



Chemical Industry News

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Legal Developments Affecting the Regulation and Litigation of Greenhouse Gas Emissions

Industries and businesses with operations that result in greenhouse gas (“GHG”) emissions will be substantially impacted by recent actions by the United States Environmental Protection Agency (“EPA”) and a recent opinion by the United States Court of Appeals of the Second Circuit (“Second Circuit”) concerning GHG and climate change. EPA has issued or proposed a number of rules that will not only require monitoring and reporting of GHG emissions, but may ultimately lead to GHG emissions control through permitting limitations. In addition, the Second Circuit has permitted a lawsuit to proceed against five of the nation’s largest utilities based on claims that those utilities’ GHG emissions constitute a public nuisance because the emissions contribute to global warming. Companies are now faced with new regulatory burdens and liability that may seriously impact the way that they do business.

Final EPA GHG Monitoring and Reporting Rule

On September 22, 2009, EPA issued a final rule titled “Mandatory Reporting of Greenhouse Gases” (“Final Rule”) which requires monitoring and reporting of greenhouse gas¹ (“GHG”) emissions from certain large emission sources. The Final Rule was issued by EPA pursuant to its existing authority under Sections

1. The GHGs covered by the Final Rule include: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorochemicals, sulfur hexafluoride as well as other fluorinated gases (e.g., nitrogen trifluoride and hydrofluorinated ethers).

114 and 208 of the Clean Air Act. The Final Rule imposes no obligations to control GHG emissions. However, EPA has acknowledged that one purpose of the Final Rule is to collect data that can be used to develop future policies to control and reduce GHG emissions.

The Final Rule applies to 31 specific source categories of GHG emitters, including direct emitters from fuel combustion or industrial processes (“Downstream Sources”), certain fossil fuel and industrial gas suppliers (“Upstream Sources”) and vehicle and engine manufacturers outside of the light-duty sector (“Mobile Sources”). Generally, an emission source, or facility, that falls within one of the identified source categories must monitor and report its GHG emissions if that source emits 25,000 metric tons of carbon dioxide equivalent (“mtCO₂e”) of GHGs per year. However, for certain source categories, such as petroleum refiner-

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ies and cement production facilities, all emission sources (or facilities) within that category must monitor and report under the Final Rule regardless of the levels of GHGs emitted per year.

Most emission sources must begin monitoring GHG emissions by January 1, 2010. Mobile sources must begin monitoring for carbon dioxide (“CO₂”) beginning with model year 2011, with requirements for monitoring additional GHGs added in subsequent model years. The Final Rule includes emissions monitoring or estimating methods for each source category in addition to general methods for sources that do not fall within a specific category. The Final Rule permits sources to use “best available monitoring methods” until March 2010 in lieu of the regulatory monitoring methods. Sources can request an extension after March 2010, but in no case will EPA permit a source to use “best available monitoring methods” after December 2010.

Initial monitoring reports are due by March 31, 2011 for sources that begin monitoring in 2010. The Final Rule requires annual reporting thereafter and the submittal of revised annual reports when necessary to correct errors. Each source must self-certify its data. However, third party verification of the data is not required, as EPA will verify the submitted data during its review and via an on-site auditing program.

While the Final Rule does not directly control GHG emissions, it does provide an incentive to reduce emissions. Under the Final Rule, a source is no longer required to monitor and report its GHG emissions if that source reduces its emissions to below 25,000 mtCO₂e per year for five consecutive years. A source may also cease monitoring and reporting if it reduces its GHG emissions to below 15,000 mtCO₂e for three consecutive years. Finally, a source is not required to monitor and report when its GHG emitting processes or operations cease.

EPA will not disclose information claimed as confidential business information (“CBI”) pursuant to EPA’s public information regulations codified at 40 C.F.R. Part 2, subpart B. However, EPA has stated that, in general, emissions data is not considered CBI. EPA plans to seek public comment in late-2009 or early 2010 on specific data elements in the monitoring reports that should be considered “emissions data” and therefore not protected as CBI.

The Final Rule does not preempt or replace state GHG emissions reporting programs. In addition, EPA

does not plan to delegate data collection to state agencies. However, EPA has stated that it is committed to working together with states to, “implement reporting programs, reduce burden on reports, provide timely access to verified emissions data, and harmonize data systems to fullest extent possible.”

EPA Proposals Concerning GHG Emissions

EPA has proposed a number of regulatory actions involving GHG emissions, including:

- EPA and Department of Transportation’s proposed rule for “Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards.” (Signed September 15, 2009)
- EPA’s proposed “Clean Air Act Prevention of Significant Deterioration/Title V Greenhouse Gas Tailoring Rule” which imposes strict GHG emission permitting requirements on industrial sources that emit more than 25,000 mtCO₂e per year. (Recently Approved by the White House Office of Management and Budget)
- EPA’s proposal to reconsider the “Johnson Memo” in which former EPA Administrator Stephen L. Johnson established a policy that the EPA should not regulate CO₂ emissions from coal-fired power plants. (Recently Approved by the White House Office of Management and Budget)
- EPA’s “Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act” rule in which EPA finds that GHG in the atmosphere endangers the public health and welfare of current and future generations and that GHG emissions from new motor vehicles and engines are contributing to air pollution that is endangering public health and welfare under Section 202 of the Clean Air Act. (74 Fed. Reg. 18886)

Second Circuit Allows Public Nuisance Claim for GHG Emissions

The Second Circuit Court of Appeals (“Second Circuit”) recently issued a decision to permit common law nuisance claims to proceed against five of the nation’s largest utilities because no federal climate change laws exist to preempt the claims. In *Connecticut*,

et al. v. American Electric Power Company, Inc., et al.,² the States of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, the City of New York, the Open Space Institute, Inc., the Open Space Conservancy, Inc. and the Audubon Society of New Hampshire (“Plaintiffs”) sought an injunction against American Electric Power company, Inc., American Electric Power Service Corporation, Southern Company, Tennessee Valley Authority, Xcel Energy, Inc. and Cinergy Corporation (“Defendants”) to curb Defendants’ CO₂ emissions. Plaintiffs alleged that Defendants’ combined annual emission of over 650 million tons of CO₂ contributes to global warming and that those emissions constitute a public nuisance.

Plaintiffs’ lawsuit was originally dismissed on September 16, 2005 by the Federal District Court.³ The district court determined that Plaintiffs’ claims raised a non-justiciable political question that would require the court to make policy determinations requiring the balancing of opposing interests. The district court explained that such policy determinations are more appropriately undertaken by the legislative or executive branches of government.

The Second Circuit reversed the district court’s decision, stating that while Plaintiffs’ claims may have political implications, the claims do not present non-justiciable political questions since Plaintiffs’ were not asking the court “to fashion a comprehensive and far-

reaching solution to global climate change, a task that arguably falls within the purview of the political branches.”⁴ Instead, Plaintiffs’ are asserting nuisance claims that fall within a “long line of federal common law . . . nuisance cases where federal courts employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented based on a fully developed record.”⁵

The Second Circuit also held that the Plaintiffs’ common law nuisance claims were not precluded by legislative or regulatory action on climate change, or the lack thereof. According to the court, “Congress’s mere refusal to legislate . . . falls far short of an expression of legislative intent to supplant the existing common law in that area . . . [I]f regulatory gaps exist, common law fills those interstices.”⁶ The court also rejected the argument that the EPA’s proposed endangerment finding concerning GHG emissions provides sufficient regulation to pre-empt common law nuisance claims.

Conclusion

New legal and regulatory developments involving GHG emissions and climate change are occurring very quickly. Industries that may be affected should become familiar with these developments in order to understand the impact on business operations.

Blank Rome LLP has experienced attorneys in numerous practice areas and business sectors. We are available to assist both existing and potential clients with an understanding as to how EPA’s GHG regulations and the Second Circuit opinion may affect your company and its business plans. ■

2. *Connecticut v. Am. Elec. Power Co.*, 2009 U.S. App. LEXIS 20873 (2d Cir., September 21, 2009) (“Connecticut”).

3. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

4. *Connecticut* at *31-32.

5. *Id.* at *39.

6. *Id.* at *48.

Blank Rome is dedicated to monitoring and reporting any legal and legislative developments that affect the chemical industry. Should you have any questions regarding the information contained in this Alert, please contact:

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