

## Climate Change and Environmental Update

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### New Federal Greenhouse Gas Emission Laws Begin to Take Effect January 2011

Last week, the U.S. Environmental Protection Agency (“**EPA**”) finalized two greatly anticipated greenhouse gas (“**GHG**”) regulatory measures. The first details the regulation of GHG emissions from vehicles beginning with model year 2012. The second confirms that GHG emissions from stationary sources will be regulated as early as January 2, 2011.

- **Vehicle Emissions.** On April 1, 2010, EPA, with the Department of Transportation, promulgated a suite of standards that regulate vehicle emissions – one set governs fleet-wide average fuel economy; a second set applies to fleet-wide average carbon dioxide emissions; and a third set caps the per-vehicle emissions of nitrous oxide and methane. The standards apply to model years 2012 through 2016 and generally apply to passenger cars, light-duty trucks and medium-duty passenger vehicles, which collectively are responsible for almost 60% of all U.S. transportation-related GHG emissions.

The standards are focused primarily on reducing emissions of carbon dioxide, one of the most abundant GHGs, but also regulate three other more potent GHGs: nitrous oxide, methane and hydrofluorocarbons. The nitrous oxide and methane limits are not designed to reduce current emissions, but rather are designed to prevent potential increases in emissions (or “backsliding”) as vehicles begin to rely increasingly on compressed natural gas, ethanol, lean-burn gasoline and other alternative fuels. Hydrofluorocarbons, which are used in air conditioning systems, are not expressly capped, but a reduction of those emissions can lead to credits toward meeting the fleet-wide carbon dioxide emission standards.

- **Stationary Sources.** On March 29, 2010, EPA reaffirmed an existing policy that any air pollutant subject to “actual control” under any provision of the Clean Air Act is automatically regulated under two air permitting programs: Prevention of Signification Deterioration (“**PSD**”) and Title V. This policy was implemented in part through a 2008 Bush Administration memorandum that ironically had the effect of *excluding* GHG emissions from regulation. However, once the vehicle emission standards described above take effect, carbon dioxide, nitrous oxide, methane and hydrofluorocarbons will be subject to “actual control” and therefore will be brought under the PSD and Title V permitting programs. EPA appears to be contending that two other potent GHGs – sulfur hexafluoride and perfluorocarbons – will also become subject to the air permitting programs by virtue of the vehicle standards, even though those compounds are not emitted by motor vehicles or subject to the vehicle emission standards.
- **Timing.** Because the vehicle emission standards apply first to vehicles with model year 2012, GHG emissions would not be subject to “actual control” until the earliest date on which a 2012 vehicle could be sold. As a result, EPA has determined that the earliest date on which PSD and

Title V permitting requirements will apply to GHG emissions from stationary sources would be January 2, 2011. Emitters should be thinking about the implications now, however, because: (i) all permits issued after that date will need to comply with applicable GHG requirements even if the permit application was submitted previously; and (ii) states may include GHG requirements in PSD permits they issue before that date.

- **Tailoring Rule.** Next, EPA is expected to finalize its “Tailoring Rule,” which will clarify which stationary sources will be subject to the PSD and Title V programs. It is anticipated that that rule will increase the otherwise applicable emission thresholds so as to regulate – at least initially – only the largest emitters of GHGs.

As the first comprehensive federal regulations to limit GHG emissions, these new measures and the forthcoming Tailoring Rule are highly controversial and could impose significant pollution control and other compliance costs. Judicial and legislative challenges have been brought against EPA’s so-called GHG “endangerment finding” on which these rules are premised, and a coalition of industry groups has already filed for judicial review of EPA’s “actual control” permitting policy. Further opposition is inevitable, and preemption of EPA regulation is also a key issue in the ongoing Senate negotiations over a draft climate bill.

- ▶ [See Joint EPA and DOT Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards](#)
- ▶ [See EPA Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs](#)

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### **EPA Seeks Corporate Ownership Information Under Greenhouse Gas Reporting Rule and Expansion of Reporting Obligations to Additional Oil and Gas Facilities**

Facilities subject to EPA’s GHG reporting rule are currently required to monitor their GHG emissions and, beginning in March 2011 and annually thereafter, report their emissions data for the preceding calendar year. EPA recently proposed amending its reporting rule to require disclosure of corporate ownership and industry classification details. EPA is soliciting input on exactly what ownership information it should require, but options include identifying either the highest level U.S. parent company with the largest ownership interest in the reporting entity or all top level U.S. parent companies and their respective ownership percentages. EPA expects that such information will allow it to better understand the aggregate GHG emissions of individual companies, as well as larger industry sectors, and help inform the development of future climate change regulations.

EPA has also formally proposed requiring emissions data from additional petroleum and natural gas systems not included under the existing rule, beginning for emission year 2011. The expanded scope would include fugitive, vented and flare combustion emissions from certain petroleum and natural gas facilities that emit 25,000 metric tons or more of carbon dioxide equivalent, including onshore and offshore production; onshore natural gas processing; onshore natural gas transmission compression; underground natural gas storage; liquefied natural gas storage, import and export; and natural gas distribution facilities. The proposal would modify the definition of “facility” so as to aggregate certain equipment into a single emission source for reporting purposes. EPA estimates the proposed amendment would encompass approximately 1,800 facilities that are not currently subject to the existing reporting rule.

- ▶ [See EPA Proposed Rule for Corporate Parent Information](#)
- ▶ [See EPA Proposed Rule for Petroleum and Natural Gas Systems](#)

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## Future Federal Actions May Need to Consider Impact on Climate Change

The White House Council on Environmental Quality (“**CEQ**”) has released draft guidance that would direct federal agencies to consider climate change when evaluating proposed federal actions under the National Environmental Policy Act (“**NEPA**”). The guidance does not establish any clear requirements, but it does advise agencies to consider the GHG emissions of the proposed action, as well as the effects climate change might have on the underlying project. Under CEQ’s approach, agencies should generally consider a quantitative assessment of both direct and indirect emissions if a proposed action would be reasonably anticipated to cause direct annual emissions of 25,000 metric tons or more of carbon dioxide equivalent. CEQ is careful not to characterize this threshold as determinative of significance under NEPA; instead it presents it as a reference point to help guide agencies in their analysis. It also notes that long term actions with emissions below that threshold may still warrant quantitative study. The guidance does not apply to land and resources management actions – which would include oil and gas drilling on federal lands – but CEQ has solicited comments on how to assess the climate change effects of these activities.

- ▶ [See CEQ Draft Guidance](#)

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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