

# THE DAILY RECORD

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## Environmental LAW

### A climate change primer for business

Reports of manipulated data and record-setting snowfalls along the Eastern seaboard and in Europe have given skeptics of the science of climate change new impetus to challenge the existence of global warming.

With opinion polls reflecting rising uncertainty, the prospects for federal climate change legislation have greatly diminished. Businesses, consequently, might be tempted to take a wait-and-see approach.

Within the past month, however, greenhouse gas regulation has moved forward dramatically in ways that should not be ignored.

The most dramatic event was the April 1 announcement from the EPA and the Department of Transportation of a joint final rule to dramatically reduce greenhouse gas emissions and improve fuel economy for new cars and light trucks beginning in 2011. The negotiated rule-making has the support of U. S. automakers because it provides the certainty of a single national standard.

Under the final rule, which will appear soon in the Federal Register, cars and light trucks must achieve a vehicle emission level of 250 grams of carbon dioxide per mile by 2016, and meet a 35.5 miles-per-gallon standard by 2016 — a 40 percent improvement from the current combined standard of 25 mpg.

The improvements needed to increase gas mileage and reduce carbon dioxide emissions will add an estimated \$1,000 to the upfront costs of a vehicle, but are predicted to save the average buyer \$3,000 over the life of the vehicle.

The deal on fleet mileage standards may simply codify changes that can be achieved with existing technology, and many would argue are long overdue. It also may open the door to much broader regulation of greenhouse gases under the Clean Air Act.

On March 29, just three days prior to its announcement of the new vehicle standards, the EPA completed its reconsideration of a Bush-era policy that the agency can issue air emissions permits regulating pollutants only if the pollutants are subject either to a provision in the CAA or to a regulation adopted by EPA under the CAA requiring actual control of that pollutant's emissions.

Boldly — illegally, many would argue — the EPA has concluded that the rule limiting greenhouse gas emissions for cars and light trucks requires actual control of emissions of greenhouse gases and takes effect in January 2011. Therefore, the EPA reasons it has the power under the CAA to require every federal air permit issued after Jan. 2, 2011 to address and control greenhouse gas emissions.

Decrying the “backdoor” expansion of the CAA, within days various industry groups filed petitions for judicial review in the D.C. Circuit, challenging the EPA's interpretation.

Meanwhile, the EPA has made it clear it does not intend to regulate greenhouse gas emissions in every federal air permit. Rather, at the same time it announced the interpretation, the EPA also announced plans to publish a “tailoring rule” to define what sources of greenhouse gas emissions would be regulated initially. The EPA has hinted that only plants that emit 75,000 tons or more of carbon dioxide or its equivalent are likely to be regulated in the first two years. The EPA wants to limit the number of affected permits to avoid overwhelming its staff and state agencies such as New York's Department of Environmental Conservation.

The tailoring rule could lead to more lawsuits against EPA on the ground that any dividing line is arbitrary and distorts the playing field by unequally burdening larger facilities.

At almost the same time the EPA announced the vehicle emissions deal and its expansion of federal permitting programs to include greenhouse gases, the agency also released plans to expand the greenhouse gas inventory program that began Jan. 1 to additional industrial sectors. Newly covered sources would be required to begin collecting emissions data on Jan. 1, 2011.

The EPA's multi-pronged actions have spurred demands for legislation that would bar EPA from regulating greenhouse gases. There are multiple bills in each house to strip the EPA's authority under the CAA, many with bipartisan sponsorship. Counter lobbying by groups such as the Sierra Club and the Natural Resources Defense Council in defense of the EPA and the Clean Air Act has become equally vocal.

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Beneath the haze, however, and regardless whether greenhouse gases will be addressed by legislation or solely by regulation, the trend is clear: Consideration of greenhouse gas emissions as a factor in business planning has moved into high gear.

The EPA is not the only source of new requirements. In February, the Securities and Exchange Commission published a new interpretive document instructing public companies on their obligations to investors to assess and disclose the impacts on their businesses of existing and proposed climate-related laws and regulations and physical changes to the environment due to climate change.

The SEC stated when its guidance was released that "interpretive releases do not create new legal requirements nor modify existing ones, but are intended to provide clarity and enhance consistency for public companies and their investors." Regardless of the disclaimer, SEC guidance generally is treated as binding.

Consideration of climate change also is emerging as a factor in environmental impact assessments that are required in conjunction with government permits and approvals. Federal permits and approvals require compliance with the National Environmental Policy Act.

The Council on Environmental Quality, which oversees implementation of NEPA, issued new guidance on incorporating greenhouse gas emissions and climate change into NEPA assessments.

In early April, the Bureau of Land Management delayed leas-

ing more than 91,000 acres of federal land in Montana and the Dakotas for oil and gas exploration in order to consider the potential impact on climate change of greenhouse gas emissions from oil and gas production under NEPA.

Similar changes have been urged for review of environmental impacts under New York's Environmental Quality Review Act (SEQRA).

Businesses that need to obtain permits or approvals at the federal or state levels should be aware of the developments in NEPA and SEQRA and tailor their environmental assessments accordingly. Recent court decisions based on the regulation of greenhouse gases through common law concepts of nuisance also have increased the potential that businesses will face additional litigation risks.

Although adoption of a federal greenhouse gas cap-and-trade program appears unlikely in the near term, significant new requirements already are in place. Changes affecting SEC disclosures, environmental reviews for new permits and approvals, and requirements for monitoring and reporting greenhouse gas emissions must be understood and incorporated into existing environmental compliance programs. Businesses should be incorporating the developments into their current planning and anticipating future restrictions on emissions.

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