHG cap-and-trade system similar to that contained in H.R. 2454. There appears to be movement within the industrial and business communities to acquiesce in such an approach, so long as it includes H.R. 2454's Clean Air Act preemption provisions, as a means of avoiding the risks, burdens, and uncertainties resulting from regulation of GHG under the Clean Air Act and continuation and proliferation of nuisance-based litigation.

Under H.R. 2454, the implementation of cap and trade mechanisms would begin in 2012 as to some GHG sources, with the balance of sources entering the system in 2014. But the time for business planning to address the effects of such system should begin long before those dates.

Should you desire further analysis of how such a system may affect your business or for assistance developing and implementing a carbon management strategy under such a system, please contact the Seyfarth attorney with whom you work, or any environmental attorney on our website.

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