

May 25, 2010

## **U.S. Senate Bill Looks to Move Cap-and-Trade Plans Forward - EPA Issues Final Tailoring Rule**

There have been two significant new developments in the regulation of greenhouse gases ("GHG"). One is the long awaited introduction of new draft legislation that sponsors hope will bridge the disagreements that have prevented the passage of comprehensive GHG legislation. The other is the issuance, on May 13, 2010, of EPA's greenhouse gas tailoring rule, the final piece of EPA's multiple promulgations to commence control of GHG from stationary sources.

### **The Kerry Lieberman (Graham) Bill**

The draft legislation is a bill sponsored by Senators Kerry and Lieberman (and formerly, Senator Graham), titled the American Power Act ("APA"). The APA establishes GHG reduction targets similar to those in previously filed bills, with a 17% reduction from 2005 levels by 2020 and an 80% reduction by 2050. The reductions would come from industrial and power plant sources that emit 25,000 tons per year or more of GHG; agricultural sources would be exempt from the requirements, but will be given incentives to achieve emission reductions that could be used as offsets. The cap and trade program to achieve GHG reductions would commence in 2013 for electric utilities and in 2016 for industrial sources.

Allowances for the cap and trade program will be acquired through a mix of direct distribution, set price sales, and auctions (subject to set floor and ceiling prices), with increasing reliance upon the auction over time. Revenues generated under the bill would go towards deficit reduction, energy bill discounts and rebates, and incentives for energy conservation and development of energy production sources that minimize GHG emissions.

Under the APA, states and local governments would be prohibited from operating cap and trade GHG reduction programs. There would be a limited preemption of GHG regulation under the federal Clean Air Act, but permitting for some sources would be required. Most observers predict that it will be an uphill battle for passage of the APA in 2010.

### **EPA's Final Tailoring Rule**

EPA's tailoring rule is designed to limit the number of stationary sources that would be subject to Clean Air Act permitting requirements for GHG emissions. The rule displaces the Clean Air Act provisions regarding the level of emissions that trigger new source review permitting requirements by creating special limits for GHG.

From January 2, 2011 until June 30, 2011, only those sources already subject to the Prevention of Significant Deterioration permitting program will have to consider GHG emissions for new or modified sources; the applicability threshold for those sources is 75,000 tons per year or more of increased GHG emissions. From July 1, 2011 to June 30, 2013, new sources that emit 100,000 tons per year or more of GHG will be subject to permitting requirements, regardless of whether their other air pollutant emissions would require permitting. Existing sources that engage in modifications that increase GHG emissions by 75,000 tons per year or more would also have to be permitted. Similar types of provisions would govern Title V permitting requirements.

EPA will conduct an additional rulemaking in 2011-2012 to determine what, if any additional permitting requirements, including adding lower emitting sources, should apply. EPA currently is committing that it will not require sources emitting less than 50,000 tons per year of GHG to obtain permits.

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Industry groups have questioned EPA's authority to vary from the statutory provisions regarding the level of emissions that triggers permitting requirement. Industry groups have also questioned whether any GHG permits may be required since EPA has regulated GHG from only mobile sources and not from stationary sources. Legal challenges to the Tailoring Rule, therefore, are likely.

Please feel free to contact us if you have any questions regarding this matter.

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