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## Recent U.S. Actions on Greenhouse Gas Regulations

Efforts in the United States to regulate greenhouse gas ("GHG") emissions date back to 1998, when the former general counsel of the U.S. Environmental Protection Agency ("EPA") concluded that GHG emissions were pollutants under the Clean Air Act and could be regulated. A year later, a group of organizations petitioned EPA to regulate GHG emissions from new motor vehicles. In 2003, EPA denied the petition, which was challenged by Massachusetts, among others, in litigation that ultimately was decided by the U.S. Supreme Court.

In 2007, the U.S. Supreme Court found that the EPA had the authority under the Clean Air Act to regulate GHG emissions. In 2009, the EPA issued an "endangerment finding" under the Clean Air Act that GHG emissions from new motor vehicles may endanger public health or welfare. This finding required EPA to issue GHG emissions standards for light-duty motor vehicles, and it also triggered the need for other regulations, including GHG permitting standards, the installation of Best Available Control Technology ("BACT") for controlling GHG from new or modified stationary sources, and New Source Performance Standards ("NSPS") for GHG emissions.

As the 112th Congress kicks off and the new House majority is set to begin intensive oversight of EPA rules, EPA recently took two significant actions that will affect the schedule for issuing GHG regulations. These actions also will ultimately affect the level of GHG emissions controls that will be required at power plants and other large stationary sources.

The first action went into effect on January 2, 2011, requiring that permits issued under the Clean Air Act for large stationary sources begin to address GHG emissions, as well as require BACT to control these emissions. To prepare for this requirement, the EPA issued a series of rules on December 23, 2010 to (1) narrow the permitting requirement so that facilities with GHG emissions below the levels set in the tailoring rule do not need permits and (2) give EPA authority to issue GHG permits in states that need to revise their permitting regulations to cover GHG emissions.

Second, on January 12, 2011, EPA waived GHG permits for the next three years for utilities, boilers and other industrial facilities using biomass. EPA is expected to continue to study the effects of biomass, and before the end of the three-year deferral, issue a rule clarifying the GHG permitting requirements for biomass.

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Third, EPA announced a schedule for issuing regulations controlling GHG emissions from electric generating units and petroleum refineries. According to this schedule, EPA will propose standards for natural gas, oil and coal-fired electric generating units by July 26, 2011 and for refineries by December 10, 2011, and issue final standards by May 26, 2012, and by November 10, 2012, respectively. EPA agreed to this schedule as part of a settlement with several states, local governments and environmental organizations that had sued EPA over its failure to update emissions standards for power plants and refineries as required by Section 111 of the Clean Air Act. Section 111 requires EPA to issue NSPS that set emissions limits for new facilities and address emissions from existing facilities.

### *Implications*

These two actions, along with EPA's endangerment finding, have set the stage for the regulation of GHG emissions from stationary sources over the next two years. These actions are extremely controversial. EPA's endangerment finding has been challenged in court, and there is some bipartisan support in Congress to use the Congressional Review Act to limit or overturn EPA's GHG rulemaking. If Congress fails to overturn or delay these actions (a likely outcome since it would require the president's approval), EPA's actions will likely be challenged in court. At a minimum, EPA's permitting and NSPS rules will have significant implications for utilities and refineries, among others.

### *Permitting Requirements*

Beginning on January 2, 2011, permits issued for large stationary sources will have to address GHG emissions. However, because these permit requirements are being phased in, and initially no facility will be required to get a new permit solely due to its GHG emissions, the burden to industry should be somewhat reduced, at least through the middle of this year. Beginning this July, however, all new sources with GHG emissions of 100,000 tons per year or modified sources with GHG emissions of 75,000 tons per year will be required to get a permit. This will rapidly increase the burden on industry and state permitting agencies.

One big unresolved question is how state permitting agencies ultimately will define BACT; in guidance issued late last year, EPA essentially passed this responsibility to states by providing only general recommendations that states should use when making BACT decisions. These determinations will prove controversial since a facility will have to use BACT to obtain a permit. In EPA's BACT guidance to state agencies, EPA placed an emphasis on BACT options that improve energy efficiency, and it identified carbon capture as a promising but expensive technology that should be considered. At the same time, EPA also recognized that certain biomass fuels by themselves may be considered BACT, and in early January went so far as to waive permit requirements for three years for facilities using biomass. The availability of options to industry and the ultimate costs will depend on the flexibility of the state permitting agencies in determining BACT.

### *New Source Performance Standards*

Implementing the agreement that EPA reached in December with states and environmental groups, on the EPA's schedule for issuing GHG NSPS for new and modified electric generating units and refineries, will likely be contentious. Once these standards are issued, these two industries will be subject to maximum limits for GHG emissions. The EPA administrator will determine whether the industry has adequately demonstrated the application of the best system of emissions reductions.

The Clean Air Act gives EPA the flexibility in setting these standards to consider several factors, including the cost of achieving such reductions, any non-air quality health and environmental impacts, and energy requirements. To establish such emissions standards, EPA will need to undertake an extensive review of existing technology and its costs, and ultimately will establish specific numeric standards for emissions of carbon dioxide, sulfur oxides, particulates, and nitrogen oxides that will vary by industry.

It is likely that EPA will establish tight controls and emissions limits on carbon dioxide emissions from power plants and petroleum refineries, thereby creating an incentive for them to reduce their GHG emissions, either directly by changing feed stocks, or by diverting the emissions for beneficial reuse.

**Cliff L. Rothenstein** (Washington, D.C.)
Government Affairs Advisor
cliff.rothenstein@klgates.com

**Michael W. Evans** (Washington, D.C.)
michael.evans@klgates.com

**Cindy L. O'Malley** (Washington, D.C.)
Government Affairs Counselor
cindy.omalley@klgates.com

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