



November 30, 2009

## ADDED IMPETUS FOR CLIMATE CHANGE LITIGATION

## ENERGY/ENVIRONMENTAL LAW ALERT

As noted in our November 6th Energy/Environmental Alert on the [“Impact of Recent Litigation on the Climate Change Debate.”](#) two recent federal appellate court decisions offer the potential for substantial impacts on greenhouse gas (GHG) emitters and their insurers. In *Connecticut v. American Electric Power Co.*, No. 05-5104 CV, September 21, 2009, the U.S. Court of Appeals for the Second Circuit ruled that public entities and public interest groups could sue major GHG emitters to force them to ratchet down their emissions. Shortly thereafter, the Fifth Circuit, in *Comer v. Murphy Oil Co.*, No. 07-60756, October 16, 2009, ruled that private plaintiffs had standing to sue the GHG emitters for damages suffered by them allegedly as a result of climate change. Both decisions merely permitted plaintiffs to attempt to prove their cases and are not final judgments. Nonetheless, the low bar that they set for standing could make summary judgment unlikely in future cases. Since GHG regulation and/or legislation appear likely in the reasonably near term, these cases also create the specter of emitters being subject to both federal compliance obligations and liability under federal common law. This double-edged liability exposure creates the potential for unintended adverse consequences.

Recently, the Environmental Protection Agency (EPA) sent its “endangerment finding” to the Office of Management and Budget (OMB) for its review. This rule, proposed at 74 Federal Register 18885 (April 24, 2009), presumably will determine that GHG emissions endanger the public health and welfare. This finding triggers regulation of these emissions under the Clean Air Act (CAA) regulations which EPA has already proposed. OMB has 90 days to review this regulation.

This finding may have implications on major GHG emitters’ disclosure obligations under securities laws. Public companies have long been required to disclose environmental issues which, broadly speaking, might have a material effect on their business, liquidity or financial condition. Such companies are also required to disclose any material information necessary to make their disclosures not misleading. It seems arguable that major GHG emitters should have begun reporting such emissions no later than the decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the Supreme Court ruled that GHG is a “pollutant” under the CAA and that EPA is authorized to regulate GHG emissions from new motor vehicles if it determines that such emissions endanger the health and welfare of the American public.

This point is emphasized by settlements that New York Attorney General Andrew Cuomo has reached with three major utilities. Last week, AES Corp. agreed to disclose material risks associated with climate change in its reports to the SEC, which will include potential liability related to the physical impacts of climate change, climate change legislation and regulation and climate change related litigation. AES will also disclose its carbon emissions, projected increases in emissions, its plans for reducing, offsetting or managing emissions and any associated corporate governance action. Dynergy, Inc. and Xcel Energy previously entered into similar settlements.

The combination of a final endangerment ruling, the Second and Fifth Circuits decisions and the precedents arising out of Cuomo’s campaign to force disclosure clearly suggests, not only that careful attention be paid to the SEC disclosure requirements, but also that efforts

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be made to assure consistency with both internal analyses and public statements on the subject. Since securities laws filings are public documents, they could provide a “road map” for potential litigants in common law cases. At the same time they are federal filings and false statements in them can give rise to both civil and criminal liability. Variance between SEC filings, public statements, regulatory disclosures or discovered internal analyses could create substantial exposure.

Potential litigants’ mapping efforts and the risk of disclosure-related liability will be further enhanced by the recently finalized GHG reporting rule. 74 Federal Register 56260 (October 30, 2009). This requires facilities emitting 25,000 metric tons per year of CO<sub>2</sub> or its equivalent and suppliers of 25,000 TPY of fossil fuels or industrial GHGs to report to EPA. The final regulation, which takes up 250 pages of very small print in the Federal Register, becomes effective January 1; the first reports are due by March 31, 2011 for calendar year 2010. These reports are generally available to the public and can be withheld as confidential business information only in extremely limited circumstances.

This self reporting of GHG emissions by major emitters will provide significant guidance concerning such emissions for potential litigants. Obviously, the ease of obtaining data to support a complaint adequate to withstand summary judgment could encourage further climate change litigation. This required self reporting emphasizes the importance of the recommendations made in our November 6 Alert. First, careful reexamination of reporting mechanisms to ensure adequacy and consistency is clearly needed. Second, insurance coverage, and the impact of any prior environmental coverage litigation, should be carefully assessed. Third, a concentrated effort to persuade EPA to clearly circumscribe the effect of its regulations and, where appropriate, include language in its regulations preempting or displacing common law should be made. Finally, a concerted effort should be made to persuade Congress to take the threat of common law liability into account in the legislation it enacts, and to include appropriate language preempting or displacing liability for both past and future conduct.

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