

KAZMAREK GEIGER & LASETER LLP

ENVIRONMENTAL ADVISORY

Climate Change Regulatory Update #1: Endangerment Finding, Tailoring Rule, and Greenhouse Gas Reporting (February 11, 2010)

As most everyone knows, the recent climate gathering in Copenhagen ended with little agreement among the participating countries. That has not stopped various United States agencies, however, from pursuing their own agendas. The purpose of this update is to bring several of those to your attention. An additional update, issued contemporaneously, addresses a recent SEC guidance document pertaining to climate-related disclosures for publicly traded companies.

Endangerment Finding and “Climategate”

On December 15, 2009, EPA published its long awaited “Endangerment Finding” under Section 202 of the Clean Air Act. That finding concluded that “greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare.” EPA went on to conclude that “the body of scientific evidence compellingly supports this finding,” citing several reports but relying particularly on the conclusions of the Intergovernmental Panel on Climate Change (IPCC).

Despite EPA’s assertions, there are good grounds to question the scientific principles on which EPA based its findings. In addition, further doubt was cast upon EPA’s finding when it was revealed that a number of scientists had apparently manipulated temperature monitoring devices and records, doctored computer models, and unlawfully obstructed efforts by various groups to get access to important data. These actions,

commonly referred to as “Climategate,” were revealed in a series of e-mails that were either “hacked” or “leaked” (no one knows for sure).

Kazmarek Geiger & Laseter has been retained as part of a team by a wide range of Congressional representatives, businesses, and trade associations to initiate two challenges to EPA’s endangerment finding.

First, we have filed a Request for Reconsideration before EPA, alleging that the revelations of Climategate raise some serious questions about the data and conclusions on which EPA has relied. The implications of Climategate were not known during EPA’s public comment period, and therefore we argue that EPA is required to reopen the climate change docket to evaluate these revelations and to provide the public an opportunity to comment. Copies of our various petitions and related documents can be found on our website at:

<http://www.kglattorneys.com/resources.html>

Second, KGL has been retained by the same group of parties to challenge EPA’s Endangerment Finding in the District of Columbia Court of Appeals. The petition was scheduled to be filed yesterday, although in a delicious piece of irony, our challenge to EPA’s claims of global warming has been delayed due to heavy snowfall in the capital! Again, the petition has been posted on our website and other more substantive pleadings will be posted as they are filed. See:

<http://www.kglattorneys.com/resources.html>

Tailoring Rule

In *Massachusetts v. EPA*, the United States Supreme Court ruled that EPA had the authority to regulate carbon dioxide under the Clean Air Act. While one might reasonably debate that conclusion and come out either way, it is not debatable that regulating CO₂ as a “pollutant” under the Clean Air Act creates an infinity of inconsistencies. For example, the Clean Air Act defines a “major source” of pollutants as certain sources that emit as little as 25 tons per year of pollutant. While that may make sense for pollutants such as nitrogen oxides and hydrocarbons, it is plainly unworkable when applied to carbon dioxide. Setting a regulatory limit at that level would subject to regulation millions of apartment and commercial buildings, restaurants, retail stores, and public facilities, all of which would create a regulatory quagmire and economic disaster.

EPA quickly realized that regulating CO₂ as a pollutant in the ordinary way was impossible, noting that the number of PSD applications would balloon from 300 to 40,000 per year, and the number of Title V permit applications would skyrocket, incredibly, from 15,000 to six million! EPA put the cost on regulators at over \$15 billion per year and the cost on the regulated sector at nearly \$40 billion per year.

So, on September 30, 2009, EPA issued a proposed “tailoring rule.” Under that proposed rule, EPA would administratively excise the 25-ton threshold from the Clean Air Act and replace it with a 25,000-ton threshold instead. By using this threshold, EPA would “tailor” the permit programs to limit which facilities would be required to obtain NSR and Title V permits. EPA claims the new threshold would cover nearly 70 percent of the national GHG emissions that come from stationary sources, including those from the nation’s largest emitters—

including power plants, refineries, and cement production facilities.

As of January 2010, EPA expected to finalize the tailoring rule sometime in the next “several months.”

Greenhouse Gas Reporting

Although it is old news, it is worth noting that on October 30, 2009, EPA published its “greenhouse gas reporting rule,” which became effective December 29, 2009. As a general matter, facilities and suppliers must begin collecting data and complying with the rule’s obligations to report greenhouse case emissions starting on January 1, 2010.

The reporting rules apply to a number of specifically listed sources, plus other sources that emit more than 25,000 tons per year of CO₂-equivalents (including municipal solid waste landfills), plus suppliers of fuels and certain chemicals.

However, there are a number of special limitations to that requirement for the year 2010. The limitations include abbreviated reporting for certain facilities, the use of “BAMM” (“best available monitoring methods”) for the first few months of 2010, a postponement of required calibrations for certain kinds of equipment, and a delay in creating the monitoring plan until April 1, 2010. Note that monitoring plans do not need to be submitted to EPA for approval, but must be kept on site as a recordkeeping requirement.

All of these issues, and countless others, will continue to play out in the agencies and the courts. If you have any questions regarding climate change issues and how they may affect your business, feel free to contact the lawyers at Kazmarek Geiger & Laseter LLP, 404-812-0839 or info@kglattorneys.com.