

# ADMINISTRATIVE WATCH

ADMINISTRATIVE WATCH ADDRESSES ENVIRONMENTAL, HEALTH AND SAFETY ISSUES



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## Facilities are Now Required to Report Greenhouse Gas Emissions

On September 22, 2009, the EPA issued a final regulation requiring for the first time approximately 10,000 U.S. facilities to calculate and report greenhouse gas (“GHG”) emissions annually, beginning on January 1, 2010. The first annual reports are due by March 31, 2011.

The new reporting requirement applies to a wide array of industries, which EPA estimates account for approximately 85% of the total U.S. GHG emissions. Applicability of the new reporting requirements must be assessed on a facility-by-facility basis. For example, facilities in certain listed source categories must report annually, regardless of GHG emissions. These facilities include power plants, cement kilns, and lime manufacturers. By contrast, facilities in other listed source categories are only required to report when CO<sub>2</sub> equivalent GHG emissions are 25,000 metric tons or more per year. This group of facilities includes iron and steel, glass, and paper manufacturers. Finally, certain suppliers of fossil fuels and industrial GHGs above applicable thresholds are also subject to the new reporting requirements.

In addition to imposing a new annual reporting obligation, the regulation also requires subject facilities to comply with various recordkeeping, monitoring, and data quality requirements.

Failure to comply with all applicable requirements of the new regulation potentially subjects the facility to EPA enforcement. Therefore, industry should consider carefully evaluating applicability of the new regulation to their operations ahead of the first reporting period in 2010.

## More Comments Sought on Regulation of Underground Injection of CO<sub>2</sub>

On August 31, 2009, a Notice of Data Availability (“NODA”) was published in the Federal Register (74 Fed. Reg. 44802), in which EPA requested comment on new data obtained from on-going research regarding underground injection and geologic sequestration of CO<sub>2</sub>. Geologic sequestration of CO<sub>2</sub> is being evaluated as one mechanism to mitigate the emission of CO<sub>2</sub>, a GHG, into the atmosphere. The NODA follows a July 25, 2008 proposed rule from EPA that would regulate the development, operation, and closure of wells for underground injection of CO<sub>2</sub> under the existing federal Safe Drinking Water Act.

The NODA also requests comment on whether geologic sequestration of CO<sub>2</sub> should be permitted above and between underground sources of drinking water (“USDW”). The EPA’s July 2008 proposed rule contemplated that underground injection of CO<sub>2</sub> could only occur below the lowermost formation containing a USDW. Injection into formations between and above USDWs would be prohibited under EPA’s proposed rule. Based upon numerous comments submitted to the proposed rule on this issue and new data, the EPA is requesting comment in the NODA that would create a waiver process with respect to CO<sub>2</sub> injection above and between USDWs. The NODA comment period ends on October 15, 2009.

## Public Nuisance Actions Against Electric Utilities for GHG Emissions are Allowed to Proceed

On September 21, 2009, the U.S. Court of Appeals for the Second Circuit (the “Court”) ruled that a group of plaintiffs, comprised of several states and environmental organizations, could proceed with a public nuisance law suit against five large electric utility companies. The plaintiffs’ suit alleged that the GHG emissions from the five electric utilities are “causing and will continue to cause serious harms affecting human health and natural resources.” The law suit was brought under federal and state common law tort theories.

In overturning the trial court’s dismissal of the plaintiffs’ claims, the Second Circuit found that the lower court was not precluded from hearing the plaintiffs’ GHG-related claims, despite the broader policy context on global warming issues. The Court rejected the defendants’ arguments that the plaintiffs’ claims were primarily a policy question for the legislature and therefore not appropriate for judicial review. The Court also found that the plaintiffs had sufficient legal standing to bring their GHG damage claims. The Court’s ruling has potentially significant implications for industry in other cases and signifies a willingness among some courts to hear GHG-related claims, even though regulatory and legislative debate on climate change policy continues to evolve.

## Other Significant GHG Regulatory Developments

- The EPA has indicated it plans to issue a proposed rule in the near future to increase the major source threshold for GHGs under the Prevention of Significant Deterioration (“PSD”) permit program of the Clean Air Act (“CAA”). The EPA has suggested this regulatory change is designed to ensure that only large stationary sources of GHG emissions are subject to PSD review, if and when GHGs become regulated under the CAA. Simultaneously, the EPA is also reviewing the Bush Administration’s decision not to require GHG emission controls in permitting stationary sources.
- On September 15, 2009, the EPA and DOT issued a joint proposal to establish a national program for light-duty motor vehicles that is designed to reduce GHG emissions and improve fuel economy, beginning with the 2012 model year. The joint proposal is in response to the U.S. Supreme Court’s April 2007 decision in Massachusetts v. EPA (549 U.S. 497).

BCCZ’s Climate Change Group actively tracks legislative, regulatory, and litigation developments regarding greenhouse gas issues at all levels of government and advises clients as to the potential impacts. For more information on these or other greenhouse gas issues, please contact Michael H. Winek (412) 394-6538 [mwinek@bccz.com](mailto:mwinek@bccz.com) or Seth A. Rice (412) 394-5490 [srice@bccz.com](mailto:srice@bccz.com).