

Climate Change, Sustainable Development, and Ecosystems Committee Newsletter

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MESSAGE FROM THE CO-CHAIRS

**Frank B. Friedman and
Mary Ellen Ternes**

Climate Change, Sustainable Development, and Ecosystems Committee

To all of our continuing and new members, welcome to our 2010–2011 ABA year! This year, the Climate Change, Sustainable Development, and Ecosystems Committee will be focusing on the following several discrete and developing areas.

First, with respect to climate change, the committee has committed to focusing on adaptation, specifically, “Adaptation: Making It Real.” Until recently, the climate change dialogue in the United States has been largely focused on the mitigation of greenhouse gas (GHG) emissions. While critically important, mitigation hardly captures all of the challenges associated with climate change. Policymakers, regulators, and practitioners must consider evolving adaptation best practices at the local, state, national, and global levels to develop effective climate change strategies. The committee is committed to topically defining and establishing parameters for this broad and not well understood topic of “adaptation” and educating ABA members regarding how the topic impacts corporate and governmental activities at the local, state, national, and global levels.

Second, the committee will continue its fine work regarding monitoring and reporting on climate change

legislative efforts; the National Environmental Policy Act (NEPA) and climate change; the changing landscape of environmental practice in light of climate change; update on state and regional climate action; the developing structure of a post-Kyoto agreement and efforts post-Copenhagen Conference of the Parties; and land use and transportation initiatives on climate change. The committee will continue to monitor the Obama administration’s approach to climate change policy under existing statutes implemented by the Department of Energy, the Environmental Protection Agency (EPA), and other federal agencies. It will continue to partner with the Air Quality Committee with respect to EPA’s GHG rulemaking efforts including the GHG endangerment finding; GHG emission tracking and reporting; and the underground injection well rule for carbon dioxide geologic sequestration. We will continue to encourage law offices to participate in the ABA-EPA Law Office Climate Challenge. This Law Office Climate Challenge helps law offices reduce their greenhouse gas footprint through paper waste minimization, green power purchasing, and EPA’s Energy Star program.

Regarding sustainable development, first, the committee has committed to focusing on sustainability’s Triple Bottom Line: Beyond Environment! “Sustainability” is not only synonymous with green measures related to recycling, energy, and climate change, but also describes a broader concept of sustaining the long-term well-being of organizations through values-based management. The sustainable governance approach is framed around a strong ethical

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Co-Editors

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commitment to the so-called Triple Bottom Line of sustainability: economic, social, and environmental responsibility. It is corporate social responsibility—or environment, social, and governance, as socially responsible investors put it—with financial responsibility added in. Financial responsibility (the economic portion of the Triple Bottom Line) is also considered an essential piece of the concept. Employing people is a commercial business’s most important social obligation and without financial success, no other good works can be done. ABA members (particularly ABA SEER members) need to be prepared to consider sustainability issues beyond the limited parameters of a purely environmental focus to ensure they are provided the proper tools for counseling clients on sustainability issues. Additionally, the committee will continue to expand the adoption of the Model Sustainable Law Policy and Guidelines, piloted in 2008 at several firms and promoted in 2009, by continuing to actively promote it with law offices during the 2010–2011 ABA year and developing best practices. If your office would like to consider adopting the policy and guidelines, explore the links on this webpage and/or contact Saul Mikalonis or Bill Blackburn. We will also adapt the policy this year for law schools and encourage them to engage in sustainable practices. In addition, we are planning a Quick Teleconference or webinar on sustainable cities, will explore partnering with professional architecture organizations on a green building initiative, and plan to participate in a broad multidisciplinary event on national sustainability policy.

With respect to ecosystems, the committee has committed to focusing on ecosystems services, specifically, “Beginning the Conversation.” Ecosystems services are benefits people derive from nature, including tangible benefits such as fresh water and fish, and more intangible benefits, such as pollination and erosion regulation. They are generally taken for granted despite their critical importance. However, as a result of increasing stress on the world’s ecosystems from causes such as climate change and increasing human population, ecosystem services are degrading at an alarming rate, a rate that is accelerating. Corporate review of reliance on, and impacts to, ecosystem services is developing into accepted due diligence

practice along with climate change and water supply. The committee is committed to educating ABA SEER members on the implications of this new area of concern as it matures into new policies and standards. Additionally, the committee plans to hold a Quick Teleconference or other program on ecosystems payments for reducing deforestation, and to cosponsor a conference on ecosystems services. We also plan to host a Quick Teleconference or brown bag meeting on climate change impacts on ecosystems and associated adaptation mechanisms and will undertake projects to implement the ABA resolution on ecosystems.

The committee plans to continue its fine programming efforts at the Section Fall Meeting and Annual Conference on Environmental Law, as well as teleconferences, webinars, and our *Year in Review* annual report. If you have any suggestions or would like to get involved, please contact Frank, Mary Ellen, or any of our vice chairs. Of course, we plan on publishing four excellent issues of this committee's newsletter, this present issue included, which goes far to continue the discussion regarding climate change legislation, policy, and litigation! Also, in this issue we are delighted to include an update regarding EPA activity by our contributing law student Daniel Mach, and an update concerning judicial developments written by J. Cullen Howe for a joint project of Arnold & Porter LLP and Columbia Law School's Center for Climate Change Law.

This issue includes three articles that address ways climate policy continues to evolve in the absence of comprehensive federal legislation. The first article by Norman Dupont deals with a climate change policy of increasing interest among local governments—ordinances to promote more energy-efficient taxi fleets and trucks. He describes a range of carrots and sticks to achieve this objective in multiple jurisdictions—New York City, the port of Los Angeles, Dallas, and Seattle. In each case the affected firms challenged the regulations based in part on grounds of federal preemption. In the first two instances the Second and Ninth Circuit Courts sided with the plaintiffs, and in the latter two cases district courts have so far supported the municipal defendants. Christina Landgraf reviews guidelines concerning disclosure of “material risk” due

to climate change from two sources, the Securities and Exchange Commission and a voluntary standard setting body, ASTM, both issued this year. She finds that “more disclosure about climate change issues seems to be a growing trend.” However, based on a review of recent corporate disclosures, she concludes that “disclosures related to climate change matters are still somewhat inconsistent.” In the final article, Dustin Till reviews some of the many issues associated with EPA's response to the Supreme Court's decision in *Massachusetts v. EPA*, holding that carbon dioxide and other greenhouse gases are “air pollutants” for purposes of Clean Air Act regulation. The range and complexity of issues to be considered are sweeping and likely to occupy multiple courts for some time to come. Although much attention will understandably focus on EPA, the remaining two articles explore the increasing significance of other agencies and jurisdictions.

Upcoming Section Programs—

For full details, please visit
www.abanet.org/environ/calendar/

February 23-25, 2011
29th Annual Water Law Conference
San Diego

March 17-19, 2011
40th Annual Conference on Environmental Law
Salt Lake City

April 11-12, 2011
Petroleum Marketing Attorneys' Meeting
New Orleans

October 12-15, 2011
19th Section Fall Meeting
Indianapolis

REGULATORY DEVELOPMENTS BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Daniel P. Mach

This fall the Environmental Protection Agency (EPA) has advanced on several fronts in its program to reduce national emissions of greenhouse gasses (GHG) through regulation of vehicle fleets and major stationary sources such as electric power plants. These efforts derive from the Supreme Court's 2007 ruling, in *Massachusetts v. EPA*, that GHG gases are "air pollutants" subject to regulation under the Clean Air Act. With the failure of efforts to pass a comprehensive climate bill during the 111th Congress, EPA's current regulatory approach may define the landscape of U.S. climate law for some time.

Proposed Heavy-Duty Vehicular GHG Emissions Standards

On October 25, EPA and the National Highway Traffic Safety Administration proposed regulations establishing national fuel economy and GHG emissions standards for heavy-duty trucks and buses. This joint rulemaking complements the agencies' April 1, 2010, final rule establishing corporate average fuel economy standards for light-duty vehicles beginning with the 2012 model year. The newly proposed rules would take effect beginning with the 2014 model year and would target reductions in emissions of 10–20 percent by 2018, resulting in estimated net benefits of \$41 billion.

Greenhouse Reporting for New or Modified Major Stationary Sources

On September 2, EPA published two proposed rules in the *Federal Register* that set important groundwork for the regulation of GHG emissions from new or modified stationary sources (75 Fed. Reg. 53,883; 75 Fed. Reg. 53,892). EPA determined that thirteen states must revise their Clean Air Act prevention of significant deterioration (PSD) permitting programs to cover GHG emissions adequately. In the event that states fail to properly revise their programs, EPA would develop federal implementation plans to bring those states into compliance. These proposed rules are an important step in EPA's implementation of its tailoring rule. That rule took effect August 2 and will subject certain major stationary sources of GHG emissions to PSD and Clean Air Act Title V permitting requirements starting in January of 2011 (75 Fed. Reg. 31,514 (June 3, 2010)).

Anticipated Final Rule on Geologic Injection and Sequestration of Carbon Dioxide

In August of 2010, EPA sent a rule that would require mandatory reporting of the capture and storage of carbon dioxide in geologic formations to the Office of Management and Budget for regulatory review. Geologic sequestration of CO₂ from power plants is viewed as a potentially important technology for curbing national GHG emissions. The agency expects to issue a final rule in the near future.

Daniel Mach is a third-year student at Harvard Law School and a Managing Editor of the *Harvard Environmental Law Review*.

One Million Trees Project—Right Tree for the Right Place at the Right Time

Join Section efforts to plant one million trees by 2014. This project calls on ABA members to contribute to the goal of planting one million trees across the United States in the next five years. In addition to planting trees, the Section also intends, through public outreach and partnering efforts, to raise the nation's awareness of the multiple benefits of trees.

If attending the 39th Annual Conference on Environmental Law in Salt Lake City, please sign up to participate in the *Public Service Project: TreeUtah* on Thursday, March 17, 2011, 9:00 a.m. - 12:00 p.m.

For more information, visit http://www.abanet.org/environ/projects/million_trees/home.shtml

JUDICIAL DEVELOPMENTS

J. Cullen Howe

Hapner v. Tidwell (9th Cir. Sept. 15, 2010): Environmental groups filed a lawsuit challenging a U.S. Forest Service decision to remove timber for fire protection purposes on the ground that the environmental assessment (EA) prepared by the agency pursuant to NEPA did not adequately address the effects that climate change would have on the decision. The Forest Service moved for summary judgment. The district court granted the motion, holding that no such analysis was required because the action would not have a direct effect on climate change. On appeal, the Ninth Circuit affirmed the district court's decision, holding that the brief discussion of climate change in the EA was appropriate given that the project involved a small amount of land and it would thin rather than clear-cut trees.

Sierra Club v. Duke Energy Indiana, Inc. (S.D. Ind. Sept. 14, 2010): A federal court in Indiana granted summary judgment in favor of a power company, holding that the Sierra Club filed its lawsuit after the applicable five-year statute of limitations expired. The Sierra Club filed a lawsuit in 2008, alleging that Duke Energy had modified its power plant in Knox County, Indiana, between 1993 and 2001 without obtaining the necessary prevention of significant deterioration (PSD) permits. Duke Energy moved for summary judgment, arguing that the action was time barred. In granting the motion, the court rejected the Sierra Club's argument that the company's failure to obtain the necessary permits constituted an ongoing violation under the Clean Air Act (CAA) such that the statute of limitations had not run. However, the court stayed its decision pending the outcome of an appeal before the Seventh Circuit that addresses the same issue (*United States v. Cinergy Corp.*, No. 09-3344 (7th Cir., filed Sept. 21, 2009)).

Association of Taxicab Operators USA v. City of Dallas (N.D. Tex. Aug. 30, 2010): An organization representing taxicab operators in Dallas, Texas, filed a lawsuit against the city, alleging that a new ordinance giving preference to taxis that run on compressed natural gas is preempted by the CAA. The ordinance

allows taxis running on compressed natural gas to automatically move to the front of the line in taxi queues at Dallas Love Field Airport. The same day the lawsuit was filed, the court granted the organization's request for a temporary restraining order preventing the city from enforcing the ordinance. On August 30, 2010, the court denied the organization's motion for a preliminary injunction, holding that the ordinance did not amount to a "standard" under CAA section 209(a) because it did not mandate quantitative emissions levels, establish manufacturer requirements, establish purchase requirements, mandate emissions control technology, or establish a penalty or fee system.

University of Virginia v. Virginia Attorney General (Va. Cir. Ct. Aug. 30, 2010): In May 2010, the University of Virginia filed a lawsuit objecting to the "civil investigative demands" served by the Virginia attorney general on the university concerning a professor previously employed by the university who was involved in the so-called Climategate controversy. On August 30, 2010, the court held that the university does not have to comply with the demands. In its decision, the court rejected the argument by the attorney general that it lacked authority to review whether the attorney general had reason to believe that fraud had been committed and held that the demands did not contain sufficient information about what the professor did that would indicate fraud.

Arkema Inc. v. EPA (D.C. Cir. Aug. 27, 2010): The D.C. Circuit vacated portions of EPA's cap-and-trade program for reducing ozone-depleting substances, holding that the agency illegally invalidated credit transfers. The lawsuit concerned EPA regulations designed to meet U.S. commitments under the Montreal Protocol, which requires member countries to phase out production and consumption of a range of ozone-depleting substances, including hydrochlorofluorocarbons (HCFCs), a potent greenhouse gas. In 2003, EPA set rules for HCFC production and consumption between 2004 and 2009 that allowed allowances to be transferred between and within companies for one year or permanently through baseline credit transfers. In December 2009, EPA issued a rule governing 2010–2014 credits that determined that the Clean Air Act bars permanent baseline transfers. In the lawsuit, plaintiffs alleged that

EPA's 2009 rule illegally invalidated baseline emissions transfers within companies. The district court held that the rule was illegally retroactive because it altered transactions approved under the 2003 rule that were intended to be permanent. The circuit court affirmed the district court's ruling and invalidated the 2009 rule.

Sierra Club v. Otter Tail Power Co. (8th Cir. Aug. 12, 2010): The Eighth Circuit held that the Sierra Club failed to establish violations by a coal-fired power plant in South Dakota under the prevention of significant deterioration (PSD) provisions of the Clean Air Act. In 2008, the Sierra Club challenged three modifications at the plant that occurred in 1995, 1998, and 2001, respectively, alleging that the plant violated the CAA by failing to obtain PSD permits before making the three modifications. The district court dismissed the lawsuit on statute-of-limitations grounds. The Eighth Circuit affirmed the district court, holding that the lawsuit was barred by the applicable five-year statute of limitations and on jurisdictional grounds given that the group failed to raise its claims during the permitting process to EPA.

EPA dismissal of petitions for reconsideration of GHG endangerment finding (EPA July 29, 2010): EPA denied 10 petitions challenging the validity of the climate science used as the basis of its 2009 finding that GHG emissions endanger public health and welfare and thus can be regulated under the Clean Air Act. The petitions alleged that e-mails stolen from University of East Anglia's Climate Research Unit indicated that scientists had manipulated data to make climate change more dramatic than it really is. Several investigations of the e-mails have concluded that the scientists have not manipulated the data. In its denial, EPA said it conducted a thorough review of the science it used and concluded that "climate science is credible, compelling, and growing stronger."

Metropolitan Taxicab Board of Trade v. City of New York (2d Cir. July 27, 2010): In March 2009, New York City adopted a package of incentives to encourage taxicab owners to convert to all-hybrid fleets. The incentives had been designed as an alternative to city fuel efficiency rules for taxis struck down earlier by a federal district court on federal preemption grounds. To encourage the purchase of

hybrid vehicles, the alternative plan relied on incentives in city lease cap rules rather than miles-per-gallon fuel efficiency standards. The fleet owners and a trade association filed an action in federal court alleging that the rules that reduced the lease caps for non-hybrid, non-clean diesel vehicles constituted a mandate that was preempted by the Energy Policy and Conservation Act (EPCA) and the CAA. In June 2009, the district court granted a motion for a preliminary injunction blocking the incentive plan, holding that the new rules amounted to a de facto mandate to purchase hybrid vehicles and thus they were related to fuel economy and preempted under EPCA and the CAA. On appeal, the Second Circuit affirmed, holding that the rules "relate" to fuel economy standards as that term is understood in statutory construction. The court found that imposing reduced lease caps solely on the basis of whether or not a vehicle has a hybrid engine has no relation to an end other than an improvement in fuel economy. Thus, it was preempted by EPCA. Because the court found that it was preempted by EPCA, it did not reach the issue of whether it was also preempted under the CAA.

North Carolina v. Tennessee Valley Authority (4th Cir. July 26, 2010): The Fourth Circuit held that public nuisance laws cannot be used to control transboundary air pollution, overturning a January 2009 decision by the district court (*North Carolina v. TVA*, W.D.N.C. Jan. 13, 2009) that held that TVA's plant emissions impacting North Carolina were a public nuisance. In that ruling, the district court held that four of TVA's 11 coal-fired power plants had to meet specific emission caps and install control technologies by the end of 2013. The 4th Circuit reversed, holding that an activity expressly permitted and extensively regulated by federal and state government could not constitute a public nuisance. In the lawsuit, North Carolina alleged that emissions of sulfur dioxide, nitrogen oxides, mercury, and particulate matter from TVA plants migrate into North Carolina and that TVA failed to take reasonable measures to control such emissions.

Appalachian Voices v. Dept. of Energy (D.D.C. July 26, 2010): A federal district court in the District of Columbia held that an environmental group challenging federal tax credits issued to Duke Energy for a "clean"

coal project was not entitled to a preliminary injunction because it failed to demonstrate the likelihood of imminent harm as a result of the project. Appalachian Voices alleged that the Departments of Energy and the Treasury failed to consider the environmental consequences of the federal clean coal tax credit program, violating both the Endangered Species Act and the National Environmental Policy Act. The court held that because Appalachian Voices did not expect an injunction to prevent Duke from proceeding with the project and the plant is not expected to begin operating until 2012, the injury was not imminent.

Mirant Mid-Atlantic LLC v. Montgomery County (D. Md. July 12, 2010): In May 2010, Montgomery County, Maryland, enacted a law that imposes a \$5-per-ton tax on carbon dioxide emissions from stationary sources emitting more than one million tons of carbon dioxide annually, effectively applying to only one coal-fired power plant in the state. The plant commenced a lawsuit in federal court, challenging the tax on the grounds that it constituted a bill of attainder and that it violated the Fourteenth Amendment's guarantee of equal protection and the Eighth Amendment's ban on excessive fines. The county moved to dismiss. The district court granted the motion in an unpublished decision, rejecting the plant's arguments that the tax violated the Fourteenth and Eighth Amendments. The plant has since appealed the decision to the Fourth Circuit.

Recent Complaints/Petitions/Motions

Petition to regulate black carbon from locomotives (EPA, filed Sept. 21, 2010): The Center for Biological Diversity, along with Friends of the Earth and the International Center for Technology Assessment, petitioned the EPA to regulate black carbon from locomotives. According to the petition, GHG emissions from locomotives are expected to increase more rapidly than emissions from other transportation sources by 2030. The petition further contends that locomotives currently emit more than 25,000 tons of particulate matter, which includes black carbon, and are expected to account for more than 65 percent of particulate matter emissions from mobile source diesel engines by 2030.

Coalition for Responsible Regulation, Inc. v. EPA and Southeastern Legal Foundation v. EPA (D.C. Cir., filed Sept. 15, 2010): Industry groups seeking review of EPA rulemakings regarding requirements for new and modified stationary sources beginning January 2, 2011, and the so-called tailoring rule that limits GHG regulation to large stationary sources filed a motion seeking to stay the effectiveness of the regulations. In addition, other petitioners, including the state of Texas, filed a separate motion seeking a stay of EPA's endangerment finding and its fuel economy standards for cars and light trucks. Among other things, the petitioners contend that EPA's regulations violate the CAA and that they will irreparably harm petitioners and the economy.

Sierra Club v. Wisconsin Power & Light Co. (W.D. Wis., filed Sept. 9, 2010): The Sierra Club filed a lawsuit in federal court against a Wisconsin power company alleging that the company violated the CAA and Wisconsin's state implementation plan by modifying and operating boilers at two of its plants without obtaining necessary permits authorizing such construction. The lawsuit also accuses the company of failing to meet emissions limits through the use of best available control technology and by generally failing to install technology to control emissions.

Texas v. EPA (D.C. Cir., filed Sept. 7, 2010): Texas filed a lawsuit against EPA challenging the agency's rejection of Texas's petition requesting that EPA reconsider its finding that greenhouse gases (GHGs) from cars and light trucks endanger human health and welfare. In its earlier petition for reconsideration, Texas alleged that the endangerment finding relied on flawed science. This petition follows a similar petition filed by the U.S. Chamber of Commerce on August 13, 2010. The deadline for filing lawsuits based on EPA's rejection of reconsideration is October 12, 2010.

Sierra Club v. Energy Future Holdings Corp. (E.D. Tex., filed Sept. 2, 2010): The Sierra Club filed a lawsuit in federal court against the owners of a power plant near Longview, Texas, alleging that it has committed more than 50,000 violations under the Clean Air Act concerning mercury and other toxic air emissions. The complaint alleges that the plant has the

highest total air pollution out of more than 2,000 industrial plants across the state and accounted for more than 13 percent of all industrial air pollution in Texas in 2008 and 20 percent of all coal-fired power plant pollution.

Coalition for Responsible Regulation v. EPA (D.C. Cir., motion filed Aug. 26, 2010): Petitioners in this case, which include 14 House Republicans and several industrial associations and companies, filed a motion to coordinate all the challenges to the four separate rules involving regulation of GHGs under the CAA. These four rules include EPA's endangerment finding, the new fuel economy standards for cars and light trucks, requirements for new and modified stationary sources under the prevention of significant deterioration (PSD) provisions beginning January 2, 2011, and the so-called tailoring rule that limits PSD requirements to large sources. On September 10, 2010, EPA filed papers opposing the motion and asking the court to conduct three separate proceedings. One proceeding would combine all cases challenging EPA regulation of motor vehicle emissions. A second proceeding would combine all cases dealing with EPA's endangerment finding. A third proceeding would combine all cases challenging the requirements for new and modified stationary sources as well as the tailoring rule.

Comer v. Murphy Oil USA, Inc. (U.S. Sup. Ct., filed Aug. 26, 2010): Plaintiffs filed a lawsuit alleging that defendants, including a number of companies that produce fossil fuels, caused the emission of greenhouse gases that contributed to climate change and thereby added to the ferocity of Hurricane Katrina, ultimately causing damages to plaintiffs' property. Defendants' motion to dismiss was granted by the district court. On appeal, the Fifth Circuit partially reversed, holding that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims, and that none of these claims presented nonjusticiable political questions. The Fifth Circuit subsequently granted a motion to reconsider its decision en banc. In May 2010, due to the loss of a quorum because of recusal of an additional judge, the Fifth Circuit dismissed the en banc review, and determined that the district court's dismissal of the lawsuit should stand. In August 2010, the plaintiffs filed a petition for a writ of mandamus with

the U.S. Supreme Court, seeking an order that would, in effect, overturn the Fifth Circuit's dismissal of the appeal.

American Electric Power Co. v. Connecticut (U.S. Sup. Ct., briefs filed Aug. 24 and Sept. 3, 2010): Eight states and New York City filed a lawsuit against six large electric power generators, seeking to limit the generators' GHG emissions by claiming that these emissions contributed to the public nuisance of climate change. In 2005, the district court dismissed the lawsuit, holding that the claims represented "non-judiciable political questions." In September 2009, the Second Circuit reversed, holding that although Congress has enacted laws affecting air pollution, none of those laws concerned greenhouse gas emissions and thus none displaced federal common law. On August 2, 2010, four electric power companies named as defendants in a nuisance lawsuit filed a petition for certiorari with the U.S. Supreme Court seeking to overturn the Second Circuit's ruling. On August 24, 2010, the Solicitor General, appearing on behalf of one of the named defendants (Tennessee Valley Authority), filed a brief in support of petitioners also seeking to overturn the Second Circuit's decision. The brief questioned whether the plaintiffs had standing to bring the lawsuit and whether recent actions by EPA to regulate GHG emissions supplant the reason given by the Second Circuit for allowing the case to proceed. On September 3, 2010, Indiana, joined by 11 other nonparty states, filed an amicus brief also seeking to overturn the Second Circuit's decision, arguing that the establishment of emissions standards for GHG emissions should be left to the political branches of government.

Chamber of Commerce v. EPA (D.C. Cir., filed Aug. 13, 2010): The U.S. Chamber of Commerce filed a lawsuit against EPA following EPA's July 29, 2010, rejection of its petition to reconsider its 2009 endangerment finding (see above).

Georgia Coalition for Sound Environmental Policy v. EPA (D.C. Cir., filed Aug. 12, 2010): Between July 30 and August 2, 2010, 19 lawsuits were filed challenging EPA's GHG tailoring rule. On August 12, 2010, the court issued an order consolidating these

challenges. The lawsuits that are part of this consolidation order are set forth on the case chart. On June 3, 2010, EPA published the final GHG tailoring rule, which limits the scope of the emissions control requirements for new and modified stationary sources to those emitting 100,000 tons or more per year and modified sources with emissions greater than 75,000 tons per year beginning in January 2011. The deadline for challenging the rule was August 2, 2010.

Connecticut v. American Electric Power (U.S. Sup. Ct., cert. petition filed Aug. 2, 2010): Four electric power companies named as defendants in a nuisance lawsuit filed a petition for certiorari with the U.S. Supreme Court to review the Second Circuit's September 2009 ruling that eight states, New York City, and three environmental groups could proceed with lawsuits that alleged that the companies' carbon dioxide emissions constituted a nuisance under federal law.

Petition challenging data relied on in making endangerment finding (EPA, filed July 30, 2010): Peabody Energy filed a petition with EPA challenging the global surface temperature records relied on in EPA's December 2009 endangerment finding regarding greenhouse gases under the Clean Air Act. The petition is based on the Data Quality Act, which requires federal agencies to ensure that scientific data used in rulemakings are objective, reproducible, and peer reviewed. Under the act, agencies must respond to petitions challenging scientific data and ensure that any data falling short of the act's standards are corrected. The petition requests that EPA correct the temperature data that underpinned its endangerment finding, arguing that various datasets used in the finding were not independent and all relied on the same flawed temperature records.

Petition to include emissions from biomass in GHG inventory (EPA, filed July 28, 2010): The Center for Biological Diversity petitioned EPA to include emissions from biomass combustion in its national GHG inventory. According to the inventory, EPA recognizes that biomass and biofuels combustion produces GHG emissions, but it excluded them from calculations of GHG emissions "because biomass fuels are of biogenic origin" and it "assumed that the carbon released during the consumption of biomass is recycled as U.S. forests and crops regenerate, causing no net

addition of CO₂ to the atmosphere." The petition alleges that EPA ignored scientific evidence concerning GHG emissions from biomass combustion.

Cullen Howe is an environmental law specialist in *Arnold & Porter's* environmental practice group, where he focuses on climate change, green buildings, and other environmental issues.

CALL FOR NOMINATIONS



The Section invites nominations for three new awards:

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

The Law Student Environment, Energy, and Resources Program of the Year Award will recognize the best student-organized educational program or public service project of the year addressing issues in the field of environmental, energy, or natural resources law. Nominees are likely to be law student societies, groups, or committees focused on these three areas of law.

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will recognize the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. Nominees are likely to be state or local bar sections or committees focused on these practice areas.

Nominations for all three awards are due at the ABA Section office by May 16, 2011. The Award will be presented at the ABA Annual Meeting in Toronto in August 2011. Award recipients should plan to be present at the award presentation.

**For more information, visit
www.abanet.org/environ/sectaward/**

LOCAL CLIMATE CHANGE INITIATIVES HIT A STONE WALL OF FEDERAL PREEMPTION ARGUMENTS

Norman A. Dupont

As prospects for an overall federal legislative approach to climate change issues dim, it is inevitable that some cities and regional governments will take the initiative through local measures that reduce greenhouse gas emissions. But, as demonstrated in a 2009 Ninth Circuit decision and a 2010 Second Circuit decision, one such strategy, local efforts to implement financial requirements that could reduce greenhouse gas emissions from trucks and taxicabs, has run into the stone wall of federal preemption. On the other hand, a recent district court decision from the Northern District of Texas rejected a preemption argument brought by cab drivers challenging Dallas's regulation of cabs serving Love airfield. This conflict highlights the need for local governments to carefully evaluate the existence of federal preemption before adopting greenhouse gas reduction measures. City officials who hope to seize the greenhouse gas reduction initiative will have to be prepared for objections based upon federal preemption and the potential for lengthy and costly litigation.

The City of New York's Efforts to Incentivize Taxicab Fleet Owners to Buy More Fuel- Efficient Cabs

The city of New York has sought for years to obtain a greener fleet of taxicabs. In its first effort, the city ordained that all new cabs meet a specific miles-per-gallon standard. In 2008, the District Court for the Southern District of New York enjoined this requirement based upon preemption grounds, specifically, the federal Energy Policy and Conservation Act (EPCA), which precludes a state (or a subdivision thereof) from adopting "a law or regulations related to fuel economy standards." *Metropolitan Taxicab Board of Trade v. City of New York*, 2008 WL 4866021 (S.D.N.Y. 2008).

New York City, however, was not deterred by this first ruling, and decided to seek another avenue to "greening" its taxicab fleet. The city's new ordinance

was based on financial incentives: taxicab owners who purchased hybrid or "clean-diesel" cabs could increase the amount they charged cabbies to lease vehicles on an hourly basis. Owners who alternatively chose to purchase less fuel-efficient vehicles (Crown Victorias) were penalized insofar as they were allowed to collect a lower amount from lease charges. The mayor's office press release described the ordinance as a step to "create cleaner air and a healthier place to live."

In response, the taxicab fleet owners filed an amended complaint challenging the new regulations and seeking an injunction against the new ordinance. Not surprisingly, the same federal district judge issued the preliminary injunction. *Metropolitan Taxicab Board of Trade v. City of New York*, 633 F. Supp. 2d 83 (S.D.N.Y. 2009).

The city appealed the district court's second ruling and argued that its new ordinance merely provided an incentive to "go green," but did not create a mandatory requirement subject to federal preemption. The court of appeals invited the United States to file an amicus brief in the matter and the government did so, siding with the city based on the argument that there was no evidence that Congress intended to preempt cities from the traditional regulation of taxicab fleets, which included restrictions on types of vehicles to be used as cabs (*Brief of the United States as Amicus Curie*, at 2-3, No. 09-2901-CV).

In something of a surprise, the Second Circuit Court of Appeals, in an opinion written by Judge Walker, rejected both the city's argument and that of the United States. The court of appeals panel held that the city's ordinance "related to" fuel economy and that the term "related to" must be given a broad meaning similar to that given to a similar term by the U.S. Supreme Court in a case addressing preemption in the context of the Employee Retirement Income Security Act of 1974 (ERISA). Thus, because the city's taxicab ordinance could be said in its broadest terms to be "related to" a fuel economy standard, it was held to be expressly preempted by the words of EPCA. *Metropolitan Taxicab Board of Trade v. City of New York*, ___ F.3d ___, 2010 WL 2902501 (2d Cir. July 27, 2010).

The Second Circuit opinion finding federal preemption a blockade to New York's efforts is not only surprising

but also intellectually unsupportable. First, the Second Circuit did not even allude to the “presumption” against preemption that the U.S Supreme Court has recently reaffirmed in the context of an “express preemption” case. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194–95 & n.3 (2009). Even though the United States in its amicus brief highlighted the traditional regulation of taxicabs by cities, there was no reference in the Second Circuit’s opinion to any presumption against the exercise of preemption in areas traditionally regulated by states or cities.

Moreover, although the Second Circuit’s opinion noted that “preemption turns on Congress’s intent,” it then sought guidance on the question of congressional intent with reference to a completely different statute, ERISA. According to Judge Walker’s opinion, because the term “related to” was used by Congress in a “broad manner,” and the same term was used in EPCA, it must have the same broad meaning (2010 WL 2902501, *4). This statutory analogy, however convenient, ignores both the unique political compromise behind ERISA and the possible differences in the political compromises that resulted in EPCA. As professor Wooten has pointed out, the threat of a series of independent state laws governing pension plans was the “glue” that drove industry and others to support an otherwise problematic pension reform bill in 1974. It was this political dynamic that led Senator Jacob Javits to underscore to his colleagues the need for a broad federal preemption provision in what became ERISA (J. Wooten, *A Legislative and Political History of ERISA Preemption, Part I*, 14 JOURNAL OF PENSION BENEFITS 31 (2006)).

Was this same political dynamic for broadly preemptive language present in EPCA, which in 1975 was largely the reaction to the Arab oil embargo and consequent shortages of fuel? There is not a hint of such a dynamic in the Second Circuit’s opinion, and Judge Walker cites nothing to support such a notion. But, without some explanation as to why the broad reading of the term “related to” in ERISA should apply to the term “related to” in a separate statute, EPCA, the Second Circuit has no viable explanation for its preemption decision. To be sure, the court of appeals

suggests that it “discern[s] no basis for concluding that the meaning of the language in each provision [that in ERISA and in EPCA] was not intended to be the same” (2010 WL 2902501 at *3), but that suggestion is tautologous: “Because the language in the two separate statutes is the same, the Court discerns no reason why the language is not the same.” The Supreme Court has held that the same words, *even in the same statute* can have different shades and meaning and consequently be “variously construed.” *Environmental Defense Fund v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). The Second Circuit’s analysis considered neither the vast political differences that went into the making of the two separate statutes nor the subtle linguistic variations that can occur to identical words in two statutes. This is of little comfort to the city of New York’s efforts to curb greenhouse gas emissions from its cab fleet, which ran smack into the stone wall of federal preemption.

The City of Los Angeles’ Efforts to Modernize the Diesel Trucks That Serve Its Port

The port of Los Angeles is the busiest container cargo port in the United States and the eighth largest in the world in terms of the number of containers unloaded in any given year. The containers are placed on trucks for shipment to their ultimate destination, and these trucks use diesel fuel. The city of Los Angeles and, at least initially, the city of Long Beach each respectively sought to impose more stringent environmental regulations on truckers who came to pick up containers at their ports. The regulations had a variety of aspects, but one of the principal provisions was a shift from regulating the “individual jobber” to make fleet owners responsible for the maintenance of truck performance. This was done by imposing “concession” requirements on fleet owners in order to improve maintenance record keeping and indirectly the overall quality of diesel trucks. *American Trucking Ass’n, Inc. v. City of Los Angeles*, 577 F. Supp. 2d 1011 (C.D. Cal. 2008), *rev’d and remanded*, 559 F.3d 1046 (9th Cir. 2009). The port of Los Angeles adopted rules requiring that all trucks serving the ports must meet certain EPA truck emission standards and instituted a “clean truck fee” that would be used to help

finance retrofits and replacements of older noncomplying trucks. 577 F. Supp. 2d at 1114. The truckers launched a legal attack on the city regulations on the grounds of federal preemption, this time under the terms of the Federal Aviation Administration Authorization Act of 1994.

In contrast with EPCA, this statute was adopted in an effort to deregulate the trucking industry, promote competition, and end the old ties of the Interstate Commerce Commission over the trucking industry. Congress enacted a political compromise in order to obtain industry support, including a broad preemption provision providing that “a state [or political subdivision thereof] . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to price, route, or service of any motor carrier.” 557 F. Supp. 2d at 1116. The district court agreed that the net effect of the city port regulations would be to regulate “service” of a motor carrier, but denied the preliminary injunction on the grounds that no irreparable injury had been demonstrated. The Ninth Circuit reversed, finding that compelling motor carriers to choose between paying “concession” fees or violating their constitutional rights was a “Hobson’s choice” that constituted irreparable injury. *American Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). On remand, the district court found that at least some of the city of Los Angeles’ rules for trucks related to safety concerns, and therefore were not preempted because of a savings clause that excepted any state (or local) regulation dealing with safety regulation from the broad preemption provisions of the statute. *American Trucking Ass’ns, Inc. v. City of Los Angeles*, 2009 WL 1160212 (C.D. Cal. 2009). The Ninth Circuit reviewed a second round of challenges by the truckers association to the district court’s ruling and this time largely affirmed the district court’s position. *American Trucking Ass’ns, Inc. v. City of Los Angeles*, 596 F.3d 602 (9th Cir. 2010).

At the end of two years of federal court litigation, the city of Los Angeles’ efforts to implement a “clean trucks” program at the nation’s largest container port was in ruins. The fee program designed to pay for refurbishing or purchasing new greenhouse gas-friendly

trucks was struck down on the basis of federal preemption. Moreover, Los Angeles and its port authority are still in litigation, since the trucking association announced that it intends to appeal for a third time a recent decision by the district court approving the mandatory requirement that truck drivers sign “concession” agreements.

The City of Dallas’s Efforts to Encourage Clean Natural Gas Cabs Serving Its Airport Survive a Preemption Challenge

The city of Dallas passed an ordinance in March of this year that provided an incentive for taxicab drivers who purchased new “compressed natural gas” cabs. Unlike New York City’s financial incentive, the city of Dallas allowed new cabs with the “CNG” designation to go to the front of the taxicab line at Love Field to pick up customers. The Association of Taxicab Operators sued, seeking a preliminary injunction based upon a claim of preemption under the Clean Air Act. In section 209(a) of the Clean Air Act, Congress expressly preempted state or local entities from an effort “to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines . . .” The taxicab association, seizing upon language from the Southern District of New York’s opinion in *Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 105 (S.D.N.Y. 2009), *aff’d in part*, 2010 WL 2902501 (2d Cir. July 27, 2010), argued that the city of Dallas’s incentive for taxicabs constituted a standard “related to” the control of emissions from new motor vehicles.

Judge Kinkeade of the Northern District of Texas was not persuaded by the preemption argument. In stark contrast to the Second Circuit, Judge Kinkeade first reviewed the long history of local regulation of taxicabs. He then specifically reviewed the legislative history of the Clean Air Act, citing language in the Senate report indicating that this statute had a narrow definition of items “relating to” new motor vehicles and emissions. The district court also noted that an “incentive program” is different than an enforceable local “standard” that might be within the zone of preemption under the Clean Air Act. This difference was sufficient to carry the day for the city of Dallas,

notwithstanding the Second Circuit's contrary reasoning. *Assoc. of Taxicab Operators, USA v. City of Dallas*, ___ F. Supp. 2d___, 2010 WL___ (N.D. Tex. Aug. 30, 2010). It is, of course, distinctly possible that the saga of Dallas's efforts to incentivize cab owners to buy CNG cabs will still be reversed by the court of appeals. Nonetheless, this case suggests at least a ray of hope open to municipalities striving to implement local regulations that reduce greenhouse gas emissions.

King County Washington's Efforts to "Encourage" Hybrid Cab Usage in the Seattle Area

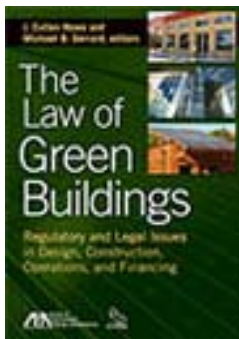
A second contrasting opinion to the Second Circuit's decision in New York is found in the determination of the district court with respect to taxicab regulation by King County and the city of Seattle in Washington. Judge Richard Jones of the Western District of Washington held that a regulation issued by the county requiring that a portion (but not all) of the licensed taxicab fleet be composed of hybrid cabs that could achieve gasoline mileage of at least 40 miles per gallon was not preempted by EPCA. Judge Jones reasoned that EPCA only prohibited "regulations" that related to fuel economy standards. The city and county's proposal, however, only affected 50 out of 560 licensed cabs and was "voluntary" in the sense that a taxicab company could acquire licenses for cabs by other means (purchase of licenses from retiring cab owners in the open market) rather than through the city

and county's system. Thus, the King County regulation was not a "requirement" that fell afoul of the EPCA preemption standard. *Green Alliance Taxi Cab Assoc. v. King County*, 2010 WL 2643369 (W.D. Wash. 2010). A climate change enthusiast might applaud Judge Jones's conclusion, but reconciling his decision approving an "incentive" system with the Second Circuit's seeming contrary opinion as to the city of New York's seeming "incentive" system for fleet owners of cabs is analytically difficult at best.

Conclusion

Congress always strikes political compromises with powerful interest groups as a method of passing complicated legislation. In many cases, industry seeks a quid pro quo: in exchange for supporting legislation that would impose some federal regulation in a particular area, it gets a preemption clause that precludes state action in anything "related to" that area. Courts should be particularly circumspect in broadly interpreting such preemption clauses, particularly where there is no legislative history supporting a broad interpretation. This is particularly true when applied to preclude local regulation of taxi or truck fleets, traditionally a matter of local regulation.

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CLIMATE CHANGE DISCLOSURES: A MOVE TOWARD CONSISTENCY OR BUSINESS AS USUAL?

Christina M. Landgraf

In the last several months, there has been significant activity in connection with climate change disclosure requirements. Early this year, the U.S. Securities and Exchange Commission (SEC) issued interpretive guidance on disclosure requirements relating to climate change. Shortly thereafter, ASTM International—one of the largest voluntary international standards organizations—issued a standard that companies may use voluntarily as the basis for reporting climate change disclosures. This article summarizes those developments and analyzes disclosure documents from several publicly traded companies that face climate change-related issues to determine how corporations subject to disclosure requirements have been responding to this guidance.

I. SEC Interpretive Guidance on Disclosure Requirements

On January 27, 2010, the SEC clarified that publicly traded companies must disclose environmental compliance requirements, environmental risks, and potential future regulations, as well as how these developments could affect business developments and profitability, in their annual filings to the SEC.

The SEC then published an interpretive release (Release Nos. 33-9106; 34-61469; FR-82, entitled “Commission Guidance Regarding Disclosure Related to Climate Change”), effective February 8, 2010, to provide guidance to publicly traded companies on the SEC’s existing disclosure requirements as they apply to business or legal developments relating to climate change. The release clarified the type of information that publicly traded companies must file with the SEC and disclose to investors in terms of climate-related “material” effects on business operations.

SEC regulations and federal securities laws require public companies to make specific disclosures for their investors’ benefit. The SEC provides the business and investment communities with guidance on how to

interpret the disclosure rules. According to the SEC, the release did not create new legal requirements or modify existing ones, but was intended to provide clarity and enhance consistency for public companies and their investors.

The release clarified the existing disclosure rules that require a publicly traded company to disclose the impact that climate change developments may have on its business. The relevant rules cover a company’s risk factors, legal proceedings, business description, and management’s discussion and analysis.

The SEC noted that the following areas were examples of issues where climate change may trigger disclosure requirements:

- **Impact of Legislation and Regulation:** When assessing potential disclosure obligations, a company should consider whether the impact of certain existing laws and regulations regarding climate change is material. In certain circumstances, a company also should evaluate the potential impact of pending climate change legislation and regulations.
- **Effect of International Accords:** A company should consider (and disclose if material) the risks and effects on its business of international accords and treaties relating to climate change.
- **Indirect Consequences of Regulation or Business Trends:** Legal, technological, political, and scientific developments regarding climate change may create risks or new opportunities for companies. For instance, a company may face decreased demand for goods that produce significant greenhouse gas emissions or increased demand for goods that result in lower emissions than competing products. Accordingly, companies should consider, for disclosure purposes, the actual or potential indirect consequences they may face because of climate change-related regulatory or business trends.

- **Physical Impacts of Climate Change:** Companies also should evaluate, for disclosure purposes, the actual and potential material impacts of environmental matters on their business.

After the release was issued, some commentators expressed concern that companies would be required to speculate on what legislation may pass and what the consequences of such legislation may be. There also was concern that disclosure on the four topics listed could include a great deal of speculation and may lead to more—not less—investor confusion. Those opposing the adoption of the release noted the great flux in the science, law and policy of climate change.

However, the release purports to be only a reminder to reporting companies of their reporting obligations under existing law and SEC regulations. Existing interpretations of “materiality” are unchanged.

II. ASTM E2718-10: Standard Guide for Financial Disclosures Attributed to Climate Change

Subsequently, on April 1, 2010, ASTM International released E2718-10: Standard Guide for Financial Disclosures Attributed to Climate Change. The guide is intended for voluntary use by reporting entities.

The purpose of the guide is to assist publicly traded companies in (1) identifying material financial impacts attributable to climate change that warrant disclosure in their financial statements, and (2) determining the appropriate content of the disclosure. The guide states that it is designed to give instructions “consistent with good commercial and customary practice” for climate change-related disclosures accompanying audited and unaudited financial statements and to encourage consistent and comprehensive disclosure of financial impacts attributed to climate change. The guide is intended to apply to both domestic and international operations, at the discretion of the reporting entity.

The guide focuses on when and how users may disclose material “financial impacts attributed to climate change.” It defines “financial impacts attributed to climate change” to include financial impacts on a

reporting entity arising from climate change, including actual or anticipated regulatory burdens, changes in market conditions, and physical harm to assets. The types of climate change-related impacts the guide identifies include the same types of climate change-related impacts the SEC release suggests that reporting entities consider when making disclosures in SEC filings. The guide defines “financial statements” broadly to encompass financial reports and information included within or outside of SEC reports.

A. Determining Whether Disclosure Is Warranted

To assist reporting entities in determining when disclosure of “financial impacts attributed to climate change” may be warranted, the guide lists several examples of major climate change-related circumstances that may result in financial impacts. These examples include

- Predicted changes/trends in resource cost or availability;
- Predicted changes in corporate assets because of physical changes attributable to climate change, such as increases in the severity of storms;
- Contracts in which a company accepts responsibility for climate change risk, such as insurance policies; and
- Litigation or claims asserted against a company alleging legal liability related to climate change.

B. Sources of Information to Consult

The guide recommends that companies review the following sources of information:

- Any environmental record available from a government agency or a commercial entity;
- Internal records regarding greenhouse gas (GHG) emissions and financial impacts associated with climate change;
- Current and proposed foreign, national, state, and local environmental laws or rules related to climate change; and
- Publicly available and internal studies on benchmarking, modeling, trends, and forecasts.

Once a company has identified a potential financial impact attributable to climate change, the guide advises that the company should determine whether (1) the likelihood of the impact occurring is more than remote; (2) the impact could have a severe impact on the reporting entity's normal operations or finances; and (3) the impact is anticipated to occur within the next year.

If these three conditions are met, the guide directs the reporting entity to estimate the probability, effect, and timing of the anticipated impact on the company's financial position. According to the guide, the reporting entity should assess whether climate change impacts are material, on an aggregate basis, and if they are, they should be disclosed. The guide defines a material item as one in which "the judgment of a reasonable person relying on the financial statement" would have been changed or influenced by its inclusion, or there is a substantial likelihood that the disclosure would alter the interpretation of information available to the investor.

C. Determining the Content of Disclosure

Once the company has determined that the climate change impacts are material, the guide suggests that the company should disclose those impacts. The guide states that disclosure of the material financial impacts of climate change should include five key topics. First, it should include a statement concerning the management's strategic analysis of the company's financial impacts attributable to climate change. Second, it should include the relevant regulatory requirements impacting the reporting entity, and the resulting financial impacts. Third, it should include the estimated likelihood, magnitude, and timing of the financial impacts attributed to climate change. This topic would include a description of the approach used to quantify the impacts, a discussion of the approach for assessing materiality, and for liabilities, the amounts accrued by the reporting entity. Fourth, it should include a separate estimate of anticipated insurance or other recoveries, and a description of the company's approach to estimate the amount of anticipated recoveries from other parties. Fifth, it should include a discussion of key external and internal factors regarding the timing or amount of financial impacts attributed to climate change. Finally, the guide also

advises that if a reporting entity thinks it will incur financial impacts because of climate change but cannot quantify them, the reporting entity should disclose why they cannot be quantified.

Companies considering whether and how to disclose the impacts of climate change in their financial statements may choose to consult the guide for assistance. Reporting entities, though, should be mindful that the guide is intended for use on a voluntary basis. Even if matters are not material, it appears that companies need to be able to think through their long-range impact and have an obligation to stay current with existing and potential climate change developments.

III. Analysis of Recent Corporate Climate Change Disclosures

More disclosure about climate change issues seems to be a growing trend. For example, the U.S. Environmental Protection Agency's (EPA's) new mandatory GHG reporting rule requires some facilities that are large emitters of GHGs to report those emissions to EPA. Such facilities were required to begin data collection on January 1, 2010.

In addition, the National Association of Insurance Commissioners (NAIC), the national organization of insurance regulators, unanimously approved a mandatory requirement for insurers with premiums of \$500 million or more to complete, annually, an "Insurer Climate Risk Disclosure Survey" form in which they would disclose climate risks to regulators, shareholders, and the public beginning in May 2010. The scope of the issues covered by the new disclosure requirement is broad. The insurers must report the manner in which they are altering their risk management and catastrophe risk modeling in light of the issues posed by climate change. In addition, the insurers must report on the steps they are taking to engage and educate policyholders on the risks of climate change, as well as whether they are changing their investment strategies based upon climate change issues.

The release ultimately may result in publicly traded companies disclosing GHG emission inventories and climate risk analyses in a more consistent manner. For

now, however, based upon a review of several publicly traded companies' financial reports filed in June 2010, it appears that disclosures related to climate change matters are still somewhat inconsistent.

Some companies have made their climate change disclosures broad and perfunctory, if not uninformative. For example, a report for one entity contained a very general statement along the following lines:

New legislation and regulations to mitigate the effects of GHGs, including carbon dioxide . . . are under consideration at the federal and state levels. In general, the effect of such future laws or regulations is expected to require the addition of pollution control equipment or the imposition of restrictions or additional costs on the Company's operations.

The report for this company also contained a small section on climate change in which the company disclosed the amount of GHGs emitted and stated that the "impact from legislation or federal, regional or state regulation of GHGs on the Company's performance will depend on a number of factors . . ." However, in its 91-page report, references to "climate change" or "GHG" appear on only two pages.

In contrast, other companies have made more specific climate change disclosures, at least with respect to the applicable federal climate change regulations. For example, one company, in a paragraph entitled "Climate Change," summarized EPA's tailoring rule, the proposed transport rule, and the National Ambient Air Quality Standard (NAAQS) for sulfur dioxide. However, the report did not state how these rules may affect the company or its operations.

IV. Practical Tips for Disclosing Climate Change-Related Matters

In light of the release and the guide, public companies (particularly those in industries most affected by climate change matters) should consider the following:

1. As part of the company's disclosure procedures, review the existing process or establish a process for assessing the materiality

of climate change matters. Determine what (if any) disclosures should be included in the SEC filings with respect to climate change matters.

2. Assess the company's other public climate change disclosures, such as state and federally mandated disclosures, voluntary disclosures in sustainability reports and to third-party organizations, and disclosures on company Web sites and in investor presentations. The SEC's release suggests that, although certain of this reporting is voluntary, some of this information may be required to be disclosed in the SEC filings under existing disclosure requirements.
3. Monitor legislative and regulatory developments on greenhouse gas and climate change matters at the international, federal, state, and regional levels, and assess the potential impact of such developments on the company's business. This is a very fact-specific and business-specific analysis.
4. If the business is subject to final legislation or regulations, determine actual emissions from the business. Companies must know their GHG emissions and other relevant emissions information to assess their risks.
5. Identify and analyze the physical impacts of climate change on the business.

It remains to be seen whether the SEC's release and the guide eventually will encourage a move toward consistency and greater transparency with respect to climate change disclosures. For now, however, it appears that a number of companies have not yet fully embraced the guidance provided by the SEC's release.

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PA PROCEEDS WITH CLIMATE CHANGE REGULATION AS LEGAL CHALLENGES MOUNT

Dustin T. Till

The Environmental Protection Agency (EPA) continues to implement its greenhouse gas (GHG) tailoring rule, which will restrict emissions from new and modified large stationary sources such as power plants and petroleum refineries beginning January 2, 2011. On September 2, 2010, the agency released two draft rules for implementing the agency's new permitting requirements under the Clean Air Act (CAA) prevention of significant deterioration (PSD) program. In its first rule, EPA is proposing a determination that the CAA implementation plans (state implementation plan or SIP) in 13 states are "substantially inadequate" because they do not apply to new or modified GHG-emitting sources. 75 Fed. Reg. 53,892 (Sept. 2, 2010). EPA would require that noncompliant states issue revised SIPs within 12 months of issuance of the final rule (slated for early December 2010). In its second rule, EPA proposes assuming responsibility for PSD permitting for GHG emissions for those states that do not timely submit compliant SIPs, via a federal implementation plan (FIP). 75 Fed. Reg. 53,883 (Sept. 2, 2010).

A report by the National Association of Clean Air Agencies projects that the majority of states will be ready to implement permitting for GHGs by the January 2, 2011, deadline. A number of states, however, are resisting EPA's new requirements. In a sharply worded August 2, 2010, letter, the state of Texas indicated that "Texas has neither the authority, nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of GHG emissions." The state of Arizona has asked EPA to reconsider its proposed determination that the Arizona SIP is inadequate. And a number of states have expressed concern that they will not have sufficient authority to implement the tailoring rule by EPA's January 2, 2011, deadline. For example, Governor Dave Freudenthal stated that Wyoming may not meet EPA's deadlines because of the need to amend state law.

With climate legislation all but dead in Congress, threats to EPA's GHG rules continue to mount. On August 2, 2010, Texas filed a petition with the U.S. Court of Appeals for the District of Columbia challenging the tailoring rule. Texas's lawsuit joins a growing body of challenges to the four major components of EPA's climate program: the endangerment finding, the mobile source rule, the PSD interpretive memorandum, and the tailoring rule. EPA recently filed a brief that opposes efforts to consolidate more than 90 lawsuits challenging those four regulatory actions into a single coordinated proceeding.

Bipartisan challenges to EPA's authority to regulate GHG emissions are also mounting in Congress. Republican opponents of EPA's GHG regulations have threatened to add an amendment to EPA's fiscal year 2011 budget that would restrict the agency from implementing those regulations for up to two years. Senator Rockefeller (D. W.Va.) has also floated legislation that would similarly delay EPA's ability to implement GHG regulations. A similar disapproval resolution sponsored by Senator Murkowski (R. Alaska) failed to clear procedural hurdles earlier this year, although there is speculation that there may be sufficient support in the Senate to preempt EPA through appropriations or otherwise.

I. The Endangerment Finding

In December 2009, EPA published its final endangerment finding, which concluded that carbon dioxide and five other GHGs "taken in combination endanger both the public health and the public welfare of current and future generations." 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA's consideration of whether GHGs endanger public health and welfare was compelled by the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*, in which the Court held that carbon dioxide and other GHGs fell within the CAA's "sweeping" and "unambiguous" definition of "air pollutant."

At least ten petitions have been filed asking EPA to reconsider its endangerment finding. In addition, at least 17 petitions for review challenging the endangerment finding have been filed in the U.S. Court

of Appeals for the District of Columbia Circuit by industry groups, a number of states, and thirteen House lawmakers. A coalition of 16 states and New York City has intervened on behalf of EPA.

II. Mobile Source Standards

EPA's positive endangerment finding compelled the agency to issue new mobile source emission standards. Consequently, on April 1, 2010, EPA and the National Highway Traffic Safety Administration (NHTSA) issued a joint rule that established the nation's first standards for GHG emissions and set new corporate average fuel efficiency standards for new passenger vehicles and light trucks for model years 2012 to 2016. 75 Fed. Reg. 25,324 (May 15, 2010). The standards require new vehicles to meet an estimated combined average emissions level of 250 grams of carbon dioxide per mile, equivalent to 35.5 miles per gallon (MPG) if the automobile industry were to meet this carbon dioxide level solely through fuel economy improvements.

A coalition of industry groups has challenged the new vehicle standards in a U.S. court of appeals, and California and twelve other states have moved to intervene on behalf of EPA. One of the petitioners, the Southeastern Legal Foundation, has indicated that its challenges to the mobile source rules will also focus on the science underlying the endangerment finding.

III. Stationary Source Standards

While EPA's endangerment finding and tailpipe standards expressly address mobile source emissions, the CAA's domino-like structure has compelled EPA to develop GHG emission regulations for stationary sources. The CAA's PSD program prohibits new or modified facilities that emit more than 100 or 250 tons a year (depending on source type) of "any air pollutant" from operating without a permit. Furthermore, facilities subject to PSD permitting requirements are required to use best available control technology (BACT) for each pollutant that is "subject to regulation" under the act and emitted by the facility. 42 U.S.C. § 7475(a).

Given the ubiquitous nature of GHG emissions, the literal application of these statutory thresholds would capture both large industrial sources such as power plants as well as myriad smaller sources that have never been regulated under the CAA, such as multifamily residential units, schools, and hospitals. Indeed, EPA has estimated that without its proposed "tailoring" rule discussed below, the number of facilities annually subject to BACT permits would increase from fewer than 300 per year to over 41,000 per year. The far-reaching implications of directly regulating GHGs under the CAA has resulted in litigation over when GHGs are "subject to regulation," and has pushed EPA to limit the scope of its stationary source regulations for GHG emissions.

A. The Johnson Memorandum

Prior to the adoption of EPA's vehicle emission standards, whether GHGs are "subject to regulation" under the CAA was hotly contested. Environmental groups have argued that existing monitoring and reporting requirements under the CAA's acid rain program made carbon dioxide "subject to regulation" for purposes of triggering BACT requirements. EPA, however, has consistently maintained its historical position that a pollutant does not become "subject to regulation" until some rule or statutory provision requires actual control of emissions of that pollutant.

The Obama administration reiterated this stance on March 29, 2010, after reconsidering a Bush-era memo articulating the agency's reasoning that had been issued by then-EPA Administrator Stephen Johnson. 75 Fed. Reg. 17,004 (Apr. 2, 2010). The agency reaffirmed the "actual control" interpretation of the phrase "subject to regulation." Thus, under EPA's interpretation, a PSD permit must require BACT for each pollutant that is subject to some form of control under a provision of the CAA or a regulation issued under authority of the Act, and this requirement expands each time a new pollutant becomes subject to "actual controls."

In its reconsideration of the Johnson memo, EPA applied its "actual control" test to the question of when GHGs would become "subject to regulation," and so covered by the PSD program. The agency concluded

that a pollutant becomes “subject to regulation” when controls on that pollutant take effect, meaning the date when the requirement to control the pollutant first applies to a source. EPA expressly rejected arguments that controls on a pollutant “take effect” on the date the regulation containing the controls is issued, or on the effective date of the regulation. If it had adopted either of these approaches, PSD permits issued immediately after the vehicle standards were published, or 60 days later when the regulation took effect, would have been required to include BACT for GHG emissions. Under EPA’s “actual control” interpretation, the GHG emission standards for cars and trucks, which apply to 2012 model year vehicles, “take effect” on January 2, 2011, as that is the first date a manufacturer could legally sell a 2012 model year vehicle. EPA’s affirmation of the Johnson memo also has drawn legal challenges.

On August 13, 2010, EPA denied petitions seeking administrative rehearing of the endangerment finding. 75 Fed. Reg. 49,566 (Aug. 13, 2010).

B. Greenhouse Gas Tailoring Rule

Applying the Johnson memo’s reading of the CAA, the issuance of mobile source standards based on the endangerment finding automatically triggers construction and operating permit requirements for stationary sources. However, the CAA’s statutory thresholds (100 or 250 tons of any regulated air pollutant a year) would vastly expand the scope of CAA permitting when applied to GHGs. To avoid that result, EPA published its final “tailoring rule” in May 2010, which limits the applicability of the PSD and operating permit programs with respect to GHGs. 75 Fed. Reg. 31,514 (June 3, 2010).

The final tailoring rule established phased compliance beginning in January 2011 along with the mobile source rules. For the first six months of 2011, EPA has limited GHG permitting to sources already required to obtain a PSD or Title V operating permit because of their other air emissions. Those sources would only be required to address GHGs in their permits if their emissions exceed 75,000 tons a year (for the PSD program, these would be new or increased greenhouse emissions). For two years after that, PSD and

operating permits also would be required based only on a facility’s GHG emissions, even if not required because of emissions of other pollutants. EPA also committed in the rule to undertake another rulemaking, beginning in 2011, to consider whether to apply GHG permitting requirements to smaller sources.

EPA estimates that about 900 new and modified facilities a year will be required to obtain permits, mostly coal-fired plants, refineries, cement plants, and solid waste landfills. EPA also plans to begin rulemaking in 2011 to consider whether to expand GHG permitting to sources emitting more than 50,000 tons per year, with the rule to be completed no later than July 1, 2012. EPA also has indicated it does not plan to require permits from smaller sources until at least April 30, 2016.

On June 3, 2010, the day EPA’s tailoring rule was published in the *Federal Register*, it was challenged by industry groups and 14 House lawmakers. Additional lawsuits were subsequently filed.

C. EPA’s Implementation Rules

The CAA establishes a cooperative framework under which EPA and the states regulate air quality. At the federal level, EPA is required to establish limits (known as National Ambient Air Quality Standards, or NAAQS) on the maximum concentrations of air pollutants allowable in various parts of the country. EPA is also required to designate areas of the country as “attainment,” “nonattainment,” or “unclassifiable” for each air pollutant, depending on whether the area is in compliance with NAAQS. States are primarily responsible for administering the CAA and are required to develop plans (known as state implementation plans, or SIPs) for implementing, maintaining, and enhancing NAAQS. SIPs must include, among other things, PSD requirements.

The CAA authorizes EPA to make a determination that a state’s SIP is “substantially inadequate” and require the state to correct such inadequacies. This action is generally referred to as a “SIP call.” When making a SIP call, EPA must establish a reasonable deadline (not to exceed 18 months) for submission of the SIP revisions. If a state fails to submit a corrective SIP,

EPA is authorized to assume responsibility for administering the CAA by developing and implementing a federal implementation plan (FIP).

In the tailoring rule, EPA raised the issue that some SIPs may not adequately authorize state permitting authorities to enforce the PSD and Title V requirements for GHG emissions. EPA asked states to submit letters by August 3, 2010, advising the agency on how the states intended to implement the tailoring rule, including whether the states have adequate authority to implement GHG permitting. EPA also independently analyzed affected states' SIPs.

Based on input from the states and its own analysis, EPA issued its proposed SIP Call, a proposed finding that the SIPs in thirteen states are "substantially inadequate" with respect to PSD permitting for GHG emissions. EPA found those SIPs to be inadequate for a variety of reasons. First, although the PSD provisions of most SIPs apply broadly to any "new source review (NSR) pollutant," the SIPs in a number of states simply list the individual pollutants by name. EPA found those SIPs "substantially inadequate" because they did not identify GHGs as among the pollutants addressed under their PSD programs. Second, EPA found that one state, Connecticut, explicitly excluded carbon dioxide as an "air pollutant" from its PSD program. Third, EPA found that some states were precluded from incorporating by reference or otherwise adopting any requirements not specifically adopted by the state legislature or other state authority.

EPA proposes requiring each of the thirteen states to submit revised SIPs within 12 months from the publication of the final rule, although EPA would allow states to set their own deadline, which could be as short as three weeks. The revised SIPs must address permitting requirements for GHG emissions under the PSD program consistent with the tailoring rule. EPA proposes publishing the final SIP Call in early December 2010, which means that revised SIPs would be due in December 2011, unless a state has asked for an earlier deadline. In addition to seeking public comment on its determination of "substantially inadequate" SIPs, EPA is also seeking comment on

whether or not the remaining SIPs sufficiently authorize GHG permitting.

For states that do not timely submit adequate SIP revisions, EPA is also proposing a FIP that would authorize EPA to administer PSD permitting for GHGs consistent with the tailoring rule. The proposed FIP is generally consistent with EPA's regulations for jurisdictions where it directly administers the PSD program. If a state has asked for an early deadline for correcting its SIP and is unable to complete work by that date, then the FIP could be triggered early in that state.

D. Potential Gap in Permitting Authority and Upcoming Actions

EPA's proposed rules may result in a gap in permitting authority in states that cannot, or refuse to, comply with EPA's tailoring rule. Before assuming responsibility for PSD permitting via a FIP, EPA must first determine that the relevant SIP is "substantially inadequate." EPA must also provide the state with a "reasonable" amount of time to cure its defective SIP – 12 months in the case of the thirteen states identified in its proposed SIP Call. Under EPA's proposed timeline, the corrective SIPs would not be due until December 2011. However, the tailoring rule is set to go into effect on January 2, 2011; thus, between February and December 2011, new or modified large GHG sources may not be able to obtain PSD permits because neither an approved SIP nor a FIP will be in place. Although a number of states, including Oregon, are in the process of revising their SIPs to address GHG permitting requirements, those revisions are unlikely to be completed before EPA's January 2, 2011, deadline. This permitting authority gap could potentially restrict parties from constructing or modifying large stationary sources in a number of states for up to a year.

EPA's proposal to let states pick an earlier deadline appears to be an effort to avoid this gap. If, for example, a state were to ask EPA to set a January 2, 2011, deadline for correcting that state's SIP, then EPA would have grounds to impose the FIP on that state in January 2011. While creative, it remains to be seen how well this concept will work when applied.

In addition to finalizing these proposed rules, EPA is expected to take several steps in coming weeks to implement its PSD permitting program for GHG emissions. For example, EPA is expected to issue draft guidance on determining what is the BACT for various GHG sources. EPA is also expected to issue a draft rule to address inadequacies in various state-level Title V (air operating permit) programs with respect to GHG emissions. Ten administrative petitions have been filed asking EPA to reconsider its endangerment finding, and dozens of lawsuits have been filed by industry groups, states, and lawmakers challenging the endangerment finding, EPA's new mobile and stationary source rules, and EPA's reconsideration of the Johnson memo. The arguments raised in the petitions for reconsideration and lawsuits target the scientific underpinnings of the endangerment finding. In particular, they are likely to focus on electronic mail messages and documents by climatologists at the Climate Research Unit (CRU) at the University of East Anglia disclosed last year. Challengers contend that those correspondences cast doubt on the reliability of the data relied on by scientific authorities and ultimately EPA.

EPA has indicated that it will issue its reconsideration of the endangerment finding by the end of July, but there has been no indication from the agency that it will alter its findings. If petitioners succeed on the merits of their challenges, EPA's authority to regulate GHG


emissions under the CAA will be severely compromised and the vehicle standards and permitting requirements for stationary sources that it has put in place could be delayed or derailed.

Legislative challenges to EPA's rules—particularly the requirement that stationary sources obtain permits for their GHG emissions—also are still being discussed. And, while the prospects for comprehensive climate legislation remain at best uncertain, the Waxman-Markey bill passed by the House of Representatives in June 2009 and several proposals that have been floated in the Senate would preempt EPA's authority to regulate GHG emissions from stationary sources under existing CAA programs.

Absent intervention by the courts or the Congress, EPA's stationary source requirements are set to take effect January 2, 2011. PSD permits issued after that date will be required to include BACT controls on the largest new and modified sources of GHGs, and the threat that EPA would act if Congress did not will have come to fruition.

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