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Environmental Risks for Energy Companies from the New EPA and from Litigation

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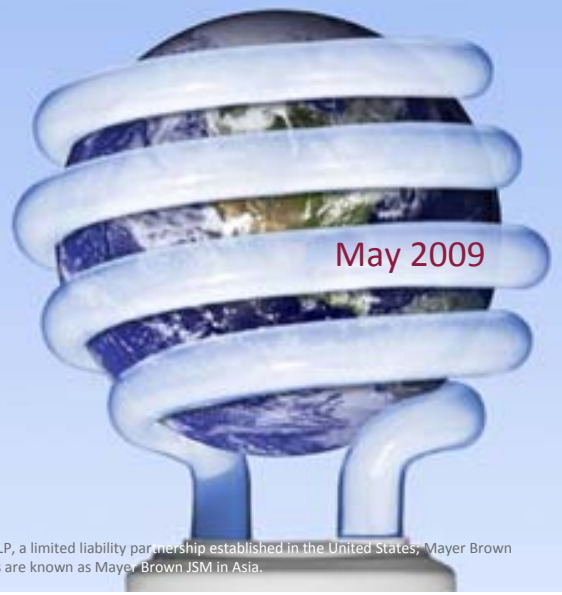

US EPA Is Taking a More Aggressive Regulatory Stance on Greenhouse Gases (GHGs).

- Reporting
  - The Agency's proposed rule for mandatory reporting of GHG emissions, 74 Fed. Reg. 16,448 (April 10, 2009), would create an ambitious program covering:
    - Suppliers of fossil fuels and industrial GHGs.
    - Manufacturers of vehicles and engines.
    - Facilities that emit 25,000 metric tons or more of carbon dioxide equivalent (CO2e) per year.

US EPA and GHGs (cont'd)

- Data primarily would be reported at the facility level.
- Depending on the source, a variety of facility, unit, process, and production data would be included.
- Reporting would be done at least annually, with the first report due in March 2011.
- The comment deadline closes on June 9, 2009.

US EPA and GHGs (cont'd)

- Endangerment Findings
  - In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that EPA improperly had denied a petition seeking regulation of GHG emissions from new motor vehicles pursuant to Clean Air Act Section 202. In response, the Agency has proposed making two "endangerment findings," 74 Fed. Reg. 18,886 (April 24, 2009).

US EPA and GHGs (cont'd)

- First, based on its assessment of the existing scientific literature, EPA would conclude that the mix of the six Kyoto Protocol GHGs—carbon dioxide, methane, nitrous oxide, perfluorocarbons, hydrofluorocarbons, and sulfur hexafluoride—constitutes "air pollution" which endangers public health and welfare.
- Second, the Agency would find that combined emissions from new motor vehicles and new motor vehicle engines of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons contribute to that air pollution. In this regard, EPA emphasized that all on-road vehicles in the United States account for 24% of national GHG emissions and greater than 4% of worldwide emissions.
- The comment period ends on June 23, 2009.

US EPA and GHGs (cont'd)

- Individual Permits
  - Last November, the Environmental Appeals Board (EAB) remanded a Prevention of Significant Deterioration (PSD) permit for a power plant so EPA could reconsider whether to impose a carbon dioxide Best Available Control Technology (BACT) limit. *See In re: Deseret Power Electric Cooperative,* 14 E.A.D. ____ (PSD 07-03)(Nov. 13, 2008).

US EPA and GHGs (cont'd)

- In January, EPA Region 9 then withdrew for further consideration a portion of its decision underlying another PSD air permit, while it was before the EAB, for the Desert Rock Energy Facility (a 1500 MW coal-fired power plant proposed to be built on Navajo Nation tribal land in New Mexico).

  The withdrawal covered those portions of the permitting decision containing the Region's basis for not including carbon dioxide limitations.

US EPA and GHGs (cont'd)

- Last month, the Agency moved for a voluntary remand of the entire Desert Rock permit so that it could re-consider:
  - Use of PM10 as a surrogate for PM2.5.
  - Integrated gasification combined cycle technology (IGCC) as BACT.
  - Issuance of a final permit before completing Endangered Species Act (ESA) consultation.
  - "Additional impacts" on soils, vegetation, and visibility.
  - Maximum Achievable Control Technology (MACT) for mercury and other air toxics.

Meanwhile, the Pace of Environmental Litigation Is Accelerating.

- At least four tort-based climate cases are pending:
  - *Connecticut v. American Elec. Power, Inc.*, 406 F. Supp.2d 265 (S.D.N.Y. 2005), *app. pending*, Nos. 05-5104, 05-5119 (2d Cir.)
  - *Comer v. Murphy Oil Co.*, No. 1:05-CV-436LG (S.D. Miss. Aug. 30, 2007), *app. pending*, No. 07-60756 (5th Cir.)
  - *California v. General Motors*, No. CV-06-05755 MJJ (N.D. Cal. Sept. 17, 2007), *app. pending*, No. 07-16908 (9th Cir.).
  - *Native Village of Kivalina v. ExxonMobil Corp.*, 4:08-cv-01138-SBA (N.D. Cal. filed Feb. 26, 2008) (argument on motion to dismiss set for May 19, 2009).

Environmental Litigation (cont'd)

- One byproduct of these claims is insurance litigation. In *Steadfast Insurance Co. v. The AES Corp*., Case No. 2008-858 (Va. Cir. Arlington Cty. filed July 9, 2008), an insurer is seeking a declaratory judgment that it has no obligation to provide a defense or indemnity coverage for the *Kivalina* claims.

Environmental Litigation (cont'd)

- Challenges to energy projects also are continuing.
  - Baard Energy recently dropped plans to seek DOE loan guarantees for a proposed coal-to-liquids plant, partly because of environmental lawsuits. Among the claims was that the wetlands permit failed to consider the facility's climate change impacts.
  - "The next thing in the environmental community is how do we start shutting down old plants . . . and replace those with energy efficiency or renewable power." David Bookbinder, Sierra Club.

    Look for attacks on waste disposal and mining, plus efforts to tighten criteria and air toxics standards, as well as impose GHG limitations.

Environmental Litigation (cont'd)

- Apart from EPA's more aggressive stance, a number of factors may give climate litigation a boost.
  - *In North Carolina v. TVA,* 593 F. Supp.2d 812 (W.D.N.C. 2009), the court held that untreated air pollution from one coal-fired power plant in Alabama and three in Tennessee were a public nuisance to the citizens of North Carolina.
    - "TVA's failure to speedily install readily available pollution control technology is not, and has not been, reasonable conduct under the circumstances."
    - The court issued an injunction with deadlines for installation of controls and emission caps.

Environmental Litigation (cont'd)

- The New York Times is reporting that the Global Climate Coalition, a former industry group, ignored its own technical experts in casting doubt on climate change science, leading some environmentalists to make comparisons to the tobacco industry.

  See Andrew Revkin, *Industry Ignored Its Scientists on Climate*, N.Y. Times (April 24, 2009) (available at http://www.nytimes.com/2009/04/24/science/earth/24deny.html).

Environmental Litigation (cont'd)

- The March 31, 2009 Waxman-Markey draft bill (Section 336) would expand the Clean Air Act citizen suit provision by specifying that "any person who has suffered, or reasonably expects to suffer, a harm" attributable to a government failure to act or a violation may bring a claim.

  "Harm" would include any effect of climate change occurring or at risk of occurring and the incremental exacerbation of such effect or risk (and specifically including any associated with a small incremental emission of any air pollutant).

Environmental Litigation (cont'd)

- On the other hand, the D.C. Circuit recently held that parties challenging the first stage of DOI's outer continental shelf oil and gas leasing program could not show substantive standing because:
  - any associated climate change which might occur would not produce immediate particularized injury, and
  - there was no causal link between the government's action and their injury.

Center for Biological Diversity v. DOI, No. 07-1247 (D.C. Cir. April 17, 2009).

Environmental Litigation (cont'd)

- Is it inevitable that a nation allegedly affected by climate change sues a developed country?
  - Consider the Alien Tort Statute (ATS), 28 U.S.C. § 1350, enacted in 1789:

    "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Environmental Litigation (cont'd)

- In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Souter, J.), the Supreme Court held that the ATS was a jurisdictional law that did not create a cause of action. While recognizing the need "for great caution in adapting the law of nations to private rights," the Court reasoned that "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant door keeping."
- But, the Second Circuit may have opened the door a little wider in *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d. Cir. 2009), a case in which a group of Nigerian children and their guardians sued for involuntary medical experimentation.

Environmental Litigation (cont'd)

- Ruling that the suit should proceed, the Second Circuit concluded the district court should have examined how the specificity of the norm relied upon by the plaintiffs "compares with 18th-century paradigms, whether the norm is accepted in the world community, and whether States universally abide by the norm out of a sense of mutual concern."
- Customary international law may be "discerned from myriad decisions made in numerous and varied international and domestic arenas" (quoting *Flores v. S. Peru Copper Corp.,* 414 F.3d 233 (2d Cir. N.Y. 2003)).
- The United States need not be a signatory to a binding treaty. "[T]he existence of a norm of customary international law is one determined, in part, by reference to the custom or practices of many States, and the broad acceptance of that norm by the international community."

Environmental Litigation (cont'd)

- To be sure, plaintiffs have not enjoyed great success with ATS claims. Nevertheless, cases continue to be filed.
  - A group of Brazilians recently brought negligence, strict liability, wrongful death, and ATS claims arising out of waste disposal in Brazil against U.S. chemical, pharmaceutical, and oil companies. *Vieira v. Eli Lilly & Co.*, 1:09-cv-0495 RLY-JMS (S.D. Ind. complaint filed April 21, 2009).
  - Shell goes to trial later this month in the Southern District of New York on claims that it aided the government in killing activists who opposed its operations in the Niger delta.

Environmental Litigation (cont'd)

- State courts also may provide a forum for hearing claims that allege overseas injury.

  Plaintiffs filed *Tellez v. Dole Food Company*, Case No. BC312852 (Cal. Super. Ct. Los Angeles amended complaint filed Sept. 7, 2004) as a toxic tort action alleging strict liability, negligence, and fraudulent concealment in connection with pesticide exposure in Nicaragua.

Environmental Litigation (cont'd)

- Nor should the possibility of overseas proceedings be discounted.
  - Consider Chevron's 15+-year legal battle arising from production in Ecuador. The case was originally brought in New York and then moved to Ecuador.
  - Claimants allege Chevron is responsible for dumping more than 18 billion gallons of wastewater, and one report puts the estimated damages at up to $27.3 billion.