Wayne State University

From the SelectedWorks of Eric Jamison

January, 2010

Hot Points Special Edition Climate Change

Eric Jamison, Wayne State University
Miller Canfield Attorneys, Miller Canfield Attorneys

Available at: https://works.bepress.com/eric_jamison/8/
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The expectations leading up to the Climate Summit were continually lowered as the U.S. Congress has yet to pass climate change legislation and other major contributors of greenhouse gas emissions hedged on their commitments to set binding emissions targets. The Summit culminated with the Copenhagen Accord which, among other commitments, set a mitigation target to limit warming to no more than 2 degrees and establish a fund of $30 billion in climate aid by 2012 to developing nations and progressively more aid in future years. The Accord fell short of the anticipated specific binding emissions targets from the major emitters of greenhouse gases. However, the lack of clear emissions reduction targets is not seen as a complete failure. The Accord is another step in the direction of international action toward climate change policy.

It is unclear what impact the Copenhagen Accord will have on climate legislation since it puts additional pressure on China, India, Brazil, and South Africa to move toward emissions reductions and mitigation efforts. The aforementioned countries and the U.S. were the lead drafters of the Accord. Lawmakers and public policy are clearly moving toward regulating greenhouse gases, though the timeframe and extent of regulation will continue to be vigorously negotiated and debated.

Additionally, multinational corporations will be subject to the emerging regulatory infrastructure resulting from the Copenhagen Accord and other regulatory regimes from countries that are unsatisfied with the results of the Accord. To be ahead of mandated action by regulators and public pressure, businesses should thoroughly evaluate their regulatory risk position and create sustainability action strategies and carbon reduction plans where appropriate.

Call us if you’d like some help wading through the complex, and often ambiguous, emerging environmental regulations from different state, regional, and international regulatory programs.
On October 27, 2009, the Division of Corporate Finance of the U.S. Securities and Exchange Commission (SEC) issued Staff Legal Bulletin No. 14E, which addresses shareholder proposals that relate to environmental risks under SEC Rule 14a-8 of the Securities Exchange Act of 1934. Bulletin No. 14E has the potential to add significant new shareholder voting and disclosure obligations on companies that have any impact on the environment. And with these new obligations come attendant liability risks associated with environmental impact disclosures or lack thereof.

Over the past decade the SEC has analyzed requests to exclude shareholder proposals by determining whether the proposal required the company to engage in an evaluation of risk. An evaluation of risk was considered to be related to a company’s ordinary business operations and such proposals were excludable pursuant to SEC Rule 14a-8(i)(7). So historically companies were not required to consider shareholder proposals related to corporate assessments of environmental risk exposure.

**TIMES AND RULES HAVE CHANGED**

The new analytical framework introduced in Bulletin No. 14E focuses on the subject matter of the risk, not whether the proposal requires a company to engage in risk evaluation. Bulletin No. 14E requires a company to include shareholder disclosure proposals relating to environmental risk if:

- The proposal’s subject matter raises significant policy issues that transcend the day-to-day business matters of the company; and
- There is a nexus between the nature of the proposal and the company.

With the increase of greenhouse gas regulation, recent judicial activity allowing climate change suits to move forward, and the increased physical effects of climate change, it stands to reason that climate change related proposals will likely be determined to raise significant policy issues that transcend the day-to-day business matters of companies and satisfy the nexus requirement between the company and the nature of the proposal.

It is important to note that there will be significant divergence over the application of the new analytical framework because the language used in Bulletin No. 14E is vague and encompasses a broad array of understandings. The determination of what constitutes a significant policy issue that transcends the day-to-day operation of the business, and what is a sufficient nexus between the company and the nature of the proposal, is open for interpretation.

Bulletin No. 14E narrows the ability of companies to use Rule 14a-8(i)(7) to limit or prevent disclosure of climate change related risks. The new guidance opens the door for investors to request information from publicly held companies regarding the risks of climate change on business performance. Not only are companies more vulnerable to having to disclose environmental risks to shareholders under the proxy rules, but these risks may soon become material disclosures required by the SEC. Significant volatility related to corporate disclosure requirements is likely.

Publicly held companies desiring assistance with their disclosure obligations concerning climate change related risk should contact the author for a white paper on the SEC’s new disclosure requirements.

The author gratefully acknowledges the assistance of Eric M. Jamison, a student at Wayne State University Law School, in writing this article.
REGULATING CO2:
Applying Old Laws to New Pollutants

Can a 40-year-old Act regulate a global pollutant like carbon dioxide? Unless Congress enacts a law saying otherwise, the federal Clean Air Act (CAA) will apply to greenhouse gases (GHG)—adding layers of regulatory complexity for American industry.

The Environmental Protection Agency (EPA) has stated that the CAA is an awkward and inefficient tool to address GHG and expressed a preference for cap-and-trade legislation that would pre-empt CAA permitting requirements. Even so, the EPA is currently taking steps to regulate carbon dioxide and other greenhouse gases under the CAA, including:

- Creating new reporting requirements for industrial and commercial sources
- Issuing an “endangerment finding” stating that GHG presents an imminent threat to human health and welfare
- Proposing new greenhouse gas emission standards for automobiles
- Proposing a “tailoring rule” to mitigate some of the “absurd results” expected when GHG become regulated air pollutants (The “tailoring rule” may not survive legal challenge because it conflicts with the literal requirements of the CAA.)

State and federal regulators and industry groups have identified numerous problems with applying the CAA’s permitting programs to GHG. For starters, the volume of carbon dioxide emissions exceeds the volume of all other traditional “air pollutants” by several orders of magnitude. And, the number of “sources” newly subjected to complex permitting program emission standards and reporting requirements will expand 10-fold according to EPA statements and 100-fold according to concerned state regulators.

Practical implications also abound. Traditionally exempt processes like space heating and small natural gas-fired boilers may now require permits and reporting. Additionally, many lightly regulated minor sources of traditional pollutants will become subject to more complex permitting programs as their GHG emissions vault them into “major source” status.

Commercial and industrial clients should evaluate their emissions of carbon dioxide both on an actual and a theoretical maximum potential basis. If you plan to install or modify any process that may emit air pollutants, allow sufficient time to acquire new permits that may be required.

We are closely monitoring the rapidly evolving GHG regulation requirements which are expected as early as this April. Call the author or Paul M. Collins at 517.483.4908 if we can help.

Environmental
Ronald E. Baylor 269.383.5849

JOIN US FOR OUR
International Climate Law
and Policy Symposium
Wednesday, April 14, 2010
Wayne State University Law School, Detroit, Michigan

Join climate change opinion leaders with international, state, and local perspectives as they discuss cutting edge legal and public policy that will shape this body of law in the coming years. Space is limited. To register or for further information go to: www.millercanfield.com/news-events.html
The traditional nuisance theory of liability dates back to medieval England. Excessive noise, obnoxious odors, polluted rivers, blinding lights, dense smoke or dust that interferes with another’s use and enjoyment of their property have been remedied by courts wielding the nuisance remedy.

Recently, a new variant on the traditional nuisance theory—the “carbon tort”—has been launched against industries emitting greenhouse gases (GHG) alleged to cause climate change. Environmentalists, wealthy beach-front property owners, and even some states have now asserted that emitters of GHG have caused harm ranging from an intensified Hurricane Katrina, to the loss of an island, to other injuries and damages.

Two recent cases demonstrate that at least some courts are willing to wade into such murky waters and entertain such claims:

**CONNECTICUT v AMERICAN ELECTRIC POWER**
Eight states, New York City and three land trusts sued six electric utilities, alleging that their GHG emissions contributed to global warming and harmed human health and the environment. In September 2009, the Second Circuit Court of Appeals held that plaintiffs did have standing to seek an injunction against the claimed nuisance, and remanded the case for further proceedings.

**COMER v MURPHY OIL**
On October 22, 2009, the Fifth Circuit Court of Appeals reversed and remanded a climate change lawsuit that had been dismissed by the district court. Property owners along the Mississippi Gulf Coast brought a class action suit against major oil, chemical, and fuel companies based on public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentations and civil conspiracy seeking property damage losses related to Hurricane Katrina. Plaintiffs claimed that major sources of GHG emissions contribute to global warming, which intensifies the power of hurricanes, thus causing plaintiffs’ claimed damages. The appellate court held that the plaintiffs had standing to assert nuisance, trespass, and negligence claims, but dismissed the other claims for prudential standing reasons.

There are many defenses to traditional nuisance theories which have yet to be considered by these courts. For example, plaintiffs may fail to prove that their injury was, in fact, caused by a defendant’s conduct. Still, companies should be aware that the GHG and climate change controversies will inevitably spill over into the courts and at least some of the litigation ahead will involve so-called “nuisance” claims. Call the author or Ronald E. Baylor at 269.383.5849 if we can help.

*Nuisance* is a common law tort defined, generally, as “activity which arises from unreasonable, unwarranted or unlawful use by a person of [their] own property, working obstruction or injury to the right of another, or to the public...” *Black’s Law Dictionary*