Climate Alert

WILMERHALE

The Perfect Storm: Congress, EPA and the Courts Tackle Climate Change

The last two weeks in September offered a perfect storm of federal activity on climate change, with significant developments in all three government branches. On September 21, 2009, the U.S. Court of Appeals for the Second Circuit decided *State of Connecticut et al. v. American Electric Power Company, Inc., et al.*, opening the door for litigation by public and private entities opposing climate change through "public nuisance" theories. On September 30, 2009, the U.S. Environmental Protection Agency ("EPA") announced two proposals setting forth its plan for regulating greenhouse gases ("GHGs") under existing Clean Air Act authority. That same day, Senators Kerry and Boxer released the long-awaited Senate climate change legislation.

It is uncertain whether the specter of EPA regulation of GHGs and/or potential litigation-driven control of major sources of GHGs will prompt swing senators to support the Kerry-Boxer legislation. It is certain, however, that companies and institutions involved in climate change at all levels, from electric utilities to building owners, from financial institutions to industrial facilities, will face consequences flowing from one or more of these developments. Rarely have all three branches of the federal government acted on an issue as important as climate change in such a concentrated timeframe. In this Climate Alert we discuss the legislation, the Agency's proposed regulations, and the Second Circuit decision (and two subsequent federal decisions), and identify some of the more critical ramifications and key action items to the wide range of interested entities.

Senate Climate Change Legislation

The Clean Energy Jobs and American Power Act ("CEJAPA") tracks the climate change legislation that the House of Representatives passed on June 26, 2009 (H.R. 2454, the American Clean Energy and Security Act of 2009) in many ways. There are also, however, some fundamental differences, as well as some significant gaps that must be filled in as various Senate Committees (six) review and markup CEJAPA.

The legislation is split into two "divisions"—the first addresses broad topics such as GHG reduction programs, research, and transition and adaptation, while the second division creates new Titles VII and VIII of the Clean Air Act, setting forth the GHG reduction targets and containing the basics of the cap and trade program.

Division 1–Greenhouse Gas Reduction Programs. The first division establishes many of the same type of programs as the House legislation, including clean transportation, carbon capture and storage, clean energy, energy efficiency and renewable energy. It requires EPA to set a goal for building efficiency and promulgate rules to establish a national energy efficiency building code for residential and commercial buildings. It creates grant and loan programs to encourage innovative energy technologies and to establish domestic and international adaptation measures, including green job training and worker transition initiatives.

Presumably most, if not all, of these programs will be funded by distributing carbon emission allowances, or revenues generated from the auction of those allowances. This initial Senate bill, however, does not detail how allowances, or revenue from the auction of allowances, will be distributed. These details will be filled in as the legislation moves through the various committee and subcommittee markups.

While the House legislation noted nuclear energy in passing, the Senate bill includes language designed to ensure that nuclear power is a part of any new energy regime. It establishes a general goal—safe and clean nuclear energy—and calls for grant money to train workers in the nuclear field and research money for improved nuclear waste management.

The House bill contained more specific provisions addressing federal energy policy that are not included in CEJAPA. However, separate Senate energy legislation does deal with some of those issues. That legislation (S.1462–the American Clean Energy Leadership Act) was reported out of the Energy Committee this summer, and it is possible that the energy legislation and CEJAPA may be merged into one comprehensive bill that looks more like ACESA.

Division 2–Cap and Trade. The second portion of CEJAPA includes the cap and trade program, although the Senate has decided that a more appropriate (and politically acceptable) term is a "pollution reduction program." While the GHG reduction targets are initially more aggressive than those set in the House bill—a 20% reduction by 2020 from 2005 levels (as compared to a 17% reduction in the House legislation)—the long range target of an 83% reduction by 2050 is the same as in the House bill.

The scope of the cap and trade program is similar to that in the House legislation. Covered entities will be required to hold emission allowances for each ton of CO_2 equivalent emitted during the prior calendar year. The universe of covered entities is functionally identical to that in ACESA—electric utilities, oil companies, large industrial sources, and several other categories of sources that emit greater than 25,000 tons per year of CO_2 equivalent ("covered entities"). The program will be phased in over a four-year period identical to the phase-in under ACESA (electricity generators and refiners/importers of petroleum-based liquid fuels in 2012, covered industrial entities in 2014, and natural gas LDCs in 2016).

As was the case with the original House "discussion draft" released by Rep. Waxman, many significant issues remain open and will be the subject of vigorous debate, including some fundamental concepts that are addressed in CEJAPA only with a "sense of the Senate" placeholder provision.

Allowances. The Senate legislation does not contain a specific scheme for disbursing the allowances to covered entities (i.e., allocated or auctioned). It does, however, identify three broad goals of the allocation process—protecting consumers from energy price increases, assisting industry in transitioning to clean energy, and spurring energy efficiency and the deployment of clean energy technology.

As occurred in the House, the specifics of where allowances are allocated or how auction proceeds should be distributed will be addressed as the legislation proceeds through the Senate. Anecdotal evidence suggests the starting point for these discussions may be concepts in ACESA as passed, with the majority of allowances/distributions going to protect electricity consumers against increases in energy prices. Based on the ACESA experience, expect that the precise distribution will likely be determined as a matter of political deal making in the search for the requisite 60 votes.

Cost Containment and Offset Measures. The legislation contains several mechanisms that are designed to control the cost of compliance and the price of emission allowances—namely, an offsets program, banking and trading provisions, a flexible compliance scheme, and a so-called soft price collar.

Offsets. Offsets, which are GHG reductions resulting from activities by third parties and sold or transferred to covered sources, are designed to provide both flexibility and cost-containment in cap-and-trade programs. By allowing offsets to be used to meet compliance obligations, covered entities have compliance options—reduce their own GHG emissions, or finance projects undertaken by third parties in

return for the offsets. Subject to certain conditions, CEJAPA authorizes the use of offsets by covered entities to meet their compliance obligations. Similar to ACESA, there is an aggregate annual national cap on the available volume of creditable offsets. The 2 billion ton cap is divided between offsets generated domestically and internationally; however, unlike ACESA where the split is 50/50, under CEJAPA no more than 25% may be generated from international projects. The legislation also seeks to promote domestic offset projects by requiring that, beginning in 2018, covered entities must surrender 5 tons of internationally-created offset credits for each 4 tons of emissions offset.

Like ACESA, the Senate legislation contains prescriptive requirements for the creation, approval, verification, use and transfer of offsets. However, while ACESA delegates authority to promulgate the program requirements to either EPA or the Department of Agriculture, CEJAPA reserves that authority to the President (in consultation with appropriate Federal agencies). This is a critical issue, particularly for legislators representing agricultural interests who want the Department of Agriculture to craft an offset program that promotes and protects agricultural offsets from farm and forestry projects.

A viable offsets market is critical to the success of any cap and trade program. Several issues will be at the top of the agenda, and will be closely debated during the Senate debate over offsets, including:

- What volume of offsets may be used annually;
- How international offsets will be discounted or capped;
- Limits on credits issued pursuant to State programs;
- Which entity will promulgate and implement the offset program rules; and
- How the Department of Justice will structure its offsets integrity office, which will investigate and enforce the carbon offsets program.

Banking, Trading and Flexible Compliance Scheme. CEJAPA provides for unrestricted trading/selling of GHG emission allowances. Allowances will be issued and tracked, and transactions recorded, under a new system to be developed by EPA. The legislation would also establish a flexible compliance scheme that would allow unlimited banking of allowances for use in future compliance periods, and effectively creates a two-year compliance period by permitting covered entities to borrow allowances from the next calendar year "without interest"—there is no limit on the number of subsequent year allowances that can be borrowed.

Covered entities would also be able to borrow allowances two to five years in the future, subject to two conditions: those allowances may cover only 15% or less of their total compliance obligation, and they must pay a "premium" to do so (annually retire 8% of the allowances borrowed).

Soft Price Collar. The Senate bill would also create a "market stability reserve," similar to the strategic reserve program in ACESA, to reduce fluctuations in allowance prices. EPA would set aside a certain number of allowances each year, and auction them quarterly to covered entities. Minimum price for 2012 allowances would be $28/ton (the same as the initial minimum price under the ACESA strategic reserve program). That minimum would increase annually by 5%, plus inflation, until 2018, where the increase would be 7% plus inflation. There are other restrictions as well: the total number of reserve allowances cannot exceed 15% of the total allowances for the years 2012-2016 (25% thereafter), only covered entities may purchase the allowances, and they can only use allowances purchased from the reserve to cover up to 20% of their total compliance obligation.

While cost containment mechanisms are subject to change, it is likely that most of the debate will center on the offset program.

State Program Issues. Like ACESA, the Senate bill would preserve existing state authority to implement GHG/climate change regulatory programs and, it also prohibits states from enacting or enforcing state or local programs that cap emissions of GHGs before the year 2018. However, the Senate version allows states to implement their own cap and trade program if the federal program is delayed.

Beginning in 2018, states may implement and enforce a cap and trade program that is more stringent than the federal program, leading to the potential for multiple and competing requirements on covered sources. Other provisions will allow covered entities that received allowances prior to 2012 under the RGGI program, the California AB32 program, and the Western Climate Initiative to exchange those allowances for allowances that can be used in the federal program.

Clean Air Act Pre-Emption. The Senate bill differs significantly from ACESA with respect to EPA's ability to regulate GHGs under existing CAA authority and programs. ACESA prohibits EPA from addressing GHGs under several existing CAA programs (including the air toxics and Prevention of Significant Deterioration (PSD) programs). There is no such prohibition in the Senate bill.

This issue is likely to be hotly debated, especially in light of the Agency's recent regulatory activities, discussed above, and the concern among some lawmakers about EPA's willingness to regulate GHGs beyond cap and trade.

Regulation of Carbon Markets. The current public discussion regarding market manipulation and the need for increased regulatory oversight of trading markets in general will likely result in some form of comprehensive regulatory oversight. How to regulate carbon markets, how stringent that oversight should be, and who the regulator(s) should be, are all hot button issues. Legislators desire regulation/oversight, but despise over-regulation. The House ultimately created a bifurcated system, giving the Federal Energy Regulatory Commission ("FERC") jurisdiction over the "spot" or cash carbon trading market and reserving jurisdiction over the carbon allowance derivative markets to the Commodity Futures Trading Commission ("CFTC").

The Senate held a series of hearings, but could not resolve the market oversight issue. CEJAPA includes a "sense of the Senate" provision calling for a single, integrated carbon market oversight program. This effectively consigns the issue to the Committee on Agriculture, Nutrition and Forestry, which likely will draft the legislative language that will ultimately appear in the Senate bill.

Competitiveness, Trade and Carbon Leakage. The Senate also has struggled with the issue of how to ensure that U.S. manufacturers are not put at a disadvantage. Trade and energy intensive sectors have advocated for provisions protecting them from such economic disadvantage. The House included both an "allowance rebate" and a "border adjustment" system. The latter touched off a spirited debate over potential World Trade Organization (WTO) consistency and protectionism.

This debate continues in the Senate. CEJAPA includes an allowance rebate program pursuant to which certain industrial sectors will receive "rebates" to compensate for additional costs incurred under the program. EPA will be required to promulgate regulations implementing the rebate program and identifying industrial sectors eligible for the rebate program. The legislation contains eligibility parameters in the context of energy, greenhouse gas and trade intensities, and sectors such as aluminum, chemicals, cement, glass, pulp and paper, and steel likely will qualify for the rebate.

The bill does not include a "border adjustment" clause, but has another "sense of the Senate" provision indicating that the final bill will include a "border measure that is consistent with our international obligations and designed to work in conjunction with" the allowance rebate provisions.

Next Steps. At least six Senate committees have jurisdiction over portions of CEJAPA, and many fundamental issues are unresolved. Several committees are in the process of holding hearings on issues under their jurisdiction, and while Senate leadership has not set a firm date by which committees must report out legislative language, there is some momentum behind setting the Thanksgiving recess as the

deadline. With so much attention focused on health care legislation, it may be difficult to meet that deadline.

EPA Regulatory Developments

EPA continues to engage in a number of administrative actions addressing GHGs. On September 22, 2009, EPA issued a final regulation establishing a mandatory GHG reporting rule; the Agency is also finalizing two related regulations: one would make a Clean Air Act "endangerment" finding for GHGs emitted from motor vehicles (proposed at 74 Fed.Reg. 18885 (April 24, 2009)); the other would set emission standards for light duty vehicles that specifically include standards for GHG emissions (proposed at 74 Fed.Reg. 49454 (Sept. 28, 2009)).

On September 30, 2009, EPA published two more regulatory proposals relevant to GHG sources. The first clarifies when the Agency believes GHGs are "regulated CAA pollutants." Ever since *Massachusetts v. EPA*, the Agency has struggled to answer the question "is CO_2 subject to regulation under the Act" such that New Source Review/Prevention of Significant Deterioration ("PSD") permitting requirements apply. Environmental groups have intervened in several PSD permitting processes, seeking to force EPA or state authorities to apply PSD requirements to GHGs. The issue has been the subject of several administrative proceedings, judicial decisions and Agency interpretations.

In the October 7 (74 Fed. Reg. 51535) proposal, EPA articulated five alternatives for determining when an air pollutant is "subject to regulation under the Act" and therefore a "regulated NSR pollutant." The Agency appears to be leaning towards adopting the position taken by the Agency in former Administrator Johnson's December 18, 2008 memorandum—that a pollutant becomes subject to regulation when the pollutant is subject to emission limits under a final national rule.

EPA consistently has taken the position that GHG specific emission standards for motor vehicles are exactly the type of regulations that render GHGs "subject to regulation" under the Act. EPA expects to finalize the GHG motor vehicle standards in early 2010 (likely before any "subject to regulation" rule). Once these standards are finalized, the issue will be moot with respect to GHGs. Nevertheless, EPA likely will proceed to finalize the regulations so that its interpretation of "subject to regulation" will be in place for the next new CAA pollutant.

The second proposal would establish the framework for applying permitting requirements to major stationary GHG sources under existing Clean Air Act authority. Once GHGs are deemed regulated NSR pollutants, the Agency faces a potential permitting nightmare under the Clean Air Act because "major sources" of regulated pollutants are subject to two significant permitting programs—preconstruction PSD permits for new and modified major sources, and operating permits for new and existing major sources. The statutory thresholds for major source status are 100/250 tons per year (depending on the type of source), and EPA admits that millions of stationary GHG sources exceed those thresholds, including high schools, multi-family and single-family residential units, and the corner coffee-donut store.

If those thresholds apply to GHG sources, the number of new major sources, or major modifications of existing sources, that will trigger preconstruction PSD permitting requirements (including a Best Available Control Technology ("BACT") review) would overwhelm permitting authorities. EPA estimates that the current annual rate of approximately 300 PSD permit applications would swell to more than 40,000 if the statutory thresholds are applied. As a result, EPA further estimates that the time it would take to get a PSD permit would increase by more than three years.

In addition, all existing major sources would be subject to the complex and cumbersome Title V operating permit requirements under the Clean Air Act. EPA estimates this would increase the number of covered sources from 15,000 to over six million, with 97% of those newly covered sources in the residential and commercial sector.

To avoid the absurdity (and administrative impossibility) of requiring permits for so many sources, the Agency has announced a proposed "phased, tailored" approach to these issues. In the first phase of this program, the Agency will define a major stationary source of GHGs as one that emits greater than 25,000 tons per year[1], the threshold EPA set in the mandatory GHG reporting rule. EPA also proposes to define the significance level for emission increases from modifications at between 10,000 and 25,000 tons per year.

EPA estimates that more than 14,000 sources would be considered major sources under this threshold (including 3,000 that do not have Title V permits), and that an additional 400 new sources or major modifications would be subject to PSD review and permitting per year. The associated burden on permitting authorities will be far more manageable than if the statutory threshold were applied.

Under the proposal, stationary sources with covered emissions and Title V operating permits would not be required to act under this program until their next operating permit renewal, when the permittee would be required to estimate GHG emissions (in CO_2E) in its renewal application—presumably using data generated pursuant to the mandatory GHG reporting rule.

For sources that trigger PSD permitting pursuant to this proposal, the burden is not limited to the time and resources necessary to go through the PSD permitting process. A critical question will be what constitutes BACT for GHG emissions. EPA has been analyzing the issue in several ongoing PSD permitting efforts, and the Agency may look to include design changes (such as integrated gasification combined cycle coal-fired power plants), process changes (such as fuel switches), and efficiencies as control options that must be evaluated in the BACT process.

There are questions as to whether EPA has the authority to interpret "major source" to mean something narrower than the 100/250 tons per year statutory definition. The Agency explains that it is not redefining the term, but rather implementing the statute in phases, with the first phase covering those sources with emissions of greater than 25,000 tons. EPA says it will evaluate the program after five years to determine whether changes are needed or expansion to smaller sources is warranted.

The Agency is almost certain to face a challenge to any regulation that defines the GHG permitting threshold, regardless of where the threshold is set. In the meantime, the regulated community, environmental advocacy groups, state permitting agencies, and EPA will continue to struggle with the issue of how to permit major sources of GHGs under the CAA.

Climate Change Litigation

The judicial branch has not been idle on the issue of GHGs. A myriad of pending federal lawsuits allege damages resulting from, or seek injunctive relief to mitigate the effects of, climate change. Conventional wisdom has been that plaintiffs in such lawsuits have a hard time overcoming two main hurdles: (a) demonstrating causation sufficient to satisfy standing requirements, and (b) convincing a federal court that the underlying issue is not a "nonjusticiable political question" reserved to the executive and/or legislative branches. In *State of Connecticut et al. v. American Electric Power Company, Inc., et al.* (Nos. 05-51-4-cv, 05-5119-cv (2d Cir. Sept. 21, 2009))("*Connecticut v. AEP*"), the U.S. Court of Appeals for the Second Circuit addressed both of these issues in a manner that many believe will prompt other federal courts to allow such lawsuits to go forward. In fact, one subsequent decision (from the U.S. Court of Appeals for the Fifth Circuit) follows *Connecticut v. AEP* closely, while another, from the District Court for the Northern District of California, comes down on the other side of both of the issues. Collectively, these decisions illustrate the willingness of the courts to address these issues absent regulatory or legislative direction.

In *Connecticut v. AEP*, states and private land trusts seek injunctive relief from six companies that own or operate coal fired power plants. Plaintiffs claim that defendants' annual combined contribution of more

than 650 million tons of carbon dioxide constitutes a public nuisance, on the basis of defendants' contribution to climate change. The complaint includes a laundry list of actual and threatened injuries ranging from harm to individual states (reduction in the snowpack in California affecting the states' drinking water sources, beach erosion and an increase in illnesses/death due to more extreme heat waves) to harm to land held in trust (property inundated by sea level rise, destruction of forests due to increases in smog). Plaintiffs allege that defendants are jointly and severally liable for creating, contributing to or maintaining a public nuisance, and they seek a permanent injunction requiring that carbon dioxide emissions from the defendants' facilities be capped and reduced over time.

Defendants moved to dismiss, arguing plaintiffs lacked standing and that the court was precluded from addressing the claims under the separation of powers doctrine because they involve non-justiciable political questions. The district court agreed, and dismissed the cases in 2005 on non-justiciability grounds, declaring that it would be "…impossible to decide the case without an initial policy determination of a kind clearly for nonjudicial discretions."[2] The district court noted that both Congress and EPA have "deliberately" declined to act on climate change, finding that a court "cannot impose by judicial fiat the kind of relief that Congress and the Executive Branch have specifically refused to impose."[3]

The Second Circuit, after careful (more than three years) review, reversed, and in a 139-page opinion refuted each of the arguments advanced by the defendants. In determining that the separation of powers doctrine did not divest the court of jurisdiction and that the plaintiffs pled the requisite standing, the Second Circuit made several significant findings:

- Where the remedies sought by plaintiffs are limited to injunctive relief from six companies, not a comprehensive solution to climate change, a court may resolve the issues without making the policy determinations cited by the district court;
- Until EPA acts to regulate greenhouse gases, or Congress enacts GHG legislation, common law nuisance claims are not displaced by the Act, and courts can and should act to fill the gaps;
- States have standing to bring public nuisance claims in the climate change field to protect their citizens;
- Owners of real property held for the public trust may bring public nuisance claims, based on potential injuries to that property arising from climate change;
- The injuries alleged in a public nuisance lawsuit are sufficiently imminent where the defendants' alleged conduct is ongoing and expected to continue;
- The causation component of standing is met by showing that there is a substantial likelihood that defendants' conduct caused the harm.

Based on these findings, the Second Circuit reversed and remanded the case to the district court for further proceedings.

Just more than a week after the Second Circuit decision, the District Court for the Northern District of California dismissed plaintiffs' common law climate change nuisance claims against 24 oil, energy and utility companies. *Native Village of Kivalina v. ExxonMobil Corporation et al.*, No. C 08-1138 SBA (N.D.Ca. Sept. 30, 2009). Plaintiffs sought up to $400 million in damages against the defendants for injuries to the Village of Kivalina, which plaintiffs allege must be relocated due to rising sea levels that threaten to submerge the village. Plaintiffs allege that greenhouse gas emissions from defendants' facilities contribute to the global warming that is causing the sea level rise.

The defendants raised the same set of issues in their motion to dismiss as had defendants in *Connecticut v. AEP*, and the district court reached the same conclusions as the district court did in *Connecticut v. AEP*, dismissing the case for lack of subject matter jurisdiction. The court held that the case would require the

court to balance the social utility of defendants' conduct with the harm it inflicts—a policy decision that the court said was best left to the executive and/or legislative branch. In support of its reasoning, the court indicated that it was not willing to make the policy judgment that the defendants should be the ones to bear the total cost of the plaintiffs' alleged injuries especially where plaintiffs readily admit that there are many more contributors to global warming than the 24 defendants. Also, alluding to the Second Circuit's holding, the court determined that there are not sufficient principles or standards to guide it in deciding the global climate change issues raised by plaintiffs.

The court also found it impossible to trace the specific effect of global warming that is alleged to be causing or contributing to plaintiffs' injuries to greenhouse gas emissions from a specific source. As a result, the court concluded that the injuries alleged by plaintiffs were not fairly traceable to defendants' actions, and that the plaintiffs did not have standing.

A little more than two weeks after the district court decision in *Kivalina*, the Fifth Circuit Court of Appeals issued a decision in *Comer v. Murphy Oil Co.* (No. 07-60756 (5th Cir. Oct. 16, 2009)), a case brought by residents/owners of land along the Mississippi Gulf coast against several energy, fossil fuel, and chemical companies. Plaintiffs are seeking damages under trespass, public and private nuisance, and negligence theories, alleging that defendants' emission of greenhouse gases contributes to global warming, which cause a rise in sea levels and an increase in water temperatures, which, in turn, exacerbated the effects of Hurricane Katrina on the plaintiffs' property. The issues of standing and justiciability again rose to the forefront in defendants' motion to dismiss.

The district court dismissed the case on justiciability grounds. The court opined that plaintiffs were asking the court to develop broad policies and standards that courts are not empowered to make and that are best left to the executive and legislative branches. The court did not reach the defendants' causation-based standing argument.

As in *Connecticut v. AEP*, the Fifth Circuit reversed and found that the plaintiffs have standing to raise the nuisance, trespass and negligence claims. The court rejected the argument that the injuries were not traceable, stating that the defendants' position would require that the court evaluate the underlying merits of the claims at the motion to dismiss stage. Here, plaintiffs' complaint alleges a chain of causation—relying on scientific reports—between defendants' conduct and the alleged injuries, and at this stage of the proceeding the court must accept the allegations as true.[4]

The court found that the issue of whether defendants are liable under the common law theories of nuisance, trespass or negligence has not been committed to the executive or legislative branch. The court acknowledged that if Congress or EPA acted to "comprehensively" regulate emissions of greenhouse gases, the common law theories might be preempted. Until such statutes or regulations are in place, however, there is no preemption. As did the Second Circuit, the court held judges are well equipped to apply common law standards to adjudicate the liability of the defendants. In a footnote, the court stated that "Although we arrived at our own decision independently [of the Second Circuit], the Second Circuit's reasoning is fully consistent with ours."[5] The Fifth Circuit remanded to the district court for further proceedings.

Implications and Ramifications. These three decisions add to the questions and uncertainties arising in the context of climate change litigation. All three cases have, to date, followed an identical procedural path: dismissal on justiciability grounds at the district court level, with two reversed on justiciability (with affirmative findings on standing) by the courts of appeals. The decisions heighten industry concerns that we are likely to see an increase in similar nuisance suits in the absence of federal legislation or regulation.

These decisions all came at the preliminary stages of the litigation, and all will be subject to further appeal. The Second Circuit decision was a panel of two judges (Justice Sotomayor was on the panel that heard the case), so an en banc review is not out of the question, and the *Kivalina* case is almost certain to be appealed to the Ninth Circuit.

With respect to causation, both appeals court decisions were at the motion to dismiss stage, not on the merits. As the Fifth Circuit noted in *Comer v. Murphy Oil*, pleading causation sufficient to satisfy a standing inquiry does not reduce plaintiffs' burden to prove causation in the litigation.

The two courts of appeals decisions do give rise to the potential for increased numbers of state and federal nuisance-based climate change lawsuits. As is the case with past standing and justiciability decisions, the opinions include road maps on issues such as pleading causation for standing and rebutting claims of non-justiciability. As cases proceed to trial, district court judges may become, in essence, the initial regulatory authorities for climate change.

Stationary sources undergoing Clean Air Act permitting with significant greenhouse gas emissions face the unsettling risk that, even after successfully navigating the permitting process for traditional CAA pollutants, they may still have to address greenhouse gases, potentially in a litigation context. If the plaintiffs in *Connecticut v. AEP* are successful, the defendants will face judicially-imposed carbon dioxide emission caps that decrease over time, and without the flexibility that is likely to be present in a cap and trade program. The specter of courts setting permit parameters is less than ideal, especially for those familiar with the history of the PSD and NSR programs under the Clean Air Act.

For those who hope that the climate change legislation or regulation will automatically "displace" common law nuisance lawsuits, there is language in the Second Circuit's opinion that should give pause. In its displacement analysis, the Court clearly indicated that in order to displace common law nuisance claims, the relevant statute or regulation must "speak directly" to the "particular issue" raised in the claim. So, for example, if EPA issues final regulations imposing greenhouse gas tailpipe standards on automobiles, the Second Circuit could say that this regulation would not displace a common law suit against a stationary source or group of stationary sources.

These appellate decisions are perceived in some quarters as the biggest potential drivers for Congressional action on climate change. Many people involved in the climate change debate agree that comprehensive legislation would be the most appropriate and most efficient means to address climate change issues. The question may be whether the concern about litigation, combined with discomfort regarding EPA's apparent strategy for regulating GHGs under current CAA authority, will generate enough Senate support to pass CEJAPA.

Conclusion

With Congress and EPA slowly moving forward in parallel on climate change, and with the risk that judicial decisions will fill gaps pending final legislation or regulation, it is increasingly challenging to stay abreast of significant developments. Any federal legislation or regulation will have widespread applicability. Businesses should identify and fully understand the issues that are critical to your company. It is also critical to watch litigation developments; in addition to the three cases discussed above, numerous GHG-based lawsuits are pending in federal and state courts, and history offers examples of many environmental regulatory programs that are implemented, to some degree, pursuant to mandates issued by the judicial branch.

If you have questions about the legislation, regulations or litigation and their implications, contact one of the authors of this note, or call your WilmerHale lawyer.

---

[1] The proposal would cover six specific GHGs, and emissions are measured in CO_2 equivalents (CO_2E).

[2] *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp. 265, 271-72(S.D.N.Y. 2005).

[3] *Id.*

[4] The Fifth Circuit cites extensively to the Supreme Court's opinion in *Massachusetts v. EPA* on this issue, specifically the Court's acceptance as "plausible" that there are links between greenhouse gas emissions and global warming, between global warming and rising ocean temperatures, and between increased ocean temperatures and increased ferocity of hurricanes.

[5] *Comer v. Murphy Oil Co.*, slip op. at 29.

FOR MORE INFORMATION ON THIS OR OTHER ENVIRONMENTAL MATTERS, CONTACT:

Kenneth R. Meade +1 202 663 6196 kenneth.meade@wilmerhale.com

Robert C. Kirsch +1 617 526 6779 rob.kirsch@wilmerhale.com

Wilmer Cutler Pickering Hale and Dorr LLP is a Delaware limited liability partnership. Our United Kingdom offices are operated under a separate Delaware limited liability partnership of solicitors and registered foreign lawyers regulated by the Solicitors' Regulation Authority (SRA No. 287488). In Beijing, we are registered to operate as a Foreign Law Firm Representative Office. Wilmer Cutler Pickering Hale and Dorr LLP principal law offices: 60 State Street, Boston, Massachusetts 02109, +1 617 526 6000; 1875 Pennsylvania Avenue, NW, Washington, DC 20006, +1 202 663 6000. This material is for general informational purposes only and does not represent our legal advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all relevant legal developments. Prior results do not guarantee a similar outcome. © 2004-2009 Wilmer Cutler Pickering Hale and Dorr LLP

wilmerhale.com