



Climate Change Update

RECENT DEVELOPMENTS REGARDING CLIMATE CHANGE

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Climate Change Update is a publication of Weil, Gotshal & Manges that provides timely and practical updates on significant legal, business and political developments related to domestic and international efforts to reduce greenhouse gas emissions and how those efforts impact corporations.

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Some Like it Hot – Conditions Ripe for Proliferation of Climate Change Litigation

Both opponents and proponents of more stringent US government regulation of greenhouse gas (“GHG”) emissions are likely to look back on 2009 with mixed emotion. The passage of the American Clean Energy and Security Act (H.R. 2454) was hailed as a domestic policy breakthrough, the first time a bill addressed specifically at tackling climate change passed either chamber of the U.S. Congress. The U.S. Environmental Protection Agency (“EPA”) issued a finding that GHG emissions endanger the public health and welfare, signaling its willingness to regulate GHG emissions under the Clean Air Act (“CAA”). On the other hand, climate change legislation is stalled in the Senate, and certain members of Congress are attempting to strip EPA of its authority to regulate GHG emissions. Moreover, results of the widely anticipated and publicized global talks in Copenhagen aimed at producing a successor agreement to the Kyoto Protocol did not result in a binding international agreement to reduce global GHG emissions. For all stakeholders in the climate change debate, the net result of these developments is continued uncertainty as to if, or how, the legislative or executive branches of the federal government will address climate change. This regulatory vacuum is pulling the judiciary into the center of the climate change debate.

Recent developments in the Second and Fifth Circuits underscore the potential that courts could become the *de facto* regulatory authority on GHG emissions and climate change and an unwelcome source of liability for corporate emitters of GHGs. In addition, legal challenges have been mounted by opposing camps in the climate change debate both to slow and expedite governmental regulation of GHG emissions. If anything is certain, court proceedings over the effort to regulate GHG emissions and damages related to climate change are just beginning.

Recent Federal Appeals Court Rulings Have Shifted the Climate Litigation Landscape and Increased the Risk of Corporate Liability

With all the focus on statutory and regulatory mechanisms to regulate GHGs, some states, environmental groups and private individuals have turned to common law to try to regulate GHGs and recover damages for harm allegedly incurred due to the impact of climate change. Three cases currently pending in separate circuits of the federal court system have revived the debate over whether common law claims such as nuisance can be used to ultimately produce regulatory action on climate change. Plaintiffs’ interim victories in two of these cases also increase the potential that corporations will face additional litigation risk with regard to climate change suits.

Connecticut v. American Electric Power Co.

On September 21, 2009, the U.S. Court of Appeals for the Second Circuit held in *Connecticut v. American Electric Power Co.* (No. 05-5104) (2nd Cir. 2009) (“*Connecticut*”)

that a group of states and environmental groups could sue several electric utility companies because the utilities' GHG emissions create a "public nuisance." In the underlying suit,¹ eight states (Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin), along with the City of New York and several private land trusts, sued six electric utility companies seeking to limit the "public nuisance" of global warming. Claiming to represent the interests of over 75 million people, as well as their economies and environments, the plaintiffs alleged that the energy utilities are the largest emitters of carbon dioxide in the US and are collectively responsible for "ten percent of worldwide carbon dioxide emissions from human activities." The plaintiffs seek via the suit to force each of the electric utilities "to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage per year for at least a decade." In a ruling similar to the small number of other climate change-related nuisance lawsuits that have been dismissed at the federal level, the district court granted the defendants' motion to dismiss on the grounds that the case raised nonjusticiable political questions that went beyond the court's jurisdiction.²

The plaintiffs appealed the ruling to the Second Circuit and oral argument on the matter was held in June 2006. After more than three years, the court issued an opinion that addresses and refutes every argument put forth by the defendant-appellees, including defendants' assertions that:

- plaintiffs-appellants' claims are nonjusticiable political questions;
- plaintiffs-appellants lack standing, i.e., the legal right to file a lawsuit

or file a petition under the circumstances, to file this suit;

- plaintiffs-appellants fail to state claims under the federal common law of nuisance; and
- plaintiffs-appellants' common law claims should be "displaced" by the CAA.

The Second Circuit remanded the case back to the district court, which must now rule on the plaintiffs' claim that the defendants have created a public nuisance through their emissions of GHGs.

Comer v. Murphy Oil USA, et al.

Soon after the Second Circuit's decision in Connecticut, the Fifth Circuit Court of Appeals issued a similar ruling in *Comer v. Murphy Oil USA, et al.*, 585 F.3d 855 (5th Cir. 2009) ("*Comer*"). In *Comer*,³ fourteen private plaintiffs sued numerous coal-using utilities, chemical companies and fossil fuel producers, alleging that the defendants' carbon dioxide emissions contributed to human-caused global warming, which warmed the waters in the Gulf of Mexico and increased the frequency and severity of hurricanes, including Hurricane Katrina. Plaintiffs, who are residents and owners of land and personal property along the Mississippi Gulf Coast impacted by Hurricane Katrina, advanced their claims under legal theories of private nuisance, trespass, negligence, civil conspiracy, unjust enrichment, fraudulent misrepresentation and concealment. The plaintiffs sought damages for loss of property, loss of income, cleanup expenses, loss of loved ones and emotional distress. The district court dismissed the suit on standing and political question grounds, and plaintiffs appealed the ruling to the Fifth Circuit Court of Appeals, which heard oral arguments in November 2008.

On October 16, 2009, the Fifth Circuit reversed the district court's political question ruling, and held that the plaintiffs had standing to assert their claims of nuisance, trespass and negligence. In its ruling, the court stated that the plaintiffs' claims do not "present any specific question that is exclusively committed by law to the discretion of the legislative or executive branch." The court also decided that the plaintiffs had satisfied the standing requirement by demonstrating that they had suffered an "injury in fact;" that this injury was "fairly traceable" to the defendants' actions; and that the alleged injury would "likely . . . be redressed by a favorable decision." Similar to the Second Circuit's ruling in *Connecticut*, the Fifth Circuit emphasized in its decision that the plaintiffs did not need to conclusively prove in its pleadings that the defendants' conduct caused their injuries. The court remanded the case back to the district court where the plaintiffs will now face the difficult task of proving that the defendants' actions proximately caused plaintiffs' injuries.⁴

Native Village of Kivalina, and the City of Kivalina v. ExxonMobil Corporation et al.

Another federal court nuisance claim attracting attention, especially in light of the *Connecticut* and *Comer* rulings, is *Native Village of Kivalina, and the City of Kivalina v. ExxonMobil Corporation et al.*, Case No. CV 08-1138 ("*Kivalina*"). In *Kivalina*, the community of Kivalina, Alaska, brought a public nuisance action against 24 large emitters of GHGs for the cost of relocating the island community. The plaintiffs alleged that the defendants' GHG emissions contributed to climate change which, in turn, caused the breakup of sea ice that previously protected the island. On September 30, 2009, the U.S. District Court for the Northern

District of California dismissed the complaint on the basis that it was a nonjusticiable claim under the political question doctrine. The district court extended its reasoning to hold that the plaintiffs lacked standing due to a failure to demonstrate causation. The district court held that “even accepting the allegations of the Complaint as true and construing them in the light most favorable to Plaintiffs, it is not plausible to state which emission – emitted by whom and at what time in the last several centuries and at what place in the world – ‘caused’ Plaintiffs’ alleged global warming related injuries.” The *Kivalina* plaintiffs filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit on November 5, 2009.

Implications – Will Court Decisions Spur Legislative Action or Increase the Risk of Corporate Liability Related to Climate Change Suits?

The *Connecticut* and *Comer* decisions have many observers questioning whether judicial action on climate change will lead to federal legislative or regulatory action. The Obama Administration acknowledges that federal inaction on climate change increases the likelihood of a splintered judiciary regulating GHG emissions on a case by case basis. Carol M. Browner, President Obama’s senior adviser for energy and climate change, emphasized the potential for court decisions to affect policy in a briefing with reporters in September 2009. Citing the *Connecticut* case, Ms. Browner warned that “the courts are starting to take control of this issue,” and argued that setting environmental standards “is best done through legislation.”⁵ Ms. Browner suggested that rulings like the one in *Connecticut* increase the pressure on Congress to pass legislation to curb

emissions of GHGs and noted that the EPA is drafting regulations on GHG emissions as dangerous pollutants under the CAA.⁶

Plaintiffs’ recent breakthroughs in the federal courts open the door for a litany of lawsuits and increase corporations’ exposure to climate change suits, especially if emitters are found responsible for causing or contributing to climate change. The *Connecticut* and *Comer* courts’ holdings that municipalities and private citizens can assert nuisance claims against particular emitters based on allegations of current and future injury associated with climate change significantly expands the universe of plaintiffs who could potentially bring climate change suits. This, in turn, increases the likelihood that additional nuisance lawsuits will be filed against industrial emitters of GHGs seeking monetary damages and injunctive relief. Although climate change litigation is in its formative stages, and no monetary judgments have been issued in favor of plaintiffs, at least one large insurer, General Re, is on record stating that climate change liability “could become a significant issue within the next couple of years.”⁷

Despite increasing fear amongst potential defendants, plaintiffs bringing climate change nuisance suits who clear the standing and justiciability hurdles will still find issues related to causation especially difficult to prove. Establishing 1) that climate change exists and 2) how, and to what extent a particular emitter’s contribution to climate change caused a specific plaintiff’s alleged injuries may be an insurmountable barrier to many plaintiffs hoping to secure damages or an injunction in court. That said, defenses related to causation may provide limited solace to defendants as plaintiffs’ issues of

proof are balanced by the fact that a plaintiff will not necessarily need to secure a judgment in its favor in order to increase the defendants’ exposure. Litigation can be costly and discovery could elicit information that could potentially create public relations issues or increase the likelihood of settlement. Additional court decisions that increase emitters’ risk of exposure to climate-related lawsuits could ultimately persuade industries who previously may not have been in favor of climate change legislation to support a federal plan to regulate GHGs given the uncertain alternative of juries deciding complex climate change issues.

Regulatory Agencies Will Be in Plaintiffs’ Crosshairs Regardless of the Regulatory Action Taken

In addition to tort-based litigation where plaintiffs are seeking damages or injunctive relief, there has been an increase in climate change-related litigation aimed at federal and state government agencies and authorities. These cases generally fall at either end of a continuum, in that, certain parties are challenging governmental authorities for taking too active a stance on regulating climate change while other groups are suing government agencies for not doing enough. Plaintiffs are filing claims in order to challenge both domestic and foreign proposed regulation and to force governments to take action under laws that are already in effect. Moreover, an increasing number of plaintiffs are also using litigation to challenge governmental agencies with regulatory control over specific projects, such as coal-fired power plants, or the issuance of permits related to those projects. Clearly, opponents and proponents of climate change regulation view the courts as a means of advancing their respective

interests and this type of climate change litigation is likely to proliferate whichever regulatory path governmental authorities choose to take.

Challenges To Prevent or Delay Governmental Regulation – EPA’s Proposed Endangerment Finding

The Supreme Court effectively ruled in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that the EPA has an obligation to regulate greenhouse gases under the CAA. As a result of the Supreme Court’s decision, the EPA Administrator signed two distinct findings regarding GHGs under section 202(a) of the CAA. On December 7, 2009, the EPA issued these Endangerment and Cause or Contribute Findings, opening the door to EPA regulation of GHGs under the CAA, which are already facing a court challenge.⁸ On December 23, 2009, seven companies and trade associations filed a Petition for Review in the U.S. Court of Appeals for the D.C. Circuit. *Coalition for Responsible Regulation et al. v. U.S. Environmental Protection Agency*, No. 09-1322.⁹ The plaintiffs’ petition is the first step in seeking an appeals court ruling to overturn the EPA’s endangerment finding, which the plaintiffs believe lacked a sufficient basis to find that GHG emissions present a risk to human health. Substantive motions are due in February 2010 and, based on the comments submitted in June 2009 by many of these same plaintiffs challenging the EPA’s findings, the plaintiffs’ challenge is likely to focus on the quality of the scientific evidence the EPA relied upon and the process the EPA employed to support its findings.

State Governments Are Not Immune from Legal Challenges with Respect to State Actions on Climate Change

Another class of climate change cases illustrates that governmental authorities not only need to defend the

actions they take to regulate climate change but also the actions they fail to take. *Public Citizen v. Texas Commission on Environmental Quality et al.*, No. 1-GN-09-002426, complaint filed (Tex. Dist. Ct., Travis County Oct. 6, 2009) shows that state governments are not immune to these types of claims. On October 26, 2009, Public Citizen, a public advocacy group, sued the Texas Commission on Environmental Quality (“TCEQ”) and each individual TCEQ commissioner over the state’s failure to regulate carbon dioxide emissions under the Texas Clean Air Act. Public Citizen, relying on *Massachusetts v. EPA*, requested that the court enter a judgment that, among other things, declares certain TCEQ rules invalid because they purport to allow the unlimited emission of carbon dioxide by coal and petroleum coke-fueled power plants. The plaintiffs also sought a declaratory judgment to force the agency to allow parties to present testimony and other evidence on carbon dioxide, global warming and climate change in contested case hearings.

Parties advocating for GHG emissions reductions also are turning to the permitting process as a means to delay or halt the continued use or expansion of coal-fired power plants as these types of power generation facilities are known to emit significant quantities of GHGs. Despite these efforts, most of the lawsuits have failed in their attempts to block proposed new coal plants or modify existing facilities. For example, in *Sierra Club v. EPA*, No. 06-3907, 2007 U.S. App. LEXIS 20215 (7th Cir. Aug. 24, 2007), environmental organizations brought an action under the CAA seeking to reverse EPA’s issuance of a Prevention of Significant Deterioration (“PSD”) permit for a coal-fired electricity plant. The plaintiffs argued that the coal plant should be required

to obtain low-sulfur coal from a further distance in order to reduce their total emissions. The court declined to order the requirement and agreed with the EPA that the request amounted to a redesign of the facility. The court ruled that the EPA’s determination regarding the use of lower emission coal at the facility should be left to the EPA’s discretion and that a source redesign is not required to be in compliance with the PSD program.

Another example is *Sierra Club v. Johnson* 541 F.3d 1257 (11th Cir. 2008), where the plaintiffs’ environmental organizations challenged PSD permits granted to two Georgia coal-fired plants. After the permits were issued by state authorities, the EPA Administrator declined to formally object and halt the process despite the EPA’s subsequent issuance of a notice of violation. The plaintiffs argued that the EPA Administrator must object to the issuance of the facility’s operating permits due to the defendant’s CAA noncompliance. The court held that the agency retained the discretion to object and any violations issued were merely early steps in determining whether a violation had occurred. Ultimately, the court denied the petition for review and decided the EPA Administrator’s actions were not arbitrary or capricious.

Cross-border Challenges by American Interests

US-based interests that operate internationally are even challenging climate initiatives in foreign courts. In December 2009, American Airlines, Continental Airlines, United Airlines and the US Air Transport Association filed an application in the English Administrative Court for a judicial review of their inclusion in the European Union’s Emissions Trading Scheme (“EU ETS”). The airlines are arguing that the EU does not have

the power under the Convention on Civil Aviation 1944 (the “Convention”) to apply the EU ETS unilaterally to non-EU airlines that fly in and out of the EU.

The UK government has been given responsibility within the EU for managing the involvement of US airlines in the EU ETS and it is the UK regulations, issued for that purpose in September of 2009, that are the immediate subject of the legal challenge.¹⁰ Those regulations lay the foundation for the inclusion of aviation emissions in the EU ETS from January 2012. The UK government plans to defend the challenge and, due to its Europe-wide significance, will seek to have the case referred directly to the European Court of Justice.

The English courts are traditionally reluctant to overturn the will of the legislature in the absence of exceptional reasons and it is also unusual for foreign entities to seek judicial review of domestic UK law, but there is a point of substance at issue in this case. In 2007, the International Civil Aviation Organization agreed under the Convention that emissions trading schemes should only be applied to flights if there is agreement between both the departing and destination countries. The rule was adopted immediately before the EU included aviation in the EU ETS and EU member states swiftly lodged reservations, indicating that they do not regard themselves as covered by the agreement.

Conclusion

Climate change litigation appears likely to escalate and the risk to corporations of incurring liabilities related to climate change litigation appears to be increasing. Private plaintiffs are likely to be emboldened by federal circuit court decisions such

as *Connecticut* and *Comer* to bring additional nuisance claims against GHG emitters for current and future liabilities alleged to have arisen due to climate change. Moreover, states, municipalities and private parties are increasingly likely to use the court system, at home and abroad, as a means to influence federal government action on climate or corporate behavior with respect to emissions. We will continue to monitor and report on significant developments in climate change litigation in order to advise our clients on how best to assess the risk and manage the uncertainty inherent in this rapidly developing area of law.

1 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

2 The political question doctrine is typically used when the federal judiciary declines to insert itself into what it views as conflicts between branches of the federal government. It is justified by the notion that there exist some questions best resolved through the political process, including congressional action or voters approving or correcting the

challenged action by voting for or against those involved in the decision.

3 No. 05-CV-436 (S.D. Miss. 2006).

4 The *Connecticut* and *Comer* appellees filed petitions for rehearing *en banc*, which are currently pending. It is also plausible that appellees in either case may seek Supreme Court review of the circuit court decisions.

5 John Schwartz, “Courts as Battlefields in Climate Fights,” *New York Times*, January 27, 2010.

6 *Id.*

7 The Globalization of Collective Redress: Consequences for the Insurance Industry, 2009, http://www.swissre.com/resources/7249eb804e42012db8a8bcb8626ab849-Publ09_FR_Globalisation_en.pdf

8 On December 7, 2009, the EPA Administrator signed two distinct findings regarding GHGs under section 202(a) of the CAA: 1) that the current and projected concentrations of the six key GHGs in the atmosphere threaten the public health and welfare; and 2) new motor vehicles and engines cause or contribute to GHGs of current and future generations.

9 The Petitioners in this matter are: the National Cattleman’s Beef Association; the Coalition for Responsible Regulation Inc.; Industrial Minerals Association-North America; Great Northern Project Development L.P.; Rosebud Mining Co.; Massey Energy Co. and Alpha Natural Resources.

10 Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009 (SI 2009/2301).

SEC Issues Guidance on Climate Change Disclosures

Perhaps spurred on by the increases in climate change litigations, the United States Securities and Exchange Commission (“SEC”), on February 2, 2010, published an interpretive release (the “Release”) to provide guidance to reporting companies on the impact that climate change issues have on existing SEC disclosure requirements. The Release is effective immediately and does not create new reporting requirements or modify existing ones, but rather seeks to clarify when a reporting company should consider disclosing the material impacts that climate change developments have on its business.

The Release cites evolving climate change legislation and regulation, shareholder demands for greater climate change disclosure, the increasing amount of information that reporting companies disclose outside of their SEC filings and historical SEC disclosure requirements concerning environmental matters as reasons why climate change disclosure guidance is warranted for reporting companies. Activists shareholder groups such as Ceres and some institutional investors, including CalPERS, have long called for such guidance and heralded the Release as an important step towards expanding

investor knowledge. The Release was also applauded by New York Attorney General Andrew Cuomo, who had not only filed a petition with the SEC calling for such disclosure guidance, but also had investigated power companies under state law to determine whether they had properly disclosed to investors the financial risks posed by climate change. Attorney General Cuomo's investigations led to settlements with Xcel Energy, Dynegy and AES Corp, requiring that each company disclose risks associated with their greenhouse gas emissions.

The Release seeks to resolve some of the uncertainty on the part of reporting companies regarding what, exactly, should be disclosed. Specifically, the Release focuses on four existing disclosure requirements and four climate change issues that may need to be discussed within the framework of those existing disclosure requirements. The following is a summary of the four existing disclosure requirements where the Release suggests that climate change issues may need to be discussed.

- **Item 101 (Description of Business):** Item 101 requires a description of the general development of a reporting company's business, including the business of its subsidiaries. This Item specifically requires disclosure as to the "material effects that compliance with Federal, State and local provisions...may have upon capital expenditures, earnings and competitive position of the registrant and its subsidiaries." Material estimated capital expenditures for "environmental control facilities" are also required to be disclosed for the current and succeeding fiscal year "and for such further periods as the registrant may deem material."

- **Item 103 (Legal Proceedings):** Item 103 requires a brief description of any material legal proceeding to which a reporting company or any of its subsidiaries is a party. Instruction 5 to Item 103 specifically requires disclosure with respect to legal or regulatory environmental proceedings if: (A) such proceeding is material to the business or financial condition of the registrant; (B) such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or (C) a governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than \$100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.

- **Item 303 (Management's Discussion & Analysis of Financial Condition and Results of Operations):** Item 303 (normally referred to as the MD&A) requires a reporting company to discuss its financial condition, changes in financial condition and results of operations and is intended to provide a narrative explanation of the registrant's financial statements and an assessment of variables that may impact future results. Although there is no specific line item addressing environmental issues, Item 303 and the corre-

sponding MD&A interpreting releases issued by the SEC are broad enough to require disclosure of any environmental matter that management believes may have a material effect on financial condition or operating performance.

- **Item 503 (Risk Factors):** Item 503 requires a separate section that discusses "the most significant factors that make an investment in the registrant speculative or risky."

The Release also noted the following four examples as ones that may trigger climate change disclosures under the above discussed disclosure rules and regulations.

- **Impact of Legislation and Regulation:** The impact of current and proposed climate change laws and regulations may require disclosure under several of the Items listed above. For example, the Release states that laws or regulations capping greenhouse gas emissions could require disclosure of material estimated capital expenditures for environmental control facilities under Item 101. In addition, risk factor disclosure relating to the negative impact such laws or regulations may pose on a registrant's business may be required. MD&A disclosure may also be required if legislation or regulation is reasonably likely to have a material adverse effect on the registrant's financial condition or operating performance. The Release additionally pointed out that discussion should not be limited to negative consequences and that appropriate disclosure should be given in the MD&A, for example, if changes in law were to provide new opportunities for reporting companies.

- **Impact of International Accords:** Similar to US law and regulation, companies should assess the impact that existing international accords (such as the Kyoto protocol and the European Union Emissions Trading System) and future ones may have on its disclosure obligations. The same analysis given to domestic laws and regulations should therefore be given to international accords and disclosure may be required for several of the Items listed above.
- **Indirect Consequences of Regulation or Business Trends:** Companies should assess the actual or potential indirect consequences it may face as a result of climate change related regulation or business trends. For example, disclosure may be required where a product is linked to the emission of significant greenhouse gas emissions, which could make the product subject to additional

regulation or decreased market demand. That said, discussion of business trends should not be limited to those that result in negative consequences – trends resulting in positive consequences such as new business opportunities and markets should also be disclosed.

- **Physical Impacts of Climate Change:** Companies should assess the actual and potential material impacts of environmental matters on its business. For example, the Release points to risks posed by adverse weather to businesses with operations or properties on coastlines, disruptions to supply chains, increased insurance claims and liabilities for insurance and reinsurance companies as well as increased premiums and deductibles for those seeking insurance and negative agricultural impacts. As with the other climate change issues

discussed above, disclosure concerning the physical impacts of climate change may be required under more than one Item.

In determining whether climate change issues should be disclosed within the existing regulatory requirements, the Staff of the SEC confirmed that reporting companies should continue to assess materiality using the standards previously announced by the Supreme Court, which defines something as material if “[there is a] substantial likelihood an investor . . . would consider [it] important in making an investment decision, or if the information would alter the total mix of information” As climate change issues continue to evolve, reporting companies must assess the adequacy of their disclosure in light of materiality standards and the guidance given in the Release in order to ensure compliance with federal securities laws and regulations.

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