

EnviroBrief

Environmental Law Practice Newsletter

March 2010

A Message from the Environmental Practice Group... We are pleased to bring you this issue of our EnviroBrief newsletter. Today's legal and political climate provides a host of environmental issues. We hope that you'll find our chosen topics of value. We encourage you to contact us with any comments you may have on the articles below or with respect to any of your environmental legal concerns.

EPA's Greenhouse Gas Inventory Rule Impacts 85% of Businesses That Have GHG Emissions – Are You Ready?

The U.S. EPA has adopted comprehensive regulations requiring each business that emits significant amounts of greenhouse gases ("GHG") to submit an annual inventory of GHG emissions to EPA.

The rule, which became effective on January 1, 2010, concerns seven (7) specific GHGs, namely: CO₂, CH₄, N₂O, HFCs, PFCs, SF₆ and certain other GHGs, including NF₃ and HFEs.

For reporting purposes, EPA requires that emissions of GHGs other than carbon dioxide (CO₂) be converted into its "carbon dioxide equivalents." For example, one ton of methane emissions is equivalent to 21 tons of carbon dioxide emissions.

The rule affects the following categories of facilities:

- Facilities presumed to be large emitters (emitting $\geq 25,000$ metric tons of carbon dioxide equivalent per year) such as ammonia producers and electronics manufacturers;

- Facilities that emit $\geq 25,000$ metric tons or more of carbon dioxide equivalent per year from stationary fuel combustion units and that fall into one of 16 "source categories," such as ethanol, glass, steel, and food item producers, as well as wastewater treatment facilities and landfills;
- Suppliers of carbon dioxide and fossil fuels;
- Manufacturers of motor vehicle engines and other mobile greenhouse gas sources such as watercraft and airplane engines; and
- Facilities that have stationary combustion units with aggregated maximum heat rates of 30 MMBtu/hour, that do not fall into one of the other numerical categories, and that emit $\geq 25,000$ metric tons of carbon dioxide equivalent per year.

Under the rule, the first GHG inventory reports will be due March 31, 2011 and will cover 2010 GHG emissions. However, vehicle and engine manufacturers will begin reporting in 2012 for calendar year 2011.

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GHG reporting will generally occur at the facility level. However, certain suppliers of fossil fuels and industrial gases and manufacturers of vehicles and engines will report at the corporate level, aggregating the data from all their facilities into one report.

The rule requires that each regulated facility self-certify its reports. No third party verification is required. Under this approach, all facilities subject to the rule would certify that they submitted truthful, accurate, and complete information to EPA. After submission, EPA will review the GHG inventory's supporting data in order to verify that the GHG inventory is complete, accurate, and complies with the rule's reporting requirements.

In a related development, on February 8, 2010, the Securities and Exchange Commission issued guidance

to public companies concerning the SEC's disclosure requirements relating to climate change issues. In this context, the SEC stated that examples of possible consequences of pending climate change legislation and EPA regulations that may require reporting include:

- costs to purchase, or profits from sales of, allowances or credits under a "cap and trade" system;
- costs required to improve facilities and equipment to reduce emissions in order to comply with regulatory limits or to mitigate the financial consequences of a "cap and trade" regime; and
- changes to profits or losses arising from increased or decreased demand for goods and services produced by the registrant arising directly from legislation or regulation, and indirectly from changes in costs of goods sold.

Max McCombs Joins the TC Environmental Team

Max McCombs recently joined Thompson Coburn's environmental practice as Senior Advisor, Environment, Health and Safety (EHS). In early 2009, Max (a non-lawyer) retired from Solutia Inc., a spin-off of Monsanto, as Vice President of Environment, Safety and Health.



At Solutia, Mr. McCombs was responsible for all EHS aspects of that global specialty chemicals business, which was comprised of 6,000 employees, operations in 13 countries and annual revenue in excess of \$3 billion. He also was responsible for annual EHS expenditures in excess of \$50 million and managed an organization of over 100 people. His global responsibilities included health, safety and environmental compliance, sustainability initiatives, legacy site remediation, brownfield redevelopment,

hazard communication (material safety data sheets and product labels), product stewardship, European REACH and similar chemical control laws, transportation and site security.

Max's wealth of EHS experience gives Thompson Coburn's environmental practice group additional technical capabilities. "Max's skill sets allow us to offer clients both a broader range of services and increased efficiencies," said Peter Strassner, the group's chair. "Max brings a new

and helpful perspective to preventing and solving our client's issues. We are excited to have a person with such in-depth global EHS expertise that spans from the board room to the plant floor embedded within our practice group," explained Strassner.

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U.S. Chamber's Environmental Lobbyist Provides Climate Change Update

Thompson Coburn recently hosted the first St. Louis area Environmental, Health and Safety ("EHS") networking event. Ross Eisenberg, Counsel, Energy and Environment, U.S. Chamber of Commerce, addressed legislative and regulatory initiatives pertaining to climate change for the many EHS executives in attendance.

Eisenberg predicted that a cap and trade bill to address greenhouse gas (GHG) emissions is unlikely to be passed in 2010. He advised that it is more likely for climate change issues to be impacted this year by regulation than by legislation. Thus, Eisenberg sees the U.S. Environmental Protection Agency and the courts being the main source of GHG activity in 2010.

Interestingly, Eisenberg explained that some of the Congress' disagreement over proposed GHG legislation is not necessarily based upon party lines. Eisenberg's charts demonstrated that some of the division in Congress is based on geography - with states having heavier coal usage for power generation generally leaning against proposed GHG cap and trade.

As this *Envirobrief* is being prepared for distribution, a number of lawsuits have just been filed in the U.S. Court of Appeals for the District of Columbia challenging the U.S. Environmental Protection Agency's finding that GHGs endanger human health and welfare. The lawsuits represent a direct attack on the EPA's effort to regulate GHGs.

What Might We Expect from President Obama and the U.S. EPA in 2010?

When President Obama was sworn into office a little over a year ago, many anticipated the course of federal environmental policy would shift dramatically. The new administration brought with it new and ambitious goals regarding:

- climate change—including the establishment of a cap and trade program that was to reduce greenhouse gas (GHG) emissions 80% by 2050;
- alternative energies—including the elimination of oil imports from the Middle East and Venezuela within 10 years; and
- the development of millions of "green jobs."

The new administration also brought with it new (or at least different) players to key environmental policy positions with a new set of priorities. This group of advisors has been dubbed President Obama's "Green Team," with some like-minded individuals calling the appointments a "Green Dream Team."

However, political predictions are just that — predictions. Most notably, GHG cap and trade did not become the law of the land in 2009, despite the sense that it was a "done deal"; in fact, cap and trade might not become the law in 2010. Instead, GHGs will in all likelihood be addressed in 2010 by EPA regulation.

Lisa P. Jackson, President Obama's appointee to head the EPA, has now been in office about a year. She was formerly the head of the New Jersey Department of Environmental Protection and is a chemical engineer by training. Administrator Jackson laid out her personal priorities in an open memo to EPA employees soon after taking office last year. She stated that her top priorities included: (1) reducing GHG emissions using the EPA's regulatory power under the Clean Air Act; (2) improving air quality by "plug[ing] the gaps" in the current regulatory system; (3) focusing on the health risks presented by chemicals in consumer products; (4) accelerating the pace of cleanup at hazardous-waste sites; and (5) intensifying the EPA's efforts to protect water quality by making "robust use" of the Agency's regulatory authority. In addition, Administrator Jackson added that her reign at EPA would include a special emphasis on "vulnerable subpopulations, including children, the elderly, the poor and all others who are at particular risk" from pollution.

Fast forward about a year, and we see that Administrator Jackson's priorities for 2010 are similar to those set for 2009:

1. **Taking Action on Climate Change:** Using the Clean Air Act, the EPA plans to finalize its mobile source rules and pursue GHG emissions reductions from large stationary sources such as power plants.

2. **Improving Air Quality:** The EPA has already proposed stronger ambient air quality standards for ozone. Building on that, EPA intends to develop tougher emission reduction goals for sulfur dioxide, nitrogen oxide, mercury and other air toxins. Further, EPA says it will strengthen ambient air quality standards for particulate matter, sulphur dioxide and nitrogen dioxide. Administrator Jackson specifically notes, "Improved monitoring, permitting and enforcement will be critical building blocks for air quality improvement."
3. **Assuring Product Safety:** One of Administrator Jackson's highest stated priorities is to make significant progress in assuring the safety of chemicals in our products. Last year, she announced principles for modernizing the Toxic Substances Control Act. There is bipartisan support in Congress for modernizing TSCA. The act has not been amended since 1976. Given the general view that the European Union is ahead of the US with its REACH initiative and pressure on the EPA to better address general chemical exposure risks beyond pesticides and pharmaceuticals, the TSCA reform legislation is expected to move forward in 2010 or 2011. Separately, EPA intends to perform rigorous, peer-reviewed health assessments on dioxins, arsenic, formaldehyde, TCE and other substances, using its streamlined Integrated Risk Information System.
4. **Cleaning Up Our Communities:** In 2009, EPA accelerated its Superfund program. Administrator Jackson explained, "Using all the tools at our disposal, including enforcement and compliance efforts, we will continue to focus on making safer, healthier communities. I am committed to maximizing the potential of our brownfields program, particularly to spur environmental cleanup and job creation in disadvantaged communities. We are also developing enhanced strategies for risk reduction in our Superfund program, with stronger partnerships with stakeholders affected by our cleanups."
5. **Protecting America's Waters:** Administrator Jackson indicated that EPA will initiate measures to address post-construction runoff, water quality impairment from surface mining, and stronger drinking water protection. EPA also plans to launch an Urban Waters initiative and says it will also revamp enforcement strategies to achieve greater compliance across the board.
6. **Expanding the Conversation on Environmentalism and Working for Environmental Justice:** EPA intends to build strong working relationships with tribes, communities of color, economically distressed cities and towns, young people and others. EPA also intends to include environmental justice principles in all of its decisions.
7. **Building Strong State and Tribal Partnerships:** The Agency has noted that declining tax revenues and fiscal challenges are pressuring state agencies and tribal governments to do more with fewer resources. EPA stated that it will do its part to support state and tribal capacity and, through strengthened oversight, ensure that programs are consistently delivered nationwide.

The first five priorities are the most likely to have the greatest impact on industry. GHG regulatory actions and developments will, no doubt, be among the issues at the forefront. Also, it will be interesting to watch Superfund this year, particularly in light of the Burlington Northern decision and the regulations under development to establish new financial assurance requirements for selected industry classes under Sec. 108(b) of CERCLA. Clean Water Act issues will likely be significant in 2010 for several reasons. First, further litigation is anticipated over the scope and reach of the Act following the Rapanos decision. Second, activity is expected with impaired waters through the TMDL program as a way of addressing non-source point nutrient discharges. Some environmental practitioners are also anticipating an increase in enforcement actions and in litigation driven by non-governmental organizations. Only time will tell, but 2010 should be an interesting year for those in the environmental field.

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