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Greenhouse Gas (GHG) Regulatory Update Three New Proposed Actions Continue the Debate

Greenhouse gas ("GHG") regulatory developments to address climate change concerns continue. On September 23, 2009, we noted EPA had finalized its GHG reporting rules. On September 30, 2009, three new proposals were released, two of which, if adopted, would initiate air quality regulation of GHGs.

The first proposal is a draft bill to be introduced in the U. S. Senate that would create a cap and trade system to reduce emissions of GHGs. The second is an EPA proposed rulemaking that would establish the requirements for determining which sources of GHGs would be required to apply for Prevention of Significant Deterioration (PSD) and Title V Operating Permits should EPA determine to regulate GHGs under the existing authority of the federal Clean Air Act ("CAA"). The third addresses the issue of whether the CAA should be construed to already apply to GHG emissions.

The draft legislation, the Clean Energy Jobs and American Power Act ("CJAPA"), was prepared by Senators Boxer and Kerry and in many respects is similar to the American Clean Energy and Security Act ("ACES") that recently was approved by the U.S. House of Representatives. It establishes a cap and trade program to reduce greenhouse gases and contains extensive provisions to encourage clean energy development, regulate the cap and trade mechanisms, and address the economic impacts of the provisions in the bill.

CJAPA differs from ACES in several respects including in regulating offsets, providing more significant incentives for companies to switch to natural gas or other cleaner fuels, and calling for a more aggressive reduction (20% versus 17%) in greenhouse gas emissions from 2005 levels by 2020. CJAPA also does not preempt existing CAA programs, including permitting requirements, from being applied to GHGs.

CJAPA is similar to the original draft ACES in that many details are left to further development in the legislative process. These details include how the allowances to emit greenhouse gases will be allocated and the nature of the regulatory oversight for the trading of allowances.

The second action, a proposed rulemaking commonly called the "Tailoring Rule," is EPA's attempt to address the concern that the emission thresholds to determine applicability of the PSD and Title V permitting requirements, as set in the CAA, are too low to allow for an effective system of permitting of GHGs emissions. The concern is that regulatory agencies could be swamped with applications as many unpermitted sources, such as schools, shopping centers, and apartment complexes, would be required to obtain permits if GHGs were included in the permitting system without changing the thresholds. The proposed rules establish a phased permitting approach setting a higher GHG emission threshold for the first phase. EPA's stated desire is that Congress enact legislation, such as CJAPA or ACES, that addresses GHGs and eliminates the need to have those pollutants addressed in permitting decisions.

The third proposal addresses whether GHGs already are regulated under the CAA. In response to a decision by the Environmental Appeals Board remanding a permit to EPA for an explanation of why GHGs were not regulated under the CAA, former EPA Administrator Stephen Johnson issued a memorandum in December 2008. The memorandum provided the rationale for EPA's conclusion that the existing rules that require power plants to monitor and report CO₂ emissions did not make CO₂ a pollutant regulated under the CAA. If CO₂ is already a regulated pollutant, then it should be addressed in permits. EPA agreed to reconsider Johnson's memorandum and has now proposed to affirm the basic conclusion in the memorandum – that a pollutant does not become a regulated pollutant unless the rules impose some form of control over the pollutant.

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If Congress does not act, EPA likely will complete the various rulemakings and determinations needed to begin the regulation of GHGs under the CAA. If that happens, the proposed permitting rules, if adopted, would determine what sources will have to obtain permits. A substantial portion of the EPA proposal consists of an explanation of why EPA believes it can set the threshold levels at amounts different from the levels in the CAA; it is likely that the rules, if adopted, will be challenged in court on that and other issues.

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