



## MULTIMEDIA: ENVIRONMENTAL BULLETIN

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Squire, Sanders & Dempsey L.L.P.

### Editor's Corner

This edition focuses on recent developments with respect to control of greenhouse gases (GHGs). US EPA has finalized the Light-Duty Vehicle Greenhouse Gas Emissions Standards which will have significant repercussions on air permitting for GHG emissions sources in the future – how significant is yet to be determined. The mandatory reporting rules, which became effective at the end of 2009, are in their first stage of implementation this quarter, but are still evolving and new source categories are expected to be covered by the end of 2010. In addition, the courts are considering what role they may play in addressing the implications of climate change, with the Fifth Circuit Court of Appeals set to rehear the case of *Comer v. Murphy Oil in May*. Finally, the SEC has also taken steps to remind businesses that climate change risks need to be considered along with all other types of financial risks. All are topics of great importance to US businesses as they attempt to deal with the current climate of uncertainty surrounding regulation of GHGs and the costs it may impose.

Regards,

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### Impact of New Light-Duty Vehicle GHG Rule

*By Allen A. Kacenjar Jr. and D. Alan Lindsey*

Although it was released on April Fool's Day, EPA's Light-Duty Vehicle Greenhouse Gas Emissions Standards trigger serious consequences for major stationary sources regulated by the Clean Air Act (CAA). Jointly issued by US EPA and the National Highway Traffic Safety Administration (NHTSA), the rule establishes limits on GHG emissions under the CAA for the first time.<sup>1</sup> As a

<sup>1</sup> *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, Fed. Reg. (forthcoming 2010).

result, GHGs are now regulated air pollutants subject to permitting obligations. In an attempt to mitigate the widespread resulting impacts, US EPA also just issued its “Reconsideration Rule” which confirms that stationary sources will require GHG permits, but not until January 2, 2011.

### Highlights of the Reconsideration Rule<sup>2</sup>

Under the CAA, facilities that emit 250 or more tons per year (tpy) (or 100 tpy for certain sources) of a “regulated pollutant” are “major sources” subject to permitting and emissions control requirements. Prior to issuance of the Reconsideration Rule, US EPA asserted that an air pollutant became a “regulated NSR pollutant” when it was subject to “actual control.” However, the underlying guidance never explained exactly when “actual control” came about. The Reconsideration Rule now provides an answer to that question: PSD permitting requirements do not apply to newly regulated pollutants (like CO<sub>2</sub>) until a regulatory requirement to control emissions actually “takes effect.”

### Highlights of the Motor Vehicles Rule

The April 1, 2010 Motor Vehicle Rule creates just such a regulatory requirement for CO<sub>2</sub>. Starting with model year 2012, new passenger cars, light-duty trucks and medium-duty passenger vehicles are required to limit emissions of certain GHGs. By model year 2016, automakers will be required to achieve average fleetwide emissions of 250 grams of CO<sub>2</sub> per mile – equivalent to 35.5 miles per gallon if achieved solely through fuel economy improvements. Allowable emission standards for each vehicle within a fleet are based on the “footprint” of the vehicle measured in square feet. The larger the vehicle, the greater the allowable emissions. US EPA is developing several ways in which manufacturers can earn credits toward the fleetwide average CO<sub>2</sub> standards including improving air conditioning systems, flex fuel vehicle credits, temporary lead time allowances and advanced technology credits.

<sup>2</sup> *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 170004(April 2, 2010).

### Key Implications of the New Rules

US EPA’s finalization of the Motor Vehicle Rule ends any debate over whether GHGs are regulated pollutants under the CAA. Now, they are. Taken together, the Motor Vehicles and Reconsideration Rules will bring GHG limits into stationary source permits for the first time. While the Reconsideration Rule ostensibly applies to any newly regulated pollutant, it was written to establish GHG permitting deadlines. Applying its new test, US EPA determined that the Motor Vehicles Rule officially “takes effect” on January 2, 2011 – the earliest point in time that a model year 2012 vehicle could be sold in the United States. Thus, GHG preconstruction and operating permits (for at least some sources) will be required starting on January 2, 2011.

Although these new rules shed significant light on the GHG regulatory picture, numerous ambiguities remain. For example, US EPA’s related Tailoring Rule has yet to be finalized and will establish highly disputed measures to phase-in GHG permitting obligations which could defer permitting requirements for smaller sources by several years. Similarly, the Reconsideration Rule does not define precisely when a permit will be deemed “issued” for purposes of meeting the January 2, 2011 deadline for GHG permitting. This appears likely to be a point of significant contention as environmental organizations seek to delay issuance of preconstruction permits for large projects to ensure that GHG limits attach. Similarly, the interim role to be played by individual states remains open, since US EPA specifically indicated it would not object to attempts by state permitting authorities to control GHG emissions more quickly.

US EPA’s new rules also arguably reset the practical deadline for Congress to pass climate change legislation. Prior to passage of the health care bills, the likelihood of final climate change legislation in 2010 was effectively zero. It now seems at least plausible – though still far from certain – that Congress may pass climate change legislation in some form this year.<sup>3</sup> Simultaneously, the

<sup>3</sup> There are at least two bills currently pending in Congress that would deprive US EPA of the authority to take any regulatory action absent legislation. Those actions remain pending while a

Reconsideration Rule has already been appealed to the DC Circuit Court of Appeals, with others sure to follow under competing theories advanced by environmental groups and industry.

#### What Can I Do About All of This?

As in any rapidly changing regulatory environment, those who help steer the process and prepare in advance have a far better chance of successfully adapting. Given the shifting dynamics of GHG regulation, potentially affected facilities should:

- Engage in and carefully monitor trade group activity to ensure that their interests are fully represented
- Identify and conduct direct efforts where special concerns or conflicts exist that may limit effective group advocacy
- Ensure ongoing compliance with the Reporting Rule, which required establishment of final GHG Monitoring Plans by April 1, 2010
- Estimate GHG emissions for new sources and proposed modifications of existing sources to assess permitting implications
- Evaluate all permits currently in the pipeline to assess the impact of GHG permitting obligations, including the prospect of BACT limits
- Prepare for permit challenges, particularly where significant CO<sub>2</sub> emissions, first-time BACT determinations or coal combustion are involved
- Establish internal processes to track GHG legislative, regulatory and litigation developments and identify trends that impact business planning
- Update business and financial plans to account for new costs and opportunities created by the changing regulatory environment

Sound advice, strong advocacy and careful planning on these topics are key to understanding the intricacies of

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compromise climate change bill is worked out by Senators John Kerry, Lindsey Graham and Joe Lieberman. That bill is expected to be introduced on Earth Day, April 22, 2010.

climate change regulation and navigating carefully to limit its impact on your operations.



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## The GHG Mandatory Reporting Rule Is Final and New Additions Are on the Horizon

*By Jessica E. DeMonte and Timothy J. Peterkoski*

On October 30, 2009, US EPA issued a final rule requiring the monitoring and reporting of annual GHG emissions,<sup>4</sup> known generally as the GHG Mandatory Reporting Rule. *See Mandatory Reporting of Greenhouse Gases*, 74 Fed. Reg. 56260 (October 30, 2009). US EPA estimates that the rule applies to more than 10,000 sources in the United States including both direct GHG emission sources as well as fuel suppliers and heavy-duty vehicle manufacturers. It does not require control of GHG emissions but does require certain sources to monitor and report on their GHG emissions. The rule went into effect December 29, 2009 and implementation has been put on the fast track. Initially covered sources were required to begin collecting the necessary GHG emissions data by January 1, 2010. Further, US EPA is already seeking to expand the rule's scope to cover additional GHG sources. On March 22, 2010 US EPA proposed a four-part rule package that would amend the GHG Mandatory Reporting Rule to encompass additional source categories.<sup>5</sup> It anticipates

<sup>4</sup> The rule requires monitoring for the following GHGs emissions: (1) carbon dioxide, (2) methane, (3) nitrous oxide, (4) hydrofluorocarbons, (5) perfluorocarbons, and (6) sulfur hexafluoride and other fluorinated gases.

<sup>5</sup> *See Mandatory Reporting of Greenhouse Gases: Petroleum and Natural Gas Systems*, 75 Fed. Reg. 18607 (April 12, 2010); *Mandatory Reporting of Greenhouse Gases: Corporate Parent and NAICS Code In Greenhouse Gas Reporting Rule*, 75 Fed.

finalizing these proposed amendments by the end of this year.

### Effective GHG Mandatory Reporting Rule

The GHG Mandatory Reporting Rule currently in effect applies to fuel and gas suppliers and vehicle manufacturers as well as GHG emitters. With regard to GHG emitters, the rule applies primarily to facilities that emit 25,000 metric tons of carbon dioxide equivalent (CO<sub>2</sub>e) per year or more from all covered source categories at their facility. However, certain industries have source categories that are automatically covered and are thus required to report regardless of the quantity of CO<sub>2</sub>e emitted. These “all in” sources categories include the following industry sectors 1) electricity generation, 2) aluminum production, 3) ammonia manufacturing, 4) cement production, 5) petrochemical production, 6) petroleum refineries and 7) soda ash manufacturing. Industry sectors that are not “all in” are only required to report emissions if they emit 25,000 metric tons CO<sub>2</sub>e or more per year from all source categories at their facilities. Sources within exempt industry sectors or that are not “all-in” still need to evaluate applicability under the existing rule because individual emission sources at these facility types may still subject them to reporting requirements. For example, stationary fuel combustion sources (i.e., boilers, combustion turbines, engines, incinerators or process heaters) at any facility are subject if they exceed the 25,000 metric ton CO<sub>2</sub>e threshold. Accordingly, a facility must evaluate each source category separately to assess applicability.

Small GHG emitters (less than 25,000 metric tons) are also not subject to the rule. Instead, to account for direct emissions from these small emitters, the rule requires fuel and gas suppliers to report the GHG emissions that could be emitted from combustion or use of the quantity of fuels or industrial gases they supply into the economy. This permits US EPA to estimate and track GHG emissions from downstream sources.

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Red. 18455 (April 12, 2010); *Mandatory Reporting of Greenhouse Gases: Additional Sources of Fluorinated GHGs*, 75 Fed. Reg. 18651 (April 12, 2010); *Mandatory Reporting of Greenhouse Gases: Injections and Geologic Sequestration of Carbon Dioxide*, 75 Fed. Reg. 18575 (April 12, 2010).

If subject to the rule, a source must monitor, collect and report data on GHG emissions. Initially subject GHG emission sources needed to begin collecting GHG emission data no later than January 1, 2010. However, beginning on April 1, 2010 facilities were required to start collecting data using the mandated monitoring equipment, processes and methods set forth in the rule. Before the April 1 deadline, sources could collect such data using less-stringent monitoring techniques known as best available monitoring methods (BAMM). The mandated requirements have been set on an industry or source category basis and require certain sources to utilize flowmeters to track fuel usage while others must have continuous emission monitors (CEM) that directly measure GHG emissions in real time.<sup>6</sup> Subject GHG emitters were also required to prepare by March 31, 2010 a GHG monitoring plan that included, at a minimum, (1) the identity of the person or position responsible for collection of emissions data, (2) an explanation of the processes and methods used to collect the required data and (3) a description of the maintenance and quality assurance methods used to maintain the collection instrumentation.

Subject GHG emitters will also have to submit an annual GHG report. The first annual report will be due no later than March 31, 2011. If, however, based upon monitoring over 2010, a source is below the 25,000 metric ton CO<sub>2</sub>e threshold then it will not be required to submit this initial annual report (unless it is an “all in” source). Once a source reports emissions, however, it is required to continue reporting annually unless it (1) has five consecutive years of emissions below 25,000 metric tons CO<sub>2</sub>e, (2) has three consecutive years of emissions below 15,000 metric tons CO<sub>2</sub>e or (3) shuts down its GHG-emitting processes or operations.

Fuel and gas suppliers subject to the rule also have an annual reporting obligation. They are required to report on the quantity of product introduced into the economy and

<sup>6</sup> US EPA has issued a series of information sheets detailing individual source or industry sector requirements which can be accessed at [http://www.epa.gov/climatechange/emissions/ghg\\_infosheets.html](http://www.epa.gov/climatechange/emissions/ghg_infosheets.html) for further detail on the applicable monitoring and collection requirements for individual sources or industries.

the estimated GHG emissions if 100-percent oxidation of fuels or release of gases resulted from use of that quantity. Vehicle manufacturers, likewise, have to report annually on emissions from vehicles or engines supplied to the marketplace in a given year. Starting with model year 2011, the manufacturers will need to report on calculated CO<sub>2</sub> emissions. Reporting on other GHGs will be required for subsequent model years as well.

The rules require all emission data submitted to be self-certified by the submitting facility or supplier. However, US EPA also intends to verify emissions data by quality assurance procedures, consistency checks and onsite audits.

#### **Proposed Amendments to GHG Mandatory Reporting Rule**

The new amendments proposed by US EPA on April 1, 2010 would expand the source categories covered by the GHG Mandatory Reporting Rule and require additional GHG reporting for certain categories. For example, under the proposals, petroleum and natural gas industry facilities, (including onshore and offshore production facilities), gas transmission facilities and storage facilities, that emit 25,000 metric tons of carbon dioxide equivalent or more annually would be required to report on vented and fugitive methane and carbon dioxide emissions. US EPA estimates that there are approximately 3,000 additional sources covered by this source category addition. Additionally, certain source categories including facilities in electronics manufacturing, fluorinated gas production, electric transmission and distribution equipment manufacturing or use, would be required to collect and report on fluorinated GHGs. US EPA estimates that there are approximately 385 sources within this category. If adopted, these newly covered industries would be required to start data collection by January 1, 2011 with a first annual report due on March 31, 2012.

The new amendments would also cover facilities that inject carbon dioxide underground for the purposes of geologic sequestration (a potential mitigation strategy) or enhanced oil and gas recovery. Facilities that conduct geologic sequestration would be required to develop a site-specific monitoring strategy and plan for detecting potential emissions and to account for the total amount of carbon

dioxide sequestered. The first annual reports of injection amounts would be due to US EPA by March 31, 2012.

US EPA also proposed to amend the GHG Mandatory Reporting Rule to require subject facilities to report additional information on their corporate structure, including ownership and corporate parent information, NAICS codes and whether emissions from the facility include emissions from a co-generation unit.

#### **Conclusion**

The GHG Mandatory Reporting Rule is not just final, but is evolving. Facilities need to understand its requirements as well as the changes that are coming down the pike. .



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## **Disclosing Climate Change Impact**

*By Geoffrey K. Barnes*

Will climate change, or governments' response to it, have a material impact on your business? Companies with a public reporting obligation that have not yet addressed that question were recently reminded by the Securities and Exchange Commission (SEC) that they need to.

On February 10, 2010 in a split decision along party lines, the SEC issued an Interpretive Release providing clarification of obligations related to material financial risks relating to climate change. (The 29-page Release is available at <http://www.sec.gov/rules/interp/2010/33-9106.pdf>). The SEC's guidelines do not alter any existing legal requirements, but instead clarify the climate related developments that must be considered, along with other financial risks. The Release identified a non-exclusive list of four areas of climate related risks that may trigger reporting requirements:

- Impact of legislation and regulation (including positive consequences, e.g., profits from sales of allowances or credits under a “cap-and-trade” system);
- Impact of international accords (e.g., Kyoto and the UN Convention on Climate Change);
- Indirect consequences or opportunities of regulation on business trends (e.g., increase or decrease of demands for existing products or services); and
- Physical impacts (e.g., where sea levels or severe weather may materially impact operations).

The Release also reviewed provisions of existing Regulation S-K under which climate change risks would be reported, including: Item 101 (requiring disclosure of material effects on capital expenses, earnings and competitive position, as well as disclosure of material estimated capital expenditures for environmental controls); Item 103 (requiring description of material pending legal proceedings, as well as governmental proceedings involving potential monetary sanctions exceeding US\$100,000); Item 303 (requiring disclosure of known trends, material events and uncertainties); and Item 503 (requiring description of “risk factors”).

The practical significance of the Release is unclear, other than as an indication of the SEC’s view of factors that a reporting company should consider in evaluating the need to disclose material impacts of climate change. The Release offered no guidance on how a company is to resolve the complex, uncertain and often conflicting views of “facts” that must be ascertained in evaluating the likelihood or materiality of climate change impacts – including potential “physical impacts” such as sea-level change or extreme weather events. In announcing the Release, SEC Chairman Mary Schapiro noted “[w]e are not opining on whether the world’s climate is changing, at what pace it might be changing, or due to what causes.”

Shortly after the Release was issued, ASTM International published a “Standard Guide for Financial Disclosures Attributed to Climate Change”, E2718-10, approved March 15, 2010, “to provide a series of options or instructions

consistent with good commercial and customary practice for climate change-related disclosures accompanying audited and unaudited financial statements.” The ASTM Guide is intended for use on a voluntary basis in determining whether a disclosure is warranted, and to assist in determining the content of disclosure, as a supplement to any other requirements imposed by law, regulations or contract. The ASTM Guide closely parallels the language of the Release, and reviews factors that should be considered, although it provides little if any additional guidance on how to resolve the many uncertainties in evaluating potential climate change impacts.

While climate change is only one of many events that could have a material impact on a reporting company, it was singled out by the SEC partly in response to continuing pressure from a variety of groups seeking to improve corporate environmental policies. For example, in 2008 and again in 2009, interested parties filed petitions with the SEC to issue interpretive guidance on climate change disclosure. In issuing the Release, the SEC indicated that it may initiate additional guidance or rulemaking on climate change disclosures this year. In short, the SEC and interest groups will likely maintain a heightened focus on climate change disclosure for the foreseeable future.

In view of the Release and the continuing attention of the interest groups that helped prompt it, public reporting companies that might be significantly affected by climate change should to take a fresh look at their disclosure procedures to ensure that they have considered the issues the Release raised. Among other things, those companies will want to ensure they have a system in place to monitor legislative and regulatory changes at all governmental levels, and to periodically re-evaluate the assumptions underlying their disclosure positions.



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## 5th Circuit Court of Appeals Poised to Address the Availability of Climate Change-Related Tort Claims

By Karen A. Winters

The 5th Circuit Court of Appeals sitting *en banc* is scheduled to rehear the case of *Comer et al. v. Murphy Oil USA et al.*, No. 07-60756 (5th Cir. Oct. 16, 2009) in May 2010. An October 16, 2009 decision of a three-judge panel of that court allowed climate change related tort claims for damages related to the ravages of Hurricane Katrina to proceed over defense objections as to the threshold issues of standing and justiciability. The arguments relative to rehearing will focus primarily on the limits of judicial authority, and whether the issue of regulation of GHGs is a matter of national policymaking as opposed to judicial fact finding. The case is being closely watched as another indicator of the role the courts may play with respect to addressing the implications of climate change in the absence of comprehensive federal climate change legislation.

The plaintiffs, residents and property owners in Coastal Mississippi, filed a putative class action against a host of companies involved in the energy, fossil fuels and chemicals industries, alleging that each emitted substantial amounts of GHGs that contributed to global warming. Plaintiffs further contend that those emissions caused a rise in sea levels, ultimately adding to Hurricane Katrina's ferocity, destroying or damaging the plaintiffs' property. The defendants moved to dismiss plaintiffs' claims on the grounds that the plaintiffs lack standing to assert their claims and that their claims present nonjusticiable political questions. The district court granted the motion and dismissed the claims. The plaintiffs appealed.

The focus on appeal relative to the plaintiffs' standing to bring the claims was the second prong of the federal standing inquiry established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); that the plaintiffs had not shown that the harms alleged were "fairly traceable" to the defendants' actions. The defendants argued that traceability was lacking insofar as: "(1) the causal link between emissions, sea level rise, and Hurricane Katrina is too attenuated, and (2) the defendants' actions are only

one of many contributions to GHG emissions, thereby foreclosing traceability." *Id.* at 10. The court rejected the argument, finding it was "misplaced" at this early stage of the litigation. The court noted that that similar arguments were rejected by the US Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497(2007) which it described as having adopted a causal chain "virtually identical in part" to the one alleged by the plaintiffs which extended one step further to include US EPA's failure to have regulated GHG emissions from motor vehicles as allowing motor vehicles to emit more GHGs than they would have, thus contributing to global warming. The court also cited the Supreme Court's recognition that injuries may be fairly traceable to actions that contribute to, rather than solely or materially cause, GHG emissions and global warming. *Id.* at 12.

The defendants also argued that the issues presented by the case were "political questions" rather than justiciable issues for the courts to decide. The court rejected this argument as well, finding that:

...[t]he most that defendants legitimately could argue is that in the future Congress may enact laws, or federal agencies may adopt regulations, so as to comprehensively govern GHG emissions and that such laws or regulations might certain aspects of state common law tort claims. Until Congress, the president or a federal agency so acts, however, the Mississippi common law tort rules questions posed by the present case are justiciable, not political, because there is no commitment of those issues exclusively to the political branches of the federal government by the Constitution itself or by federal statutes or regulations.

The panel concluded that the plaintiffs did indeed have standing to assert their public and private nuisance, trespass and negligence claims and that none of these claims present nonjusticiable political questions. Accordingly, the district court decision was reversed and the plaintiffs' claims for nuisance, trespass and negligence remanded to the district court for further proceedings.

The rehearing is set against the backdrop of US EPA's finalization of its response to the US Supreme Court's decision in *Massachusetts v EPA*, *supra*, and its further advancement of regulation of GHGs under the CAA. In late 2009, US EPA concluded that current and projected concentrations of greenhouse wastes in the atmosphere threaten public health and welfare and combined emissions of these gases from new motor vehicles and new motor vehicle engines cause or contribute to that GHG air pollution and threaten public health and welfare. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202 (a) of the Clean Air Act*, 74 Fed. Reg. 66496 (December 15, 2009). With this predicate "endangerment" finding, US EPA, along with the National Highway Safety Administration, just this month finalized a joint rule establishing GHG emission standards and corporate average fuel economy standards for light duty vehicles. In March 2010, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards: Final Rule, Fed. Reg. (forthcoming 2010). US EPA is expected to finalize shortly its proposed rule to "tailor" major source applicability thresholds for GHG emissions under Prevention of Significant Deterioration and the Title V programs. *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55291 (October 21, 2009).

The panel opinion is the second decision by a three judge panel of a federal circuit court of appeals to allow GHG related tort claims to proceed over preliminary objections as to standing and justiciability. *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2nd Cir. 2009) and a September 2009 Squire Sanders' *Climate Change Alert* "Key Appellate Decision Expands the Potential for GHG Nuisance Claims." A subsequent petition for rehearing and rehearing en banc filed in that case was denied. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009) (petition for rehearing en banc denied Mar. 5, 2010). A third case where a district court reached an opposite conclusion has made its way to the 9th Circuit Court of Appeals where it is currently in the briefing stages. *Native Village of Kivalina et al. v. ExxonMobile Corporation*

*et al*, 663 F.Supp. 2d 863 (N.D. Cal. 2009), appeal docketed, No.09-17490 (9th Cir. Nov. 6, 2009).



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