MEMORANDUM

EPA TAKES ACTION TO REGULATE GREENHOUSE GAS EMISSIONS, WITH MUCH MORE TO COME

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I. Recent Actions

On May 7, 2010, Environmental Protection Agency ("EPA") Administrator Lisa Jackson and Secretary of Transportation Ray LaHood promulgated a joint final rule representing the first substantive federal action to limit emissions of greenhouse gases ("GHGs"). 75 Fed. Reg. 25324 (May 7, 2010). The rule ("GHG Mobile Source Rule") establishes emissions standards for passenger cars and light trucks under section 202 of the Clean Air Act, 42 U.S.C. § 7521, and corporate average fuel efficiency ("CAFE") standards under the Energy Policy and Conservation Act. The standards will apply to 2012 and later model year vehicles and will require that fuel efficiency increase and GHG emissions decrease through 2016, by which time the projected combined car and truck fleet will need to achieve the equivalent of 35.5 miles per gallon. These standards are projected to reduce GHG emissions from light vehicles by 21 percent, reducing GHG emissions by 960 million metric tons and oil consumption by 1.8 billion barrels between 2012 and 2016, with a cost of $52 billion and benefits of $240 billion. The average price of an average vehicle will increase by about $950, but consumers who pay cash will recover that amount in fuel savings over the first three years of the vehicle's life.

Although the rule has significant implications in its own right, it has far broader regulatory implications for other businesses. This rule will render GHGs "subject to regulation" under the federal Clean Air Act, resulting in the classification of GHGs as "regulated NSR pollutants" subject both to permitting requirements of the Prevention of Significant Deterioration ("PSD") program and the federal Title V Clean Air Act operating permit program. *See* 40 C.F.R. § 52.21(b)(50)(iv) (term includes pollutants "otherwise subject to regulation under the" Clean Air Act). Without further action by EPA, this change would make more than 25,000 heretofore unregulated sources, including large commercial buildings burning fossil fuels for heat, subject to regulation under the Clean Air Act and swamp state and federal permitting authorities. EPA therefore promulgated two additional rules to avoid these results. On April 2, 2010, the EPA Administrator promulgated a final interpretive rule ("Trigger Rule") in which she reaffirmed the decision of former EPA Administrator Stephen Johnson that PSD and permitting requirements do not apply absent actual, substantive limitations on emissions of GHGs (the "Johnson Memorandum"). The Trigger Rule clarifies that, in the case of the GHG Mobile Source Rule, such limitations would come into existence on January 2, 2011, when the first 2012 model year vehicles would require a certification of compliance with the GHG Mobile Source Rule. 75 Fed. Reg. 17004 (Apr. 2, 2010). The agency will thereafter phase in the application of the PSD and Title V permitting programs under the PSD and Title V Greenhouse Gas Tailoring Rule ("Tailoring Rule"), 75 Fed. Reg. 31514 (June 3, 2010), that it promulgated on June 3, 2010, so that smaller sources of GHG emissions will not immediately require permits under those programs.

These actions followed a spate of other final and proposed actions by EPA, the Securities and Exchange Commission, and the Council on Environmental Quality requiring, *inter alia*, reporting of greenhouse gas emissions, financial disclosure of climate change impacts and regulatory risks, and consideration of these issues under the National Environmental Policy Act. These administrative initiatives are catalogued in the table below. Several recent judicial

decisions also may create new risks for companies that do not proactively address their "carbon footprint." These developments, which we will discuss below, are likely just the first wave of future actions to address climate change that will affect most sectors of the economy and many fields of legal practice.

TABLE 1: SUMMARY OF FEDERAL REGULATORY ACTIONS

Agency	Action	Status	Description
EPA	Endangerment Finding	Final 74 Fed. Reg. 66496 (Dec. 15, 2009)	Formally finds GHG emissions from mobile sources to threaten health and welfare; outgrowth of U.S. Supreme Court decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007)
EPA	GHG Mobile Source Rule	Final 75 Fed. Reg. 25324 (May 7, 2010)	Rule establishes first federal regulatory program constraining GHG emissions through new emission standards for motor vehicles
EPA	"Johnson Memorandum" Revisited, a/k/a "Trigger Rule"	Final 75 Fed. Reg. 17004 (Apr. 2, 2010)	Interprets term "subject to regulation" for purposes of NSR/PSD program and establishing January 2, 2011, as date GHGs will be "subject to regulation"
EPA	"Tailoring Rule"	Final 75 Fed. Reg. 31514 (June 3, 2010)	Creates *de minimis* thresholds for regulation of GHGs, at least as a first step towards a comprehensive regulatory program
EPA	GHG Reporting Rule	Final 74 Fed. Reg. 56260 (Oct. 30, 2009)	Requires annual reporting of GHG emissions from identified source categories, beginning with 2011 report on data from 2010
EPA	Amendments and Additions to GHG Reporting Rule	Proposed: 75 Fed/ Reg. 18455 (proposal to require additional information), 18576 (reporting of GHG injection and geologic sequestration), 18608 (petroleum and natural gas systems), 18652 (additional sources of fluorinated GHGs) (April 12, 2010) Proposed: 74 Fed. Reg. 16448 will be finalized for: industrial landfills (Subpart HH), wastewater treatment	Impose requirements for additional information and reporting by additional source categories

		facilities (Subpart II), underground coal mines (Subpart FF), and magnesium production (Subpart T) (April 10, 2009)	
CEQ	Guidance on Addressing Climate Change Under NEPA	Proposed: 75 Fed. Reg. 8046 (Feb. 23, 2010)	Requires consideration of impacts of GHG emissions and sets presumptive threshold of 25,000 metric tons CO_2e
SEC	Guidance on Reporting on Impacts of Climate Change	Interpretive: 75 Fed. Reg. 6290 (Feb. 8, 2010)	Calls for reporting of impacts of climate change and GHG regulation

II. *Massachusetts v. EPA* and EPA's Endangerment Finding

EPA's recent actions were the inevitable result of the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency,* 549 U.S. 497 (2007), in which the Court reversed EPA's denial of a petition requesting that EPA regulate mobile source emissions of GHGs under section 202 of the Clean Air Act ("CAA") and remanded the matter to the EPA to make a factual determination of whether GHG emissions from motor vehicles contribute to "pollution" that could "reasonably be anticipated" to "endanger public health or welfare." 42 U.S.C. § 7521, 68 Fed. Reg. 52922 (2003). The Court's three holdings are directly relevant to many of the recent regulatory developments that herald the beginning of federal economy-wide regulation of GHG emissions. First, the Court held that Petitioners had demonstrated standing based on the impact of GHG emissions on Massachusetts' coastline under the analysis set forth in *Lujan v. Defenders of Wildlife*, 504 U. S. 555 (1992), coupled with the special status of states, as set forth in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237 (1907). Second, the Court held that carbon dioxide and other GHGs were "pollutants" that EPA could legally regulate under the CAA. Finally, the Court held that EPA's reliance on factors outside of the statutorily prescribed standard to deny the petition required that the matter be remanded to EPA to make a determination based on the statutory standard, which requires EPA to regulate emissions, if they "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *See* CAA § 202, 42 U.S.C. § 7521; *Massachusetts v. EPA,* 549 U.S. at 534 ("The statutory question is whether sufficient information exists to make an endangerment finding.").

On December 15, 2009, EPA Administrator Lisa Jackson made that endangerment finding. She found that elevated concentrations of six GHGs could be anticipated to endanger both health and welfare:

> The Administrator finds that elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations. The Administrator is making this finding specifically with regard to six key directly-emitted, long-lived and well-mixed greenhouse gases: Carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The Administrator is making this judgment based on both current observations and projected risks and impacts into the future. Furthermore, the Administrator is basing this finding on impacts of climate change within the United States. However, the Administrator finds that when she considers the impacts on the U.S. population of risks and impacts occurring in other world regions, the case for endangerment to public health and welfare is only strengthened.

74 Fed. Reg. 66496, 66516 (Dec. 15, 2009). She further found that "emissions of the well-mixed greenhouse gases" from new "[p]assenger cars, light-duty trucks, motorcycles, buses, and medium and heavy-duty trucks" "contribute to the air pollution that may reasonably be anticipated to endanger public health and welfare." *Id.* at 66536.

The endangerment finding has been appealed by a number of industry groups and states, with a number of states and environmental groups intervening to support EPA's decision. *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency,* D.C. Cir. Dkt. No. 09-1322. It is unlikely that those appeals will succeed in overturning the decision in light of the Supreme Court's decision in *Massachusetts v. EPA, supra,* the deference normally afforded an expert agency on scientific issues, and the weight of scientific evidence supporting EPA's decision. That evidence included three reviews of the science by the National Research Council of the National Academy of Sciences, numerous EPA studies, comprehensive reviews of the literature by the Intergovernmental Panel on Climate Change, and a decision by the District of Vermont in

Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007) after a *Daubert* hearing and trial involving the scientific issues in a challenge to Vermont's adoption of GHG automobile emissions standards.[1] A resolution to disapprove the endangerment finding under the Congressional Review Act, 5 U.S.C. § 801 *et seq.,* was introduced by U.S. Senator Lisa Murkowski, S.J.Res.26—*A joint resolution disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act,* but its chances of passing both the House and Senate and not being vetoed are remote. A Senate vote is scheduled for June 10, 2010.

III. The GHG Mobile Source Rule

In light of the endangerment finding and the holding in *Massachusetts v. EPA, supra*, EPA was under a mandatory duty to adopt the GHG Mobile Source Rule under the Clean Air Act. EPA elected to coordinate its actions with the National Highway Traffic Safety Administration ("NHTSA") to adopt a single rule governing both CAFE standards and Clean Air Act standards. 75 Fed. Reg. 25324 (May 7, 2010). The new standards are also consistent with California's mobile source GHG standards, which have been adopted by 13 other states and the District of Columbia. Moreover, California is undertaking several other actions so that compliance with the federal standard will be deemed to satisfy the California standard. The Rule was adopted in close consultation with the automobile manufacturing industry, which has agreed not to challenge the rule and to withdraw litigation against states that have adopted the California standards.

The GHG Mobile Source Rule establishes both an individual emissions limit for each vehicle type, based on its "footprint" (size as measured by multiplying the wheel base times the track width) and whether it is a car or truck, and a corporate average for all vehicles. If the standards were met solely through fuel efficiency, the standards would increase average fuel efficiency in passenger cars from 33.8 mpg (a GHG emissions standard of 263 g/mile) in 2012 to 39.5 in 2016 (a standard of 39.5 mpg (225 g/mi) in 2016 and combined cars and trucks from 30.1 (295 g/mi) to 35.5 (250 g/mi). However, the targets for passenger cars would range from 41.4 mpg for compacts such as the Honda Fit to 32.6 mpg for full-size cars such as a Chrysler 300. These standards can be met by use of a wide range of technologies, including engine improvements, advanced transmissions, stop-start technologies, tire performance, reduced vehicle weight, and increased use of hybrid and advanced technologies.

The GHG Mobile Source Rule also provides considerable opportunity for flexibility, and includes opportunities for averaging, banking, and trading. Trading can occur among the vehicles in a manufacturer's fleet and among various manufacturers. Improvement in vehicle air conditioning systems that reduce releases of hydrofluorocarbon ("HFC") refrigerants or decrease indirect engine load will generate credits. EPA has also established a system of credits for flex-fuel and alternative vehicles, temporary lead-time allowances for manufacturers with limited vehicle lines, advanced technology credits, off-cycle innovative technology credits, and credits for early reductions in model years 2009-2011. In future rulemakings, EPA intends to assess impacts on "upstream" GHG emissions for alternative fuel vehicles using electricity.

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[1] NAS/NRC has just released three new reports on climate that update and further support the science underlying the endangerment finding and the need for reductions in GHG emissions. *See,* NAS/NRC, *Advancing the Science of Climate Change* (2010); NAS/NRC, *Limiting the Magnitude of Future Climate Change* (2010); NAS/NRC, *Adapting to the Impacts of Climate Change*, (2010), *available at* http://americasclimatechoices.org/.

IV. The Tailoring Rule

As noted, without further action, EPA's adoption of the GHG Mobile Source Rule would make tens of thousands of previously unregulated emitters of carbon dioxide subject to both the Clean Air Act PSD and Title V programs. EPA proposed the Tailoring Rule on October 27, 2009, because of its concern that state and federal permitting authorities would be overwhelmed by an avalanche of permit applications if greenhouse gases become "regulated NSR pollutants," 74 Fed. Reg. 55292 (Oct. 27, 2009), and finalized that rule on May 13, 2010. The final rule was published in June 3, 2010, edition of the *Federal Register*. 75 Fed. Reg. 31514 (June 3, 2010).

As is the case with all other GHG standards, the Tailoring Rule defines greenhouse gases to include all six greenhouse gases (carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons and perfluorocarbons) expressed in carbon dioxide equivalents or CO_2e. 40 C.F.R. §§ 51.166(b)(48)(i)-(ii); 52.21(b)(49) (definitions of "greenhouse gas" or "GHG" and "carbon dioxide equivalent" or "CO_2e," respectively). EPA will phase in the application of New Source Review and Title V permitting for emitters of GHGs in three phases. During Phase 1, running from January 2, 2011, until June 30, 2011, only new construction or modification projects that are currently subject to the PSD or Title V permitting programs due to the emission of *other* pollutants (e.g., particulates, carbon monoxide, NOx, VOCs, SOx) will be subject to the PSD or Title V permitting requirements for GHG emissions. During this phase, new or modified sources that are subject to PSD review will need to determine and employ the Best Available Control Technology ("BACT") for their GHG emissions only when those emissions will increase by 75,000 tpy CO_2e or more. Sources that require Title V permits, due to emissions of other pollutants, will still need to address all applicable requirements relating to GHG emissions when they apply for, renew, or revise their permits regardless of whether their emissions exceed the 75,000 tpy CO_2e threshold. During Phase 1, no sources would be subject to CAA permitting requirements due solely to GHG emissions.

During the second phase, beginning on July 1, 2011, and continuing through June 30, 2013, EPA will build on the first phase by applying PSD permitting requirements to the construction of new sources of GHG emissions that emit 100,000 tpy CO_2e or more even if they do not exceed the permitting thresholds for any other pollutant. New and existing sources that emit 100,000 tpy CO_2e will be also be subject to Title V permitting requirements. EPA has also established "significance levels" for modifications at existing facilities, so that if a modification increases GHG emissions by at least 75,000 tpy CO_2e, the source will be subject to PSD permitting requirements for GHG emissions and will need to employ BACT. EPA estimates that about 550 sources will need to obtain Title V permits for the first time due to their GHG emissions; most of these sources will likely be landfills and industrial manufacturers. There will be approximately 900 additional PSD permitting actions each year triggered by increases in GHG emissions from new and modified emission sources.

Because states are responsible for most permitting under the Clean Air Act, the final Tailoring Rule requests states to inform EPA whether they must make rule changes to implement the new GHG emissions thresholds and when such changes will be adopted. If there are cases where necessary rule changes cannot be made before January 2, 2011, EPA will take appropriate action to ensure that the existing CAA permitting rules do not apply to sources excluded by the Tailoring Rule. EPA also announced its intent to develop supporting guidance and other information to assist permitting authorities, such as guidance on the development of BACT for GHG PSD permits.

The Tailoring Rule was proposed as an interim measure and EPA will address smaller sources in two future rulemakings. EPA has committed to undertake a second rulemaking, beginning in 2011 and finishing by July 1, 2012, addressing sources between 50,000 and 100,000 tpy CO_2e in

which it will consider options for potentially excluding certain smaller sources from permitting or developing alternatives, such as permits by rule, in which it could streamline permitting for these sources and reduce permitting burdens on states and the regulated community alike. EPA announced that it does not intend to require either PSD or Title V permitting for sources with GHG emissions of less than 50,000 tpy CO_2e before April 30, 2016. EPA will conduct a study on possible mechanisms for streamlining the permitting of those smaller sources of GHG emissions or exempting those sources, which it will complete by April 2015. EPA intends to promulgate a third rule by April 30, 2016, in which it will address Clean Air Act permitting for those small facilities.

It is doubtful that EPA could permanently exempt smaller sources from PSD and Title V requirements because the statute specifies a 250-ton trigger for most sources. *See,* 42 U.S.C. §7491(g)(7) (defining "major stationary source," *inter alia,* as sources with the potential to emit 250 tons per year of any pollutant). By proposing the Tailoring Rule as an interim measure to be followed by subsequent measures, EPA has sought to insulate the rule from challenges under the Supreme Court's statement in *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007), that EPA "has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies."

V. The Trigger Rule and Timing

EPA's promulgation of the Trigger Rule, 75 Fed. Reg. 17004 (Apr. 2, 2010), which adopted and modified the December 18, 2008, memorandum issued by former EPA Administrator Johnson,[2] assures that there will be adequate time for the Tailoring Rule to go into effect and guidance to be developed before any requirements for PSD or Title V permits will be triggered by the GHG Mobile Source Rule. However, while smaller sources will be temporarily exempt from regulation, EPA's discussion in the Trigger Rule suggests that there may be at least some impacts on permit applications for sources that are already subject to PSD.

The Johnson Memorandum was issued following the remand by the EPA Environmental Appeals Board ("EAB") of an EPA-issued PSD permit for a coal-fired power plant in which the EAB determined that EPA had not taken a consistent position on what type of regulatory action would make a pollutant a "regulated pollutant" that would trigger PSD and its BACT requirements. The Johnson Memorandum found that the term "subject to regulation … requires actual control of emissions of that pollutant" and that PSD requirements "apply to a pollutant upon promulgation of a regulation that requires actual control of emissions."

The Trigger Rule evaluated five potential "triggering" events that could render a pollutant "subject to regulation" under the PSD program and adopted a modification of the "actual control" interpretation. Where the Johnson Memorandum had stated that the triggering event occurs when the regulation subjecting a pollutant to emission limitations is promulgated, the Trigger Rule found that the pollutant would be "subject to regulation" at the time the regulation controlling emissions actually "takes effect." EPA concluded that this occurs "when a control or restriction that functions to limit pollutant emissions takes effect or becomes operative to control or restrict the regulated activity." *Id.* at 17016. In the case of the GHG Mobile Source Rule, EPA determined that that will occur when the GHG Mobile Source Rule first requires

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[2] Memorandum from Stephen Johnson, EPA Administrator, to EPA Regional Administrators, RE: EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration ("PSD") Permit Program (Dec. 18, 2008) (''Johnson Memorandum''); *see also* 73 Fed. Reg. 80300 (Dec. 31, 2008) (public notice of Dec. 18, 2008, memo).

"compliance through vehicular certification before introducing any Model Year 2012 into commerce," which will occur on January 2, 2011. *Id*. at 17007. Other dates would apply for regulations promulgated under other sections of the Clean Air Act. EPA further concluded that the same trigger applies to Title V requirements.

Although no requirements will take effect before January 2, 2011, EPA stated that "permitting authorities that issue permits before that date are already in a position to, and should, use the discretion currently available under the BACT provisions of the PSD program to promote technology choices for control of criteria pollutants that will also facilitate the reduction of GHG emissions." *Id*. at 17020. Specifically, EPA directed that, in making BACT determinations, permitting authorities should consider energy efficiency, which will reduce both GHG emissions and emissions of other pollutants. EPA stated that it will be developing new guidance on how to consider energy efficiency and GHG emissions in BACT determinations and issuing it in the future.

This consideration could allow many companies to achieve cost savings. Frequently, capital-intensive add-on technologies, such as scrubbers, will decrease efficiency and increase both GHG emissions and cost. For that reason, consideration of energy efficiency and cost may tip the balance against those technologies in a BACT determination. Although EPA's discussion was limited to determinations under the Clean Air Act, similar considerations should apply to technology determinations under other statutes, such as evaluations of technologies under the Clean Water Act. This consideration may also tip the balance in favor of fuel switching to biomass or less carbon-intensive fuels over add-on technologies.

EPA expressly refused to adopt a grandfathering rule for pending PSD permit applications. EPA stated that the permit would be governed by the law in effect at the time that the permit was issued so that permits issued before January 2, 2011, would not need to include a GHG BACT analysis, but permits issued after that date would need to do so. EPA stated:

> To the extent any pending permit review cannot otherwise be completed within the next nine months based on the requirements for pollutants other than GHGs, it should be feasible for permitting authorities to begin incorporating GHG considerations into permit reviews in parallel with the completion of work on other pollutants without adding any additional delay to permit processing.

Id. at 17021.

VI. Litigation

Recent court of appeals decisions allowing nuisance suits to proceed against large emitters of greenhouse gases create an additional impetus for companies to examine their emissions profiles and take reasonable efforts to reduce greenhouse gas emissions. In *State of Connecticut v. American Electric Power Company, Inc.*, 582 F. 3d 309 (2d Cir. 2009) ("*Connecticut v. AEP*"), the Second Circuit held that eight states, the City of New York, and three land trusts could maintain a public nuisance action seeking injunctive relief against six companies operating coal-fired power plants that allegedly emit approximately ten percent of the United States' carbon dioxide emissions. In *Comer v. Murphy Oil, USA,* 585 F.3d 855 (5th Cir. 2009), *vacated after court, en banc, lost quorum,* No. 07-60756 (May 28, 2010) ("*Comer*"), a panel of the Fifth Circuit held that residents and landowners injured by Hurricane Katrina could maintain state-law public and private nuisance, trespass, and negligence claims against defendants in the energy, fossil fuel, and chemical industries based on allegations that the defendants' GHG emissions had

caused or contributed to their damages. *Comer* upheld the district court's dismissal of a fraudulent misrepresentation claim, based on the allegations that defendants "unlawfully disseminated misinformation to dissuade government regulation and engaged in a civil conspiracy." Although the panel decision has been vacated under very procedural circumstances,[3] the *Comer* decision's reasoning is nonetheless important to developments in greenhouse gas liabilities.

In *Connecticut v. AEP*, the lower court had dismissed the complaint, holding that it presented a non-justiciable political question. The Court of Appeals broadly rejected this contention, reasoning that the nuisance claims presented a judicial rather than political question. The Court held that the Restatement (Second) of Torts and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), and other public nuisance cases articulated well-established "judicially discoverable and manageable standards" for deciding the case. The Court went on to address three additional important issues: (1) standing, (2) the standards to be applied in a public nuisance suit, and (3) whether the Clean Air Act displaces the federal law of nuisance.

With respect to standing, the Court found that both the plaintiff states and land trusts had standing to bring the claims and, in so doing, clarified the language in *Massachusetts v. EPA, supra*, regarding the "special status" of states. The Court reasoned that there were two separate grounds for finding state standing to bring suit—standing based on a state's status as *parens patriae* and standing based on the traditional interest analysis articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Court found that the states satisfied both the traditional *Lujan* test under *Massachusetts v. EPA, supra*, and the *parens patriae* test. For the purposes of the latter test, a state needed to show that (1) it has a quasi-sovereign interest, (2) its interest is separate from that of private parties, and (3) it must have alleged injury to a sufficiently substantial segment of its population. The Court found that the land trusts had standing under a *Lujan* analysis, based on the impacts of climate change on their lands.

The Court found that both the states and the land trusts had properly pleaded claims based on the federal common law of nuisance. The Court's analysis hewed closely to Restatement (Second) of Torts, which incorporates a long line of air and water pollution cases founded on the law of public nuisance.

Finally, the Court found that the federal common law of nuisance as applied to GHG emissions had not been displaced by Clean Air Act. The Court's analysis involved the companion decisions in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"). In *Milwaukee I*, the Court held that Illinois could maintain an action to abate water pollution based on the federal law of nuisance, but in *Milwaukee II* it held that the subsequent enactment of the Clean Water Act had displaced the federal common law with statutory standards. In *Connecticut v. AEP,* the Court held that the then-current state of regulation of GHG emissions under the CAA, where EPA had only

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[3] The Court vacated the panel decision by virtue of granting a petition for rehearing *en banc* but was forced to dismiss the appeal, over a vigorous dissent, when it lost its quorum. This had the procedural effect of affirming the lower court's ruling from the bench.

proposed the endangerment finding, more resembled the state of the regulation under the Clean Water Act's predecessor law in *Milwaukee I.* The Court concluded:

> In sum, at least until EPA makes the requisite findings, for the purposes of our displacement analysis the CAA does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources. Accordingly, the problem of which Plaintiffs complain certainly has not "been thoroughly addressed" by the CAA. Milwaukee II, 451 U.S. at 320, 101 S.Ct. 1784. We express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA, if and when such regulation should come to pass, would displace Plaintiffs' cause of action under the federal common law.

Under the Court's analysis, it appears that the federal law of nuisance will *not* be displaced unless there is actual regulation of the particular source or source category under the Clean Air Act. However, it is unclear what type of regulation would displace the federal common law and whether, under the current regulatory structure of the Clean Air Act, such displacement would occur under any circumstances.

Although the Court in *Connecticut v. AEP, supra*, did not find it necessary to address the plaintiffs' assertion of separate state law claims, that issue was addressed by the panel decision in *Comer,* where the panel, sitting in diversity, addressed claims based on the common law of Mississippi. The defendants had moved to dismiss on political question and standing grounds and the district court granted the motion from the bench "[d]escribing this suit as a 'debate' about global warming … 'which simply has no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this court can measure conduct.'" *Comer*, 585 F.3d at 860, n.2.

The panel found that the plaintiffs easily satisfied Mississippi's liberal standing requirements, and met the more rigorous federal standards under a *Lujan* analysis. The nature of the plaintiffs' injuries and the fact that they were seeking damages satisfied the requirements for concrete injury and redressability. With respect to the claims based on nuisance, trespass, and negligence, the panel found that the defendants' argument that plaintiffs had not satisfied the third requirement that the injury be "fairly traceable" to the defendants' conduct "essentially calls upon us to evaluate the merits of plaintiffs' causes of action" and was "misplaced at this threshold standing stage of the litigation." *Id.* at 864. Noting that the complaint alleged causation based on scientific studies and that defendants' "contention that traceability is lacking because their emissions contributed only minimally to plaintiffs' injuries is also similar to another EPA argument rejected by the Supreme Court in Massachusetts," the panel concluded that plaintiffs had standing. *Id.* at 866. The Court concluded that the plaintiffs did not have standing to assert unjust enrichment, civil conspiracy, and fraudulent misrepresentation claims, which the court found to be assertions of generalized grievance based on defendants' public relations statements.

The panel also held that plaintiffs' claims did not present a political question:

> The questions posed by this case, *viz*., whether defendants are liable to plaintiffs in damages under Mississippi's common law torts of nuisance, trespass or negligence, are justiciable because they plainly have not been committed by the Constitution or federal laws or regulations to Congress or the president. There is no federal constitutional or statutory provision making such a commitment, and the defendants do not point to any provision that has such effect. The most that the defendants legitimately could argue is that in the future Congress may enact laws, or federal agencies may adopt regulations, so as to comprehensively govern greenhouse gas emissions and that such laws or regulations might preempt 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.

Id. at 870. The panel noted the federal courts are not free to reject cases over which they are given jurisdiction nor to invoke the political question doctrine merely because an issue is "politically charged."

In an unusual procedural twist, the *Comer* panel decision was vacated by entry of an order filed on May 28, 2010. The Fifth Circuit had granted the defendants' request for a rehearing *en banc*, an action which vacated the panel opinion. *See Comer*, No. 07-60757, slip op. at 2 (May 28, 2010).[4] The *en banc* court was originally composed of nine judges; subsequent to the granting of the rehearing request, one of the judges had to be recused, leaving the *en banc* court without a quorum. *Id*. Five of the remaining eight judges declared that the court could not conduct judicial business without a quorum and, that absent that quorum, the appeal had to be dismissed. *Id*. at 4. Furthermore, these five agreed that "[t]here is no rule that gives this court authority to reinstate the panel opinion, which has been vacated." *Id*. The May 28, 2010, order breathed life back into the district court opinion, which dismissed the complaint.

A third case will likely give the Ninth Circuit the opportunity to rule on both the standing and political question issues. In *Native Village of Kivalina v. Exxon Mobil*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *on appeal*, No. 09-17490 (9th Cir.), the trial court dismissed the federal common law nuisance claims of an Alaskan village against 24 oil companies, energy companies, and utilities on the basis of the political question doctrine and standing. The village alleged damages caused by the fact that it is sinking and suffering from coastal erosion caused by the impact of global warming on permafrost.

Even if *Kivalina* is reversed or the panel's reasoning in *Comer* is adopted in another action seeking damages, causation will remain a significant issue. Plaintiffs seeking damages will need to demonstrate an adequate nexus between the defendants' emissions and the damages that the plaintiffs have suffered.

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[4] The May 28, 2010, order can also be found on LEXIS. *See Comer v. Murphy Oil, USA*, 2010 U.S. App. LEXIS 11019 (5th Cir. 2010).

It is also possible that these issues could eventually reach the Supreme Court. In that case, the Second Circuit's heavy reliance on *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237 (1907), a case also cited by the panel in *Comer*, may give a hint of which way Justice Anthony M. Kennedy, the key swing vote, may tend. Justice Kennedy cited that case *sua sponte* in oral argument in *Massachusetts v. EPA*, suggesting that it supported the proposition that states should be afforded special solicitude in the standing inquiry and therefore supports the states' assertion of standing.

VII. Reporting Rule

In the Consolidated Appropriations Act of 2008, Publ. Law 110-161, 121 Stat. 1844, 2128 (2008), Congress required EPA to develop a GHG Reporting Rule under § 114(a)(1) and § 208 of the Clean Air Act. The objective was to obtain GHG emissions data from large sources and suppliers to inform future policy decisions. EPA proposed its Reporting Rule on April 10, 2009, and published the final Reporting Rule on October 30, 2009. 74 Fed. Reg. 56260 (Oct. 30, 2009). Although the final rule did not impose requirements on all of the industries proposed (such as, for example, industrial landfills, wastewater treatment facilities, underground coal mines, and magnesium production) and has been subject to subsequent proposed amendments, the final rule nonetheless established the major components of the program. The Reporting Rule became effective on December 29, 2009, and facilities subject to it were required to start collecting emissions data using best available monitoring methods on January 1, 2010.

The Reporting Rule applies to the following general source categories: (1) certain specifically listed source categories, regardless of how much GHG they emit; (2) certain sources/processes that emit at least 25,000 metric tons/year of CO2e; (3) stationary fuel combustion sources with maximum heat input capacity of 30 mmBtu/hour where emissions meet or exceed 25,000 metric tons/year of CO2e; and (4) suppliers of fossil fuel and industrial GHGs where emissions exceed 25,000 metric tons/year of CO2e. Specifically listed source categories that must report regardless of their GHG emissions include electric generating facilities, petrochemical production, petroleum refineries, and municipal solid waste landfills, among others. Examples of industry facilities subject to the 25,000 metric tons/year threshold in the second category include pulp and paper manufacturing, glass production, and iron and steel production.

The Reporting Rule requires electronic submittal of an annual GHG report. The first deadline for the reports is March 31, 2011. The Reporting Rule establishes requirements for measurement, verification, data quality, and information retention requirements. Entities subject to the Reporting Rule must also develop a written GHG Monitoring Plan. Generally, records related to the annual GHG report, such as data used to calculate the GHG emissions of each unit, operation, project or activity, and certification and quality assurance tests, should be kept for three years. The Reporting Rule permits reporters that emit less than 25,000 metric tons/year of CO2e for five consecutive years or those that emit less than 15,000 metric tons/year of CO2e for three consecutive years to forego the submittal of annual reports. EPA can enforce the Reporting Rule under the Clean Air Act.

As indicated above, the Reporting Rule has been subject to proposed supplemental amendments, several of which were published on April 12, 2010. On that date, EPA published a proposed rule in the *Federal Register* seeking to augment background information requirements in the GHG Report. The proposal would require a reporter to disclose information about its corporate parents, provide its primary and other applicable NAICS codes, and indicate whether any of its reported emissions are from cogeneration. EPA proposed two options for reporting corporate lineage. Under Option 1, reporters would need only to identify the highest-level domestic corporate parent company with the largest ownership interest in the reporting company by name and physical address and indicate its ownership status (wholly owned, multiple owners, or single ownership). Under Option 2, EPA proposes to require reporters to identify all domestic parent companies and the respective percentage of ownership. Comments on the proposal must be received by EPA on or before June 11, 2010.

Also on April 12, EPA proposed to extend the Reporting Rule to additional industry groups by publishing three proposed rules. The first proposal would apply the Reporting Rule to the following industries that are sources of fluorinated GHGs: electronics manufacturing; fluorinated GHG production; electrical equipment use; electrical equipment manufacture or refurbishment; and importers and exporters of pre-charged equipment and closed-cell foam. Similarly, in the second proposal, EPA offered a revised reporting rule for emissions from onshore petroleum and natural gas production, offshore petroleum and natural gas production, natural gas processing, natural gas transmission compressor stations, underground natural gas storage, liquefied natural gas storage, liquefied natural gas import/export terminals, and distribution. The third proposal would require GHG reporting from carbon dioxide injection and geologic sequestration operations. EPA indicates in the preamble for each of the three proposed rules its intent to have these sources begin monitoring emissions in 2011 and submit their first reports by March 31, 2012. Comments on these supplemental proposed rules must also be received by EPA on or before June 11, 2010.

EPA's reporting requirements differ from those of The Climate Registry and most voluntary carbon reporting systems in that EPA requires reporting of only Type 1 emissions (*viz.* direct emissions from facilities) and the carbon emissions from imports and production of fossil fuel. The Climate Registry and most voluntary reporting systems also require the reporting of Type 2 emissions—indirect emissions arising from the generation of electricity used. Although the Reporting Rule will ensure that total emissions are not double counted, the current reporting system will be less useful in a regulatory program where it will be necessary to assess the overall impacts of fuel switching between fossil fuels and electricity.

VIII. CEQ Guidance on GHG Considerations under NEPA

The Council on Environmental Quality ("CEQ") is tasked by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*., to develop guidance for implementing that statute. NEPA requires all federal agencies to analyze the environmental effects of major actions they propose to take that might significantly affect the quality of the human environment and establishes a process agencies must comply with to show that they properly considered the environmental implications of their actions. Actions such as issuing a federal permit or providing federal financing typically require federal agencies to comply with the NEPA decision-making process.

On February 23, 2010, CEQ published a notice that it had developed draft guidance for how federal agencies should incorporate climate change and GHG emissions considerations into the

NEPA process. 75 Fed. Reg. 8046 (Feb. 23, 2010). The draft guidance is available online at http://ceq.hss.doe.gov/. In this draft guidance, "CEQ proposes to advise Federal agencies that they should consider opportunities to reduce GHG emissions caused by proposed Federal actions and adapt their actions to climate change impacts throughout the NEPA process and to address these issues in their agency NEPA procedures." The CEQ draft guidance notes that climate change impacts arise in the consideration of the GHG emissions effects *of* a proposed action and alternative actions, as well as the relationship of climate change effects *to* a proposed action and its alternatives.

CEQ's draft guidance asserts that many Federal projects have the potential to emit GHGs and enunciates the Federal government's commitment to energy conservation-related goals, including eliminating or reducing GHG emissions. The proposed Guidance provides that where proposed actions are subject to GHG emissions "accounting requirements" such as the Reporting Rule for sources emitting 25,000 metric tons/year of CO_2e, this information should be included and considered in the NEPA documentation. Further, the agency's analysis of direct effects of the proposed action should include: (1) quantification of cumulative emissions over the project's life; (2) a discussion of measures to reduce GHG emissions, including reasonable alternatives; and (3) a qualitative discussion regarding the link between the emissions and climate change. Despite proposing a 25,000 metric tons/year threshold for direct effects of a proposed federal action, CEQ cautions that this is not meant to be "an absolute standard of insignificant effects." The draft guidance further indicates that both direct (Type 1) and indirect (Type 2) GHG emissions from a proposed project should be considered. In scoping the project, CEQ directs that agencies should follow the "rule of reason." It warns the agencies to avoid using "useless bulk and boilerplate documentation" and directs that they focus their discussion to correlate with the importance of the GHGs from the proposed action.

CEQ also addresses how agencies can comply with NEPA in assessing the potential impacts of climate change on a proposed action. The project's sensitivity, location, and time frame determine the extent to which the current or projected effects of climate change ought to be considered. The effects of climate change can range from impacts on public health and safety to effects on the integrity of a project site or design. The draft guidance recommends that agencies begin by identifying the "reasonably foreseeable future condition of the affected environment" for the no action alternative and use these conditions as a baseline to evaluate alternatives. Where potential impacts could be significant but are also very uncertain, agencies are encouraged to consider the proposed action and related alternatives against the baseline "drawn as distinctly as the science of climate change effects will support." CEQ also recommends climate change effects be considered for projects designed for long-term use in areas sensitive to climate change. CEQ suggests adaptive management approaches, indicating that monitoring programs may be appropriate where adapting to climate change is important to a particular project.

In addition to accepting comments on the draft guidance itself, CEQ seeks public input on seven specific issues, phrased as questions. Among these are "How should NEPA documents regarding long-range energy and resource management programs assess GHG emissions and climate change impacts?" and "How should uncertainties associated with climate change projections and species and ecosystem responses be addressed in protocols for assessing land management practices?" The public comment period on the CEQ guidance expired on May 24, 2010.

IX. SEC Guidance

The United States Securities and Exchange Commission ("SEC") published an interpretive release in the *Federal Register* providing guidance to public companies addressing climate

change reporting. 75 Fed. Reg. 6290 (Feb. 8, 2010); *see also,* Gerald J. Guarcini, et al., *SEC Issues Interpretive Release on Climate Change Disclosure* (Feb. 18, 2010), available at Ballard Spahr LLP Legal Alerts, www.ballardspahr.com. The guidance does not amend current reporting obligations but rather highlights the expectation that management should be reviewing risks related to climate change to determine whether those risks are material and need to be disclosed. The release also reminds companies that information related to climate change risks should be consistent among required SEC filings as well as voluntary disclosures, such as press releases.

Items 101 (Business), 103 (Litigation), 503(c) (Risk Factors), and 303 (Management Discussion & Analysis) of Regulation S-K may require disclosure of the impact of potential climate change legislation or regulation. Registrants are reminded not to limit their disclosures related to a proposed law only on negative impacts, but to include discussion of opportunities and positive impacts. Impacts from legislative and regulatory changes include: (1) costs to purchase, or profits from sales of, allowances or credits under cap and trade programs; (2) expenditures for facilities and equipment improvements to reduce greenhouse gas emissions to comply with regulatory limits or mitigate the financial consequences of a cap and trade law; and (3) changes to profit or loss arising from increased or decreased demand for goods and services produced by the company due to legislation or regulations and, indirectly, from changes in costs of goods sold. To the extent international treaties and accords affect a registrant's business, registrants should also consider the impacts of such measures related to climate change to determine whether disclosure is required.

Evolution of the law, technology, politics, and science pertaining to climate change may also create new opportunities or risks that should be disclosed in a company's risk factors, Management Discussion & Analysis, or in the description of its business. Examples of indirect consequences from these developments may include changes in the demand for products depending on their relative emissions-intensiveness, increased competition to innovate, and demand for alternative energy transmission and generation. Shifts in a company's plan of operations should be disclosed if the facts and circumstances make these opportunities or consequences material to its business operations or financial condition. Registrants should also consider whether their reputation may be affected by public perception due to the amount of GHG emitted and whether that could have a negative effect on business operations or financial condition.

The SEC also notes that some companies may be vulnerable to severe weather or climate-related events and should therefore consider disclosure of those material risks or consequences. SEC identified the following potential consequences of severe weather on businesses: property damage; disruptions to its own operations or those of its customers or suppliers; increased insurance claims and liabilities for insurance and reinsurance companies; decreased agricultural productivity; and increased insurance premiums and deductibles or a decrease in the availability of coverage for plants and operations in areas subject to severe weather.

In addition to the requirements of Regulation S-K, the SEC observes that pursuant to Rule 408 under the Securities Act of 1933, as amended, and Rule 12b-20 under the Securities Exchange Act of 1934, as amended, companies must disclose "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading."

The SEC plans to monitor the effect of the release on company filings as a part of its ongoing disclosure review program. The SEC also will consider recommendations made by the Investor Advisory Committee, as well as comments received at a public roundtable on climate change

disclosure that the SEC plans to hold this spring. After the SEC evaluates the input from these sources, it will determine whether it should issue additional guidance or undertake rulemaking.

X. Future Directions

In the near term, EPA can be expected to continue to expand the scope of required GHG reporting and add to the classifications of sources regulated. As noted above, EPA has announced it will issue guidance on conducting BACT analyses for GHGs, and it will likely act on its proposals to expand GHG reporting. EPA also expects to propose a rule for control of GHG emissions from heavy-duty vehicles in July 2010. Based on the analysis in the Advance Notice of Proposed Rulemaking,[5] EPA expects to develop regulations covering additional mobile sources (airplanes, locomotives, marine vessels, off-road vehicles, etc.). We can also expect that EPA will develop new source performance standards ("NSPS") covering GHGs for a variety of industrial stationary sources as it updates the NSPS under section 111 of the Clean Air Act, 42 U.S.C. § 7411. Section 111 contains endangerment language identical to that found in section 202 of the Clean Air Act, and EPA has received a number of rulemaking petitions directed at both NSPS and mobile source categories. EPA's statement in the Trigger Rule that energy efficiency and GHGs should be considered in developing technology based emissions limits should apply equally to rules establishing NSPS.

Although these developments are significant, there are many more coming, even if comprehensive legislation remains stalled in the Senate. The Center for Biological Diversity and 350.org have submitted a rulemaking petition to EPA requesting that it establish a National Ambient Air Quality Standard for GHGs. *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act* (December 2, 2009). There is no deadline for EPA action on that petition. However, when a similar petition was filed after EPA had established regulations limiting lead emissions under section 202 of the Clean Air Act, the Second Circuit held that the EPA's endangerment finding created a mandatory duty to list a pollutant that is emitted from diverse sources under section 108 of the Clean Air Act and to establish an NAAQS for that pollutant under section 109 of the Act. *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976).[6]

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[5] 73 Fed. Reg. 44354 (July 30, 2008).

[6] *NRDC v. Train* held that the additional language in section 108—"but for which he plans to issue air quality criteria under this section"—does not change the mandatory nature of the duty to list. NRDC, 545 F.2d at 325. In the Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act ("ANPR"), 73 Fed. Reg. 44354 (July 30, 2008), EPA raised the possibility that the decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), may change that conclusion. ANPR, supra note 4, at 44477 n. 229. However, there is nothing in Chevron's holding regarding the deference owed agency determinations in the area of the agency's expertise that would appear to overturn the simple issue of statutory interpretation resolved in *NRDC v. Train*. In *NRDC v. Train*, the court specifically rejected the argument that the phrase "but for which he plans to issue air quality criteria under this section" made the decision to list lead one within the discretion of the Administrator. NRDC, 545 F.2d at 325. The Supreme Court's treatment of a similar issue of statutory construction in *Massachusetts v. EPA, supra,* where it found that the term "in his judgment" did not create discretion not to act in the face of similar mandatory language, would seem to undercut reliance on *Chevron.*

If EPA is required to list GHGs as a priority pollutant, states would be required to develop and implement state implementation plans, identifying a range of measures across a variety of economic sectors to reduce GHG emissions under section 110 of the Clean Air Act. 42 U.S.C. § 7410. These could very well include cap-and-trade programs. In fact, it is possible that these plans might include the existing regional cap-and-trade programs established under the Regional Greenhouse Gas Initiative ("RGGI") and the Western Climate Initiative ("WCI"). *See* 42 U.S.C. § 7410(a)(2)(A) (authorizing inclusion of market-based mechanisms in SIPs). A cap-and-trade program could be established under this authority even without Congressional action. A cap-and-trade program could also be established under section 111(d) of the Clean Air Act, *id.*§ 7411(d), if EPA does not establish an NAAQS and call for SIPs.

EPA has repeatedly stated that it would favor an amendment to the Clean Air Act specifically addressing GHG emissions. The House has passed the American Clean Energy and Security Act, which would create such a program, integrating regulation under the Clean Air Act with incentives to develop clean and alternative energy and energy conservation and a program for regulating carbon markets. However, a variety of legislative vehicles have stalled in the Senate, and attempts to adopt regulation there have been sidetracked by attention to other legislative priorities and partisan differences. Although legislation would remove certain uncertainties, speed the course of regulation, and reduce the likelihood of successful challenges in court, it appears increasingly clear that comprehensive regulation of GHG emissions will occur regardless of whether Congress acts or not. EPA regulatory actions, actions by the states, and potential liabilities will all put a price on carbon emissions and create business risks and opportunities that should play a part in corporate planning.