Legal Opinion Letter

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CO_2 CONTROL UNDER CLEAN AIR ACT: HEADED FOR A GLORIOUS MESS?

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In a September 19, 2008 Washington Legal Foundation LEGAL OPINION PAPER, the authors analyzed a Fulton County, Georgia Superior Court case, *Longleaf Energy Associates v. Friends of the Chattahoochee*, which adopted a controversial argument by environmental advocacy groups that carbon dioxide ("CO_2") has been "subject to regulation" under the Clean Air Act's "Prevention of Significant Deterioration" ("PSD") program since at least 1993. The state trial-level court ruling was the first (and only) success for that argument in court. Though not a party to the Georgia litigation, the Environmental Protection Agency ("EPA") had strenuously opposed the environmental groups' position in several other cases, including in a matter then pending before EPA's Environmental Appeals Board.

What a difference a year makes. In that short span of time, the Georgia court has been reversed, and EPA issued a nationwide interpretation under one Administration only to announce it would revisit that interpretation under new leadership.

Ultimately, though, it may not matter much. EPA is poised to promulgate its first regulation of CO_2 emissions – from automobiles. The Agency has said that this rule could make CO_2 "subject to regulation" under the Clean Air Act for purposes of the PSD program and its requirements that new and existing stationary sources that undergo major modifications install Best Available Control Technology ("BACT") to reduce emissions of PSD-regulated pollutants. EPA is now focusing its regulatory efforts on how to "tailor" the impact of this action to large stationary sources of CO_2, and such efforts will undoubtedly generate further legal controversy. Below is a summary of the most important events:

- Georgia Court of Appeals rules CO_2 is not "subject to regulation." – On July 7, 2009, the Georgia Court of Appeals (the state's intermediate appellate court) reversed the lower court, holding the lower court's ruling was not required by either the Clean Air Act or *Massachusetts v. EPA*. In addition, according to the appellate court, finding otherwise "would engulf a wide range of potential CO_2 emitters in Georgia … in a flood of litigation over permits, and impose far-reaching economic hardship on the State." An appeal by the plaintiffs to the Supreme Court of Georgia was denied on September 28, 2009. Meanwhile, the Circuit Court of the City of Richmond, Virginia reached a similar result on August 10, 2009, in a challenge to a PSD

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permit for a coal-fired power plant in Wise County, Virginia. Plaintiffs in that case announced they would appeal.

- EPA issues a policy interpretation. – On December 18, 2008, shortly before leaving office, EPA's then-Administrator Stephen Johnson issued what he considered to be the "definitive" interpretation of when an air pollutant becomes "subject to regulation" under the Clean Air Act, thereby imposing BACT requirements ("the PSD Interpretive Memorandum"). The PSD Interpretive Memorandum clarifies the Agency's position that pollutants "subject to regulation" can include only those that are subject to actual emissions control requirements; monitoring and reporting requirements alone do not render a pollutant subject to the PSD program. The Agency concluded that neither CO_2 nor other greenhouse gases ("GHG") meet this test. Environmental advocacy organizations immediately sought administrative reconsideration and a stay, and filed a legal challenge.

- EPA reconsiders its interpretation. – On February 17, 2009, shortly after taking the helm at EPA, Administrator Lisa Jackson announced that the Agency would initiate a proceeding to reconsider the PSD Interpretive Memorandum but would not stay its effect pending conclusion of that proceeding. EPA's proposal to reconsider the PSD Interpretive Memorandum was published on October 7, 2009. EPA requested comment by December 7, 2009 on a number of potential interpretations, but expressed as its preferred interpretation essentially what it stated in the original Memorandum: only an EPA rule requiring control of emissions of a pollutant from a final national rule would trigger PSD.

- EPA proposes a CO_2 automobile emission standard. – In mid-September 2009, EPA announced it was considering setting the first-ever federal GHG emissions standards for automobiles in response to the Supreme Court's 2007 decision in *Massachusetts v. EPA*. Significantly, EPA has taken the position that the establishment of such a standard would make CO_2 a PSD-regulated pollutant. EPA published the proposed vehicle standards on September 28, 2009, with the intent to issue a final rule by late March 2010. The comment period closes on November 27, 2009.

- EPA addresses the impact of the CO_2 rule on stationary sources. – Most recently, on September 30, 2009, EPA released a proposed rule that would "tailor" the PSD impacts of its automobile emissions standard by applying BACT requirements, at least for an initial period, only to larger stationary sources of CO_2 emissions – those emitting over 25,000 tons per year. Some have already questioned whether EPA has the legal authority to do this.

Even if the measures EPA plans to take to mitigate the impact of applying PSD for CO_2 to stationary sources can withstand judicial challenge, imposition of PSD to CO_2 emissions would impose enormously expensive burdens on American consumers and industry. The only things certain to result from this path are confusion and litigation, which will further complicate the task of legislators attempting to address climate change concerns.

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