

Showdown at the Greenhouse Gas Corral

January 5, 2011

With the new year upon us, much speculation is focused on the course of Greenhouse Gas (GHG) regulation in the United States. Mid-term election results shifted power to the Republican Party and created an expectation that GHG regulation would slow down. However, powerful and countervailing forces are at work--making the future of GHG regulation far from certain. All three branches of the federal government, as well as several states, are attempting to influence the course of GHG regulation in the near term.

While the probability of "cap-and-trade" legislation in Congress is virtually nil, the executive branch is endeavoring to address GHG regulation via the Environmental Protection Agency's (EPA) efforts now under way. Effective January 2, 2011, the first phase of the EPA's Clean Air Act driven GHG regulatory program takes effect with a focus on approximately 400 major stationary sources. Though small in scale, this effort is big in a symbolic sense in that the EPA does not intend to back down from one of the Administration's primary environmental goals.

Meanwhile, the House Energy and Commerce Committee, now under Republican control, is expected to aggressively counter the EPA's efforts on grounds that such regulation would undermine economic development which is of utmost importance in these challenging economic times. The Administration has indicated it will veto any such efforts by Congress. Additionally, several states (most notably Texas) which bear the ultimate responsibility to carry out EPA's mandate, have indicated their inability or unwillingness to carry out the federal GHG regulations. Still other states are attempting to establish their own GHG regulatory regimes. Since the mid-term elections, California, Massachusetts and New Mexico have passed such legislation.

Against this backdrop, on December 6, 2010, the U.S. Supreme Court granted certiorari in *Connecticut et al., v. American Electric Power Corp.*, 582 F.3d 309 (2d Cir. 2009) to review the decision of the Second Circuit Court of Appeals.

The lawsuit was brought by several states and non-profit organizations claiming that GHG emissions from five major energy companies are causing climate change which causes harm to their property and is a public nuisance. The Second Circuit held that the plaintiffs could use the federal common law of public nuisance to seek redress for their injuries including injunctive relief such as capping emissions at levels the court decides is appropriate.

The outcome of the case could have major implications for regulated emitters as a result of action emanating from all levels of government involved in regulation of GHGs. If the Court finds in favor of these entities, it would stop most climate change nuisance litigation. If the Court decides in favor of the plaintiffs, climate change lawsuits will likely increase and may result in significant compliance costs for regulated entities. Depending on the holding and the rationale, the decision could curtail or accelerate the use of common law tort theories, such as nuisance, trespass, and negligence. Judicial recognition of climate change public nuisance claims may bring additional pressure on Congress to enact federal legislation to address climate change.

We will continue to monitor the situation. Contact us to stay abreast of the action and its impact.