

# KIRKLAND ALERT

March 2010

## EPA Provides Initial Roadmap for Greenhouse Gas Regulation Under the Clean Air Act

In a February 22, 2010 letter to several Senators (“Feb. 22 Letter”), the Environmental Protection Agency (“EPA”) set forth its timeline for the implementation of regulations for greenhouse gas (“GHG”) emissions. The EPA intends to use its existing authority under the Clean Air Act to regulate the emission of GHGs beginning in 2011. While the Feb. 22 Letter lacked specific details regarding many items of importance to industry and other stakeholders, it does provide a clear roadmap of the EPA’s plan and timing for regulating GHGs.

Therefore, although the fate of the Waxman-Markey bill (H.R. 2454) and similar legislation is unclear, there is still a distinct possibility that GHG emissions may be subject to regulation beginning in 2011. The focus of many in 2009 was on the Waxman-Markey legislation, understanding its implications for industries in general and one’s company in particular, and planning for the increase in regulation and costs associated with GHG emissions that would ramp up over a ten to fifteen year span. If the EPA is able to implement its proposed GHG emission controls under the Clean Air Act framework, the effect on industry will commence within 12 to 36 months.

### *EPA Proposed Timeline for GHG Regulation*

The EPA is relying on its authority under the Clean Air Act<sup>1</sup> to regulate GHGs. In order to regulate a pollutant under the Clean Air Act, the EPA must make a finding that such pollutant endangers the health and welfare of Americans. In the landmark case *Massachusetts v. EPA*<sup>2</sup>, the Supreme Court held that the term “air pollutant” under the Clean Air Act could include GHGs, should the EPA determine that they endanger the health of Americans. On December 15, 2009, the EPA issued such determination (“Endangerment Finding”).<sup>3</sup> The EPA has issued several notices of proposed rulemaking seeking comment on its plans to regulate GHGs.<sup>4</sup>

In the Feb. 22 Letter, EPA Administrator Lisa Jackson proposed the following timeline:

- 2010: No stationary source of GHG emissions will need a Clean Air Act permit to cover its GHG emissions for calendar year 2010.
- January through June 2011: Large stationary sources of GHGs (including electric generating facilities and certain industrial facilities) that must obtain Clean Air Act permits for emissions other than GHGs (*e.g.*, particulate matter, sulfur and nitrogen oxides) will need to address GHG emissions in any such permit applications. It is uncertain from the Feb. 22 Letter whether GHG regulation will apply only to new sources of emissions, or whether it will also apply to those sources that are renewing or modifying their Clean Air Act permits.
- July 2011 through 2013: All large sources (presumably stationary) of GHG emissions would be subject to GHG emission regulation beginning in the second half of 2011. Administrator Jackson did not elaborate in the Feb. 22 Letter what this process would entail, but it would likely be a permit application process similar to the current Clean Air Act permit process for regulated emissions. Additionally, Administrator Jackson noted that she anticipated that at some point between July 2011 and 2013, the EPA will set the threshold level for large sources of GHG emissions at a level that is “substantially higher” than the 25,000 ton per

annum limit that the EPA originally proposed in its rulemakings.

- 2016: The smallest sources of GHG emissions will not be subject to Clean Air Act regulation (and permitting) prior to 2016. It is uncertain from the Feb. 22 Letter what the EPA will consider to be the “smallest sources” but presumably such entities would have GHG emissions that were substantially below the threshold for large (stationary) sources of GHGs.

### *Best Available Control Technology for GHGs*

To comply with Clean Air Act obligations to control its regulated emissions, an emission source is obligated to use the “Best Available Control Technology” (“BACT”) to control such emissions. In the Feb. 22 Letter, Administrator Jackson acknowledged that there are currently no approved or commercially available BACT for GHG emissions. While theoretical procedures have been proposed, carbon capture and storage or sequestration processes may not be available or commercially viable on the timeline proposed by the EPA.

According to the Feb. 22 Letter, in defining BACT, the EPA will use the current framework for non-GHG emissions, including analysis of the commercial viability of a given technology. Not addressed in the Feb. 22 Letter is the scenario in which GHG emission regulation becomes effective but no BACT process has been designated. It is uncertain what legal standing the EPA would have to designate mitigation (such as planting trees or the purchase of carbon offsets) as BACT.

### *Opposition to EPA GHG Regulation under the Clean Air Act*

Members of both the US House of Representatives and the Senate have introduced resolutions of disapproval pursuant to the Congressional Review Act of 1996 (“CRA”). If such resolutions are enacted, they would (i) render the EPA’s Endangerment Finding regarding GHGs null and void and (ii) make any future attempt by the EPA to regulate GHGs under

the Clean Air Act subject to specific authorizing legislation from Congress. The resolutions of disapproval are a procedure under the CRA, a rarely used law which provides Congress with an expedited process to void any regulatory rules issued by federal agencies. Such resolutions of disapproval must still be adopted by a majority of both houses, and can be vetoed by the President. The Senate resolution has quite broad support, with 41 Senators currently co-sponsoring it (including 3 Democrats). Two House resolutions have been introduced, the first by House Committee Chairs Ike Skelton and Collin Peterson on February 25, 2010, and the most recent by Congressman Barton on March 2, 2010, which has over 80 co-sponsors.

In addition, 17 petitions for review of the EPA endangerment finding, involving more than 70 petitioning parties, have been filed in the DC Circuit. The petitioners include the Attorney Generals of Texas, Virginia, and Alabama, as well as a wide range of companies and trade groups. The petitions have been consolidated into one case before the DC Circuit.<sup>5</sup>

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<sup>1</sup> 42 U.S.C. § 7401 et.seq. (2006).

<sup>2</sup> 549 U.S. 497 (2007).

<sup>3</sup> See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66495 (December 15, 2009) (to be codified at 40 C.F.R. ch. 1).

<sup>4</sup> See, e.g., Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44353 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. 1); Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (proposed April 24, 2009) (to be codified at 40 C.F.R. ch. 1).

<sup>5</sup> *Coalition for Responsible Regulation, Inc. et al., v. Environmental Protection Agency*, No. 09-1322 (D.C. Cir. February 18, 2010) (order for consolidation of cases).

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