

# V&E Climate Change Report

January 21, 2010 – Issue 13

## Copenhagen, Congress, and Climate Change Regulation in the United States

by Christopher K. Carr

At the end of 2009, several major developments took place that outline the potential scope of federal regulation of greenhouse gases (GHGs) in the United States, including action by the U.S. Environmental Protection Agency, Congress, and international negotiators in Copenhagen. These developments clarified a number of climate-related issues, while leaving many questions unanswered.

As discussed elsewhere in this *Report*, EPA is moving forward with regulating greenhouse gas emissions under its existing Clean Air Act authority. This EPA action has been widely seen as a means to prod Congress to regulate greenhouse gases, to provide a better-suited statutory authority to reduce these emissions. But, if Congress fails to act, EPA has shown an intent to start regulating greenhouse gases through regulations promulgated in March of this year.

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## Power Plant Permit Petition Decisions Hint at Evolving Role for Control Technology Reviews

by Christopher B. Amandes

Prevention of Significant Deterioration (PSD) and Title V permits for coal-fired electric generating units (EGUs) are being routinely challenged by environmental groups as part of an overall strategy to prevent the construction of new coal-fired power plants and ultimately to retire the nation's existing fleet of such plants. These groups' efforts to impose emission limits for greenhouse gases (GHGs) through the Clean Air Act permit process generally have had little success because of EPA's stance that GHG controls are not yet required under the Clean Air Act. *See the related article about GHG PSD Issues in this Report.* However, two recent EPA orders responding to petitions to object to state permit decisions about best available control technology (BACT) at coal-fired EGUs may illuminate some of EPA's current thinking about the future of control technology at these types of sources, including how the concept of BACT may be evolving to include greater consideration of different processes and fuels.

In a December 15, 2009 order in the proceeding titled *In the Matter of Cash Creek Generation, LLC* (Petition Nos. IV-2008-1 & IV-2008-2), EPA Administrator Lisa Jackson granted the portion of the petition from three environmental groups that challenged Kentucky's refusal to consider the use of natural gas as a fuel as part of the BACT review. The permit applicant has proposed to build a new 770 MW EGU that would burn natural gas for a startup period of six months to one year, and then switch to Integrated Gasification Combined Cycle (IGCC) technology, which creates a synthetic gas from the processing of a coal slurry, with the option to burn natural gas as a secondary fuel thereafter. IGCC produces lower emissions than burning coal itself, but the Sierra Club and its co-petitioners questioned why Kentucky did not consider using only natural gas, which produces even lower emissions.

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Congressional climate change action moved in fits and starts at the end of 2009. While the House of Representatives passed comprehensive climate legislation earlier in the year, in the Senate, concerns of jobs, energy costs, other legislative priorities (such as healthcare and financial reform), and competing visions for how to address climate change, largely stalled significant movement on climate change legislation since the bill introduced by John Kerry (D-MA) and Barbara Boxer (D-CA) — the so-called Kerry-Boxer bill — was reported out of the Senate Environment and Public Works Committee in early November. However, on December 10, a bi-partisan group of Senators including Senator Kerry, Joe Lieberman (I-CT), and Lindsey Graham (R-SC) sent a set of principles to President Obama that provided an assessment of what climate commitments could be acceptable as a political matter in the Senate, and more action is expected.

Internationally, following rancorous negotiations at the UN Copenhagen conference, the outline of a new framework for international cooperation on climate change was introduced through the “Copenhagen Accord.” Although negotiators left the details of binding commitments to the future, these details could be hammered out as soon as this year.

As discussed below, each of these developments has provided some answers regarding the shape of possible U.S. regulation of greenhouse gas emissions, while leaving open many issues. On net, they signal continuing movement toward federal regulation of greenhouse gas emissions.

## **Copenhagen—Chaos and Accord**

The UN meetings in Copenhagen had been looked to by advocates for climate change action as the moment when nations of the world would come together and decide on the future scope of international climate change treaty obligations.

Some 120 world leaders—reportedly the largest gathering of heads of state and government in the history of the UN—convened in Copenhagen for the negotiations, and a total of some 30,000 plus delegates, stakeholders, and onlookers participated in what at times devolved into a chaotic atmosphere, complete with grandstanding speeches and street demonstrations. The result of the meetings was a short “Accord”: short in text, short on details, short of the expectations of many, and yet containing significant insights into what future international cooperation on climate change may involve.

The Copenhagen meetings were formally convened under the United Nations Framework Convention on Climate

Change (UNFCCC) and the Kyoto Protocol to that convention. The United States is a party to the former but not the latter. Under the Convention, countries agreed to cooperate to avoid the most dangerous impacts of anthropogenic greenhouse gas emissions. However, numeric emission reduction targets were only agreed to as part of the Kyoto Protocol, whereby developed countries (so-called “Annex I” countries) agreed to specific emission reduction targets. Developing countries (those not listed as Annex I countries) had no such emission reduction obligations.

In the run up to Copenhagen, the Obama administration caused some hopes to be raised among advocates of climate change regulation, by the President himself agreeing to attend the Copenhagen meetings, and then agreeing to attend the final day, when the final agreement was expected to be made. However, the specter of Kyoto looms over U.S. engagement in the international negotiations, whereby the Clinton administration had negotiated U.S. commitments under the Kyoto Protocol that were politically untenable to the Senate, which never ratified the treaty. However, it merits noting that the U.S. is the only major developed country not to have ratified the Kyoto Protocol, putting a spotlight squarely on the U.S. position entering into the Copenhagen negotiations.

In the months running-up to Copenhagen, negotiators made little progress in outlining the terms of a legally binding treaty, causing a reduction in goals by negotiators so that only a “politically binding” agreement would be sought that could be turned into a formal, legally-binding treaty following Copenhagen. Much attention was placed on whether the U.S. would commit to specific emission reduction targets, and whether major developing countries that had been free of such burdens under the Kyoto Protocol (such as China and India) would follow suit.

The Copenhagen negotiations were fractious, showing the limits of a UN process based on some 193 countries achieving consensus on a path forward to address climate change. In the end, President Obama engaged in significant multi-lateral and bi-lateral discussions with a smaller number of key countries, ultimately framing the Accord with China, India, Brazil, and South Africa, and with the Accord allowing countries (these and others) to identify the measures they plan to undertake by the end of this month (by January 31, 2010). Under the Accord, Annex I countries are to indicate their economy-wide emission reduction targets for 2020. Developing countries are looked to identify “mitigation actions,” which shall be subject to “their domestic measurement, reporting, and verification.” Verification of

developing-country commitments was hotly debated in Copenhagen (including concerns by the Chinese regarding preserving their national sovereignty). Final language in the Accord provides that developing country mitigation actions that are undertaken with international support (e.g., financing or technology support) will be subject to *international* measurement, reporting, and verification, suggesting a potentially heightened level of verification for measures in the developing world that receive such support.

Other components of the Accord include recognizing the need to mobilize financial resources from developed countries to address international deforestation, but further details are deferred to future negotiations and the finalization of a broader, more comprehensive climate change framework. The Accord does contemplate developed countries providing \$30 billion total over three years (from 2010 to 2012) to assist with both mitigation (reducing emissions) and measures to adapt to the adverse physical impacts of climate change in the developing world, with a goal to commit \$100 billion *annually* by 2020 for developing country climate-related needs. The funding is anticipated to come from both public and private sources, which could include funds from the purchase of emission offsets generated by emission reductions in the developing world that could be used to satisfy compliance obligations under climate regimes such as those contemplated by the Kerry-Boxer bill and the Waxman-Markey bill passed by the full U.S. House of Representatives in June 2009.

### Senate Developments

The Kerry-Boxer bill was reported out of the Senate Environment and Public Works Committee on November 5, following partisan rancor. Indeed, Republicans boycotted the proceedings, forcing a vote on the bill without any markup. Thus, what might have been significant amendments to the bill intended to garner additional votes in the Senate (toward the all-important 60 votes necessary to overcome a filibuster) remained unconsidered.

No sooner had Kerry-Boxer been reported out of the EPW committee, than attention shifted to the bi-partisan effort led by Senators Kerry, Graham, and Lieberman. A promised “framework” was sent to President Obama by these Senators on December 10, in the midst of the Copenhagen meetings, to provide the Obama administration an assessment of what climate commitments could be politically acceptable in the Senate.

Like the Copenhagen Accord, the Kerry-Graham-Lieberman framework was short in text and short on details. The framework did not include legislative text, but rather “principles and guidelines that will shape ongoing efforts” to develop comprehensive climate change and energy legislation. These principles were recognized as a “work in progress.” They propose a “market-based system” with a near term greenhouse gas emission reduction target “in the range of” 17 percent below 2005 emissions levels, with a long term target of approximately 80 percent below 2005 levels. This near-term target is identical to the 2020 target included in the Waxman-Markey bill, and slightly less stringent than that in the Kerry-Boxer bill (which seeks 20 percent reductions by 2020).

The principles mention securing energy independence, including both the deployment of clean energy technologies and, regarding one possible avenue for obtaining additional Senate votes, increasing the supply of domestically produced oil and natural gas as well as nuclear power. The principles specifically mention maintaining the ability to refine petroleum products in the United States as a national security priority.

Regarding federal preemption of state GHG regulatory activity, the principles state that it “is imperative that a federal pollution control system be meaningful and be set by federally elected officials.” In conjunction with reducing consumer costs for energy “to moderate the price of carbon and prevent extreme market volatility,” the principles specifically mention consideration of a “price collar and strategic reserve” (i.e., some form of price floor and cap for carbon permits, and a special pool of permits that could be drawn from in the event that permit prices rise to a certain level). The principles also support energy efficiency as a means of reducing energy bills.

Similar to provisions in the Waxman-Markey and Kerry-Boxer bills, the principles support (without providing details) “clean coal technology,” assistance to manufacturers to maintain the competitiveness of American-made goods, and significant amounts of domestic and international offsets (emission credits generated by international offset projects and by domestic entities whose GHG emissions are not otherwise regulated), including offsets for environmentally-friendly farming practices.

### What Does It Mean?

One implication of the Copenhagen Accord negotiated by the President is that the U.S. is now scheduled to identify the U.S. commitments under that Accord by the end of this month. Presumably they will be in line with reductions in the range of 17 percent below 2005 levels announced by the White House ▶

in the days before Copenhagen—which is in line with the reductions targeted in the Waxman-Markey bill and the Kerry-Graham-Lieberman principles. Notably, this tight timeline for submitting an emission reduction target under the Accord contrasts with the lack of a specific timeline to negotiate a formal climate change treaty under the UN process, and the U.S. commitment may be made subject to future Congressional action. Failing agreement in Copenhagen, some proponents of international climate action hope for treaty terms to be hammered out by the next annual UN climate conference at the end of this year in Mexico City—or sooner. Although the Copenhagen Accord does not commit to this, international developments merit close watching.

Senate progress on major climate legislation has widely been considered difficult in an election year. However, it should be recognized that much significant environmental legislation has been passed in an election year (including the Clean Air Act Amendments of 1990). Furthermore, the Obama administration appears to remain committed to climate action, as witnessed by among other things the President's significant, personal intervention to salvage some form of agreement—the Accord—from the Copenhagen chaos.

Competing domestic legislative priorities do complicate Senate action on a comprehensive climate bill. Competing priorities as of this writing include healthcare reform, laws to reform oversight of the U.S. financial system, and the possibility of more bills to stimulate job growth. Financial reform had been identified as logically preceding a climate bill, since such reform (including possibly derivatives regulations) may regulate the carbon trading market that would be created under bills like the Waxman-Markey and Kerry-Boxer bills. Indeed, the Waxman-Markey bill itself contained various market oversight provisions that, by their terms, would be superseded should certain financial reform legislation be passed.

Jobs and the economy remain paramount concerns to U.S. voters, and thus members of Congress, as they near an election year. The Administration and proponents of climate action have tried to promote the job-creating aspects of a climate bill. If they can succeed in this regard, prospects for passing the bill are likely to be enhanced.

Meanwhile, the U.S. EPA is actively pursuing an agenda to regulate greenhouse gas emissions through its existing authority under the Clean Air Act. As further discussed elsewhere in this *Report*, on December 15, EPA published in

the *Federal Register* its “endangerment finding” that motor vehicles contribute to GHG emissions that endanger public health and welfare. EPA is scheduled to release final rules regulating such motor vehicles in March of this year. Such regulation of motor vehicles could trigger a broader array of regulation under the existing provisions of the Clean Air Act, most notably the “Prevention of Significant Deterioration” regulations that regulate new and modified major sources of emissions. This regulation would bring about the “glorious mess” colorfully predicted by John Dingell (D-MI), and would likely be subject to an avalanche of litigation, including litigants seeking to spur more stringent or even broader EPA action, as well as litigants challenging EPA as acting beyond its statutory authority. EPA action under its existing statutory authority provides an incentive for Congress to act to provide more tailored legislation, but whether this incentive will prompt Congress to legislate—and the extent to which EPA action under its existing authority may be reigned in by Congress—will be significant issues to watch for this year.

Senator Lisa Murkowski (R-AK) has discussed introducing a measure to remove—at least to some extent—EPA's ability to regulate GHGs under its existing statutory authority. However, the exact timing of a vote on such a measure remains unclear as of this writing.

So where do things stand? GHG regulations and legislation could impact a wide swath of U.S. industry and commerce, including producers and consumers of energy. Hence all the controversy. We should know more by the end of this month. And should know more than that by the end of March. And so on through the end of this year, though there is likely to be a hiatus on Congressional activity once the election season kicks into high gear. Given the Administration's commitment to addressing climate change, there is likely to be continuing emphasis on government programs providing incentives for “clean energy” (broadly construed). These incentives may be up to and including a comprehensive, economy-wide “cap-and-trade” program along the lines of Waxman-Markey and Kerry-Boxer. Or legislation may be pursued that contains a suite of other climate and energy related provisions, including possibly incentives packaged as part of a “jobs” bill. And, unless stopped in court or preempted by Congressional action, EPA shows every indication of continuing to move forward to regulate GHGs. Stay tuned. ■

*Petition, from page 1*

In granting this portion of the *Cash Creek* petition, EPA did not determine that Kentucky's BACT review should have required the permit applicant to use natural gas. EPA instead remanded the permit to the state and the applicant with the instruction to expand the administrative record to further explain why the long-term use of natural gas as a fuel was not considered as a control option. EPA explained that when a potential control strategy is not evaluated in detail, the administrative record must reflect why that option was determined not to be "available." The fact that the *Cash Creek* facility was proposed to burn natural gas during the startup period and later shift to the IGCC process suggested that the option of burning natural gas was already designed into the project and therefore did not constitute "redefining the source." EPA acknowledged that there could be economic, environmental, or energy considerations dictating against the use of only natural gas, but Kentucky was required to explain what those considerations were and why they weighed against the option of using only natural gas.

While it granted this part of the petition on a seemingly narrow issue of administrative procedure however, EPA took the opportunity to express some thoughts about control technology for coal-fired EGUs and the appropriate scope of BACT review. When states undertaking a BACT review are considering different technologies or different fuels that could be claimed to be "redefining the source," EPA "strongly recommended" an analytic framework set out by EPA's Environmental Appeals Board (EAB) in several recent PSD review cases, including the September 2009 decision in *In re Desert Rock Energy Company, LLC* (PSD Appeal No. 08-03). The EAB framework calls first for the consideration of how the applicant defined the proposed facility's "end, object, aim, or purpose," which it referred to as the "basic" or "fundamental" design of the facility. Then the permitting authority should take a "hard look" at the applicant's determination to "discern which design elements are inherent for the applicant's purpose and which design elements may be changed to achieve pollutant emissions reductions without disrupting the applicant's basic business purpose for the proposed facility." EPA stated that BACT should not be applied to regulate the applicant's purpose or objective, but it left the suggestion unsaid that BACT could affect how that purpose or objective is actually achieved.

While this analysis may sound uncomfortably close to allowing "redefining the source," EPA went on to say that

EPA's opinion "should in no way be interpreted as EPA expressing a policy preference for construction of natural-gas fired facilities over IGCC facilities to generate electricity." EPA called IGCC an important technology and a positive strategy to reduce emissions from coal-fired electricity generation. In a masterpiece of double negative, EPA went on to say that the order did "not conclude that it is not possible or permissible for the permit applicant or [Kentucky] to develop a rationale which shows that firing exclusively with natural gas would 'redefine the source' or is otherwise not an 'available option.'"

In a second order, also issued on December 15, 2009, EPA granted a portion of a petition that challenged a BACT determination for a proposed coal-fired plant in Fulton, Arkansas. *In the Matter of American Electric Power Service Corporation, Southwest Electric Power Company, John W. Turk Plant, Fulton, Arkansas* (Petition No. VI-2008-01). The John Turk plant would burn pulverized sub-bituminous coal in an ultra-supercritical steam boiler, with natural gas used as a startup fuel. Among other things, the petition challenged Arkansas's failure to consider IGCC in its BACT review.

EPA granted this portion of the *John Turk* plant petition for substantially the same reasons as in the *Cash Creek* decision. Although Arkansas had analogized the turbine/heat recovery technology of IGCC to natural gas combustion and relied on earlier precedent finding that the use of natural gas instead of coal at an EGU was "redefining the source," EPA reiterated its strong recommendation that permitting agencies follow the EAB two-step approach in *Desert Rock*. And EPA distinguished the result reached in the *Deseret Power* case, noting that the *Deseret Power* applicant had the objective of using waste coal, which was considered to be incompatible with IGCC technology. EPA went on to say that an applicant's lack of expertise to operate a different type of source or cost savings considerations should not be considered during the "fundamental design" phase of the analysis, although both could be considered when assessing economic impacts and other costs in the later stages of the BACT review. EPA concluded that Arkansas "may yet be able to substantiate here that IGCC technology would redefine the source," and EPA asserted that it was not determining "that IGCC must be considered in a BACT analysis in all circumstances."

EPA's grant of the *Cash Creek* and *John Turk* petitions places substantial burdens on permit applicants and permitting entities to justify why different technologies or fuels are rejected in a BACT analysis, at least as to certain ►

EGUs using coal or coal-derived fuels. EPA continues to acknowledge the principle of not “redefining the source,” but under the BACT analysis articulated by EAB and EPA, that principle seems to carry less weight today than in years past. So far, these developments are playing out in the permit proceedings for coal-fired EGUs, but the same types of considerations are likely to guide EPA as the agency turns its

attention to New Source Performance Standards (NSPS) for GHG sources, because NSPS is generally considered the “floor” for BACT. In addition, EPA’s statements about the appropriate BACT analysis in the coal-fired EGU cases will undoubtedly be considered as permitting agencies conduct BACT reviews for GHG emissions at other types of sources, as well as for pollutants other than GHGs. ■

## EPA Publishes Greenhouse Gas Endangerment Finding

by Eric Groten

Announcing it on the eve of the Copenhagen conference and publishing its finding as the conference reached its climax, EPA has now made official its view that greenhouse gases (GHGs) “endanger both the public health and welfare of current and future generations.” 74 Fed. Reg. 66,496 (Dec. 15, 2009). This finding is made pursuant, and as a prerequisite, to formal regulatory action under Section 202(a)(1) of the Clean Air Act, which provides as follows:

The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

With this finding in place, EPA is now free to adopt its rules governing greenhouse gas emissions from motor vehicles, as the agency proposed in September. 74 Fed. Reg. 49454 (Sept. 28, 2009).

But the endangerment finding has consequences far beyond a mere preamble to EPA’s new “car rules.” This is EPA’s first official finding, made in response to the U.S. Supreme Court’s dictates in *Massachusetts v. EPA* and using notice and comment rulemaking procedures, that GHG emissions warrant regulation under the federal Clean Air Act. And for all practical purposes, it could be its last; although Clean Air Act regulatory requirements for certain other types of sources technically hinge on separate findings of “endangerment” specific to those sources, very little about the EPA finding is specific to GHG emissions from cars. Instead the *Federal Register* notice reads like a bureaucratized version of *An Inconvenient Truth*:

- “[H]uman-induced climate change has the potential to be far-reaching and multi-dimensional....”
- “[A]dverse air quality impacts provides strong and clear support for an endangerment finding, [including from i]ncreases in ambient ozone, [which] are expected to occur over broad areas of the country....”
- “[M]ortality and morbidity associated with increases in average temperatures, which increase the likelihood of heat waves, also provides support for a public health endangerment finding.”
- “[H]uman-induced climate change may alter extreme weather events, [which] also clearly supports a finding of endangerment given the serious adverse impacts that can result from such events and the increase in risk, even if small, of the occurrence of events such as hurricanes and floods.”
- “[P]ublic health is expected to be adversely affected by an increase in the severity of coastal storm events due to rising sea levels.”
- “[E]levated carbon dioxide concentrations and climate changes can lead to changes in aeroallergens that could increase the potential for allergenic illnesses.”
- “The evidence on pathogen borne disease vectors provides directional support for an endangerment finding.”
- “[T]he Administrator places weight on the fact that certain groups, including children, are most vulnerable to these climate-related effects.”

And that’s just public health. As for public welfare:

- “Water resources across large areas of the country are at serious risk from climate change, with effects on water supplies, water quality, and adverse effects from extreme events such as floods and droughts.”
- “The most serious potential adverse effects are the increased risk of storm surge and flooding in coastal areas from sea level rise and more intense storms.... [T]here is the potential for hurricanes to become more intense (and even some evidence that Atlantic hurricanes have already become more intense).”

- “[C]limate change is expected to result in an increase in demand for electricity production, especially supply for peak demand.”
- “Climate change will likely interact with and possibly exacerbate ongoing environmental change and environmental pressures in settlements, particularly in Alaska where indigenous communities are facing major environmental and cultural impacts on their historical lifestyles.”
- “[C]hanges in climate will cause some species to shift north and to higher elevations and fundamentally rearrange U.S. ecosystems.”

Having published these findings, it will become difficult for the current EPA administration or even any future EPA to decline ANY requested action under the Act to control GHG emissions, ultimately including adoption of ambient air quality standards for GHGs. Indeed, EPA already has received petitions demanding just that. And one can expect these governmental findings to show up in tort cases almost immediately.

Nowhere in the 50 pages of triple-column, fine print *Federal Register* text will one find any analysis of the basis on which the Administrator makes these findings, or any presentation of specific studies supporting any of these drastic conclusions. Instead, the reader is referred to the findings of other quasi-governmental bodies: “The major assessments by the U.S. Global Climate Research Program (USGCRP), the Intergovernmental Panel on Climate Change (IPCC), and the National Research Council (NRC) serve as the

primary scientific basis supporting the Administrator’s endangerment finding.” When one goes to the section of the *Federal Register* notice described as a discussion of “the science on which these Findings are based,” one finds instead discussion about legal topics, such as EPA’s authority to effectively transfer its obligation to make the endangerment finding to other entities, the meaning of cases describing EPA’s standards for decision, its failure to consider the beneficial effects of climate change, etc. The published response to comments does not address in any detail the voluminous studies and analyses of studies submitted by the interested public. In all, this notice treats the science as settled, leaving only arguments about legal issues, such as whether the failure of the car rules to make any difference in global GHG concentrations might have some bearing on making the endangerment finding in the first place.

Not surprisingly, the finding has been challenged. The first petition for review was filed within about a week of publication, *Coalition for Responsible Regulation, et al. v. EPA*, No. 09-1322 (D.C. Cir. filed Dec. 23, 2009), and others no doubt will follow before the mid-February deadline. In addition, at least one petition for reconsideration has been filed, based largely on revelations concerning possibly skullduggery in the temperature records maintained by the University of East Anglia’s Climate Research Unit, which are critical to the IPCC findings of historical temperature increases attributed to industrial emissions of GHG. But with its December 15, 2009 publication, EPA has committed itself to defending global warming, and to prosecuting its alleged causes. ■

## EPA Grapples With When PSD Review Is Triggered in the Climate Change Setting

by Christopher B. Amandes

With progress on climate change legislation stalled in Congress, EPA is moving ahead, slowly but steadily, to regulate greenhouse gases (GHGs) under the federal Clean Air Act. As of January 1 of this year, certain facilities are required to begin tracking their GHG emissions under the mandatory GHG reporting rule that was finalized in late October, and vehicle manufacturers are no doubt studying the EPA and the National Highway Traffic Safety Administration (NHTSA) proposed rule on car and light truck GHG emissions

for the 2012 to 2016 model years (the GHG Light Duty Vehicle Rule). EPA’s proposed “tailoring” rule provides insight into how EPA would like to apply the Clean Air Act’s permitting provisions to GHG sources for at least the first six years of such a regulatory regime. But while EPA takes further action on that and other rules and while the inevitable litigation about EPA’s decisions proceeds, EPA has had to confront the issue of how to apply the existing permitting provisions of the Clean Air Act to GHG sources in a world where the United States Supreme Court has declared GHG to be an “air pollutant.”

The last word of the Bush administration EPA on this subject was the so-called “Johnson Memorandum,” issued by then-EPA Administrator Stephen Johnson on December 18, 2008. In that memorandum, Administrator Johnson responded to a decision by EPA’s Environmental Appeals Board (EAB) ▶

involving a Prevention of Significant Deterioration (PSD) permit for a new waste-coal-fired electric generation unit in Utah. The EAB had directed EPA Region 8 to provide a better rationale for its conclusion that pollutants subject only to monitoring and reporting requirements under the Clean Air Act were not “subject to regulation under the [Clean Air] Act” and therefore not subject to PSD review. See *In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008). The Johnson Memorandum relieved EPA Region 8 and all other EPA regional offices from this obligation by declaring that EPA would require PSD review only for those pollutants that were subject to actual control of emissions under the Clean Air Act and not for pollutants subject only to monitoring or reporting requirements. As of the date of the Johnson Memorandum, GHGs, and more specifically, carbon dioxide, were subject to certain monitoring and reporting requirements but not to emission controls under the Clean Air Act.

Less than one month into the Obama administration, the EPA granted a petition for reconsideration of the regulatory interpretation at the center of the Johnson Memorandum. In granting the motion for reconsideration, however, EPA did not stay the effectiveness of the Johnson Memorandum, although it also noted that states were not obligated to follow it as they issued PSD permits under their state implementation plans. In addition, Administrator Lisa Jackson publicly signaled that the Johnson Memorandum might not be EPA’s last word on the subject.

On September 30, 2009, EPA issued a proposed rule that solicits comments on five alternative approaches to interpreting the phrase “subject to regulation under the Act” for PSD purposes. Under the approaches discussed by EPA, a pollutant would be “subject to regulation” for PSD purposes if the pollutant was subject to (1) actual emission controls under the Clean Air Act; (2) emission monitoring or reporting requirements; (3) regulatory requirements included in an EPA-approved state implementation plan; (4) an EPA finding of endangerment; or (5) the grant of a section 209 waiver (allowing a state to regulate vehicle emissions). EPA’s *Federal Register* notice for the proposed rule describes at some length the issues involved with each possible interpretation and announces that EPA’s preference is to retain the approach

set out in the Johnson Memorandum, namely, that only pollutants subject to actual emission controls would be subject to PSD review. EPA notes that the “actual control interpretation” best reflects the agency’s past policy and practice and allows the agency to develop information about a particular pollutant before being forced prematurely to consider controls for that pollutant.

EPA solicited public comment on its proposed interpretation through December 7, 2009, and it is not known precisely when EPA will take action to finalize the rule. Thus, for now, the primary effect of the proposed rule may be to preserve the status quo for those entities currently seeking permits for significant GHG sources. With the Johnson Memorandum not stayed and EPA having announced that its preferred interpretation is the “actual control interpretation,” it is harder for project opponents to argue that carbon dioxide or other GHGs are pollutants “subject to regulation” under the Clean Air Act.

For GHG sources, however, the Johnson Memorandum and a formal rulemaking endorsement of the “actual control interpretation” are likely to provide only short-lived relief from PSD permitting. EPA clearly contemplates that when the GHG Light Vehicle Duty Rule is finalized (or at least when it goes into effect), GHGs will become “subject to regulation under the Act” and will be subject to PSD permitting. EPA’s proposed rule states EPA’s intention to finalize its “tailoring” rule no later than the time that the GHG Light Vehicle Duty Rule goes into effect so that when GHGs become subject to regulation under the Act, only the largest GHG sources — and not every 100 or 250 ton per year source — will have to undergo PSD permitting.

Of course, environmental and other groups may not share EPA’s views about what is the most desirable regulatory schedule. Furthermore, EPA’s “tailoring” rule, when finalized, will almost certainly be challenged by those who want the statutory PSD limits of 100 and 250 tons per year to apply to GHGs, either because of a wish to impose controls on the broadest possible range of GHG sources or a wish to make a Clean Air Act GHG permitting program so unmanageable that Congress is forced to intervene. ■

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## Vinson & Elkins Expands to West Coast

### ***New Silicon Valley Office Focuses on Emerging Clean Energy Projects, Venture Capital, and Intellectual Property***

On January 10, 2010, Vinson & Elkins expanded to the West Coast by opening a new office in the Silicon Valley, which is rapidly emerging as one of the energy capitals of the world.

Widely recognized as the world's leading energy law firm, V&E opens its new Palo Alto office with three partners who have relocated from Texas. [Boyd Carano](#) of Houston and [Kyle Fox](#) and [Margaret Sampson](#) of Austin provide clients with extensive expertise in energy project finance and development, emerging company formation and venture capital finance, and intellectual property and life sciences. In addition, V&E is looking to grow the office immediately through lateral hires.

"California is fast becoming the center of clean energy ventures and venture capital in the United States, especially for innovative technologies such as biofuels, photovoltaic and concentrating solar power, and advanced battery storage," says Boyd, whom Euromoney annually names as one of the top lawyers in international energy and project finance. "Large segments of the clean energy sector are evolving beyond the traditional Silicon Valley investment strategy to encompass a longer term, more capital intensive approach, involving various financing structures for various stages of development.

"Commercial scale production facilities, such as algae-to-fuel facilities, advanced bio-refineries, and utility-scale solar power plants, will require carefully structured arrangements with contractors, suppliers, operators, off-takers, and government agencies to successfully finance and commercialize clean energy technologies," says Boyd, who represented eSolar in a transaction with NRG Energy for the development of three solar thermal power plants totaling up to 500 megawatts. "As a result, a lot of the clean energy investors are going to be seeking joint ventures, strategic alliances, and commercial arrangements with traditional energy players, especially those with strong balance sheets and proven track records in power generation, refined products, petrochemical, and transmission sectors."

Kyle, who represents emerging and venture-backed companies, says that President Obama's commitment to double the renewable energy capacity of the United States by 2012 is supported by the \$40 billion set aside for clean energy initiative in the 2009 federal stimulus package, along with the \$20 billion being offered in modified tax incentives targeting clean energy.

"We believe that private investment dollars will chase the benefits of federal funding," says Kyle. "Clean energy and the related technologies are going to become major drivers of venture investment activity in the energy business.

"Silicon Valley is leading the clean energy revolution because of its entrepreneurial community—executives who successfully lead companies from ideas to operations, investors willing to prove a new technology, and professionals who understand the needs of early stage enterprises," says Kyle. "Clean energy will require pairing Silicon Valley's substantial strengths with traditional energy financing, regulatory, and operational expertise. Our clients recognize that they need advisors who know both worlds, and who provide guidance throughout the life of a clean energy company, from idea and venture financing through development and operation."

The final component of the Palo Alto office's practice focus is intellectual property, which is critical to all clean energy and life science businesses, according to Margaret, who has a Ph.D. in Molecular and Human Genetics and will be leading V&E's IP practice in California.

"Clean energy clients with IP holdings face a myriad of legal issues, including strategic patent portfolio development, management and freedom-to-operate in the market, mergers and acquisitions, and IP licensing and enforcement," says Margaret. "It is critical to the long-term success of these clients to have an IP strategy in place at all stages of growth, which anticipates and evolves with the client's business plan, competitive and development challenges, and the market."

Boyd, who is the managing partner of the new office, says that V&E will be actively pursuing associate and partner laterals this year. ■

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