

# **Gibson, Dunn & Crutcher**

## **Webcast Briefing On**

.....

*Change is in the Air: Environmental Laws  
and Regulations Under the New  
Administration*

January 27, 2009

**GIBSON, DUNN & CRUTCHER LLP**

---

LOS ANGELES • NEW YORK • WASHINGTON, D.C. • ORANGE COUNTY • SAN FRANCISCO • PALO ALTO  
LONDON • PARIS • MUNICH • BRUSSELS • DUBAI • SINGAPORE • CENTURY CITY • DALLAS • DENVER

---

# *President Obama's Environmental Team*



- **EPA Administrator**
- **LISA P. JACKSON**
  - Transition Team Leader
  - Former NJ EPA Administrator
  - Former US EPA enforcement staffer

# *President Obama's Environmental Team*

- JACKSON INITIAL PRIORTIES
  - GHG Regulation/Legislation
  - Air Quality
  - Chemical Risks
  - Haz Waste Clean up
  - Waterway protections

# *President Obama's Environmental Team*

## **White House Climate Change Czarina**

### **CAROL M. BROWNER**

- Transition Team Leader
- Former EPA Administrator
- Headed FLA EPA
- Former Gore Legislative Aide



# *President Obama's Environmental Team*



- **Chair, White House CEQ**
- **NANCY SUTLEY**
  - Transition Team Member
  - Former LA deputy mayor for energy and environment
  - Former Browner Special Asst

# *President Obama's Environmental Team*



- **COMMON BACKGROUND**
  - All Transition Team Members
  - Originally Clinton supporters
  - Connected to Al Gore
  - Life long Environmental regulators
  - Slight Private Sector/Business Experience

# *President Obama's Environmental Team*



- **Secretary of Energy**
- **STEVEN CHU**
  - Professor of Physics at the University of California, Berkeley
  - 1997 Nobel Prize winner in Physics
  - Vocal advocate for more research into alternative energy and global warming
  - Joined the Copenhagen Climate Council

# *President Obama's Environmental Team*

- Upcoming Key Appointments
  - Deputy Administrator
  - Ass't Atty General for Environment
  - Ass't Administrator for Air
  - General Counsel
  - Ass't Administrator for Enforcement

# *New Congressional Players*



- **Henry Waxman – 30<sup>th</sup> District of CA**
  - New Chairman of House Energy & Commerce



- **Dianne Feinstein – Senator from CA**
  - Chair of Appropriations Subcommittee on *Interior, Environment, and Related Agencies*

# *New Congressional Players*

- **Barbara Boxer – Senator from CA**
  - Chairman of the Environment and Public Works Committee
- **Nancy Pelosi – 8th District of CA**
  - Speaker of the House



# *Anticipated Developments in Climate Change Legislation and Regulation*

- President Obama's goals:
  - An economy-wide cap-and-trade program to reduce GHG emissions 80 percent below 1990 levels by 2050
    - 100% of emission credits to be auctioned
  - Focus on energy efficiency and renewable energy standards
  - National goals for reducing electricity demand
  - Invest \$150 billion over 10 years to develop and deploy clean technology and create “green” jobs

# *Anticipated Developments in Climate Change Legislation and Regulation*

- President Obama's goals:
  - Cutting motor vehicle emissions
    - Invest in advanced battery technology and biofuels
    - Increase CAFE standards by 4%
    - A national low-carbon fuel standard
  - Engage in the ongoing United Nations Framework Convention on Climate Change negotiations
    - Complete a new international climate change agreement by December 2009
    - Technology-transfer program would be created to provide American technology to the developing world

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Vehicles for accomplishing these goals
  - New legislation
  - New regulations under existing legislation

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Key Players in Congress
  - Rep. Henry Waxman - Energy And Commerce Committee
    - He will move "quickly and decisively" on climate change
    - Goal of passing climate legislation out of his committee before Memorial Day
  - Rep. Edward Markey - Subcommittee on Energy and Environment and House Select Committee on Energy Independence and Global Warming
    - Committed to legislative agenda on climate change and clean energy
  - Sen. Barbara Boxer – Environment and Public Works

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Five Major Substantive Issues For Cap-and-Trade Program
  - Scope of the covered industries
  - Stringency of the emissions targets
  - How to handle allocations
  - Availability of offsets
  - Interaction with existing state and regional programs

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Dingell - Boucher Discussion Draft
  - Amend the Clean Air Act to establish an economy-wide cap-and-trade program
  - Reducing covered emissions to:
    - 6 percent below 2005 levels by 2020;
    - 44 percent below 2005 levels by 2030
    - 80 percent below 2005 levels by 2050
  - Applies to:
    - Fossil fuel-fired electric generating units
    - Stationary sources that produce 25,000 tpy CO<sub>2</sub>-e
    - Various listed sectors (e.g., refiners, aluminum producers)

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Dingell - Boucher Discussion Draft
  - Establish industry-specific performance standards for sources not covered by the program.
  - New Source Performance Standards
  - New Source Review will not apply to GHG emissions
  - Title V permits will not be required
  - Preempts state, local and regional cap-and-trade programs for GHG emissions

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Dingell - Boucher Discussion Draft
  - Three options for regulating GHG emissions from motor vehicles
    - EPA establishes GHG emission standards for new motor vehicles under Section 202 of the Act
    - EPA establishes GHG standards “fully consistent” with the CAFE standards
    - EPA is prevented from setting GHG emission standards for vehicles already subject to a CAFE standard

# *Anticipated Developments in Climate Change Legislation and Regulation*

- US Climate Action Partnership
  - Urged Congress to pass a cap-and-trade bill this session
    - 20 percent reduction from 2005 levels by 2020.
    - 42 percent reduction from 2005 levels by 2030.
    - 80 percent reduction from 2005 levels by 2050.
  - National greenhouse gas registry
  - Set upper level limits on the use of offsets in any year of 1.5 billion metric tons of domestic and 1.5 billion metric tons of international offsets.
  - Phase in auction of allowances

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Lieberman-Warner Climate Security Act
  - Only 54 Senators supported cloture (60 votes needed to cut off debate and force a vote), bill dead for this session
    - Up from 38 who supported cloture of a weaker bill in 2005

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Lieberman-Warner Climate Security Act
  - GHG cuts:
    - 4% from 2005 levels in 2012
    - 19% from 2005 levels in 2020
    - 71% from 2005 levels in 2050.
  - Cap-and-trade system administered by EPA, with emissions monitoring and reporting system.
  - Phases out free emissions allowances for polluting industries and allocates increasing share of allowances to public benefit (energy efficiency, renewables, etc.)

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Lieberman-Warner Climate Security Act (cont'd)
  - Allows partial compliance with offsets
  - Allows firms to trade and bank emissions allowances
  - Creates a cost containment auction in which firms can buy a limited number of emissions allowances borrowed from the program's later years.

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Potential Regulatory Developments
  - Increased CAFE standards
  - California's waiver for motor vehicle GHG Regulations
  - Clean Air Act ANPRM
  - Permitting/New Source Review for GHG emissions

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Increased CAFE requirements
  - The Energy Independence and Security Act of 2007
    - Improve fuel efficiency by 40 percent by 2020
    - Combined fleet-average of 35 miles per gallon on average
  - NHTSA issued a Notice of Proposed Rulemaking
  - Citing recent financial difficulties of the automobile industry, the Bush administration failed to finalize rules
  - On January 26: President Obama signed an executive order instructing NHTSA to finalize rules to increase fuel economy

# *Anticipated Developments in Climate Change Legislation and Regulation*

- California's waiver request for motor vehicle GHG emissions regulations
  - Waiver was denied by the Bush Administration.
  - On January 21, 2009, California requested reconsideration.
  - Lisa Jackson: “if I am confirmed I will immediately revisit the waiver, looking at the science and the rule of law, and relying on the expert advice of EPA's employees in making a determination.”
  - On January 26, President Obama signed an executive order directing EPA to expeditiously review the prior waiver denial.

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Clean Air Act ANPRM
  - Result of the Supreme Court’s mandate in *Massachusetts v. EPA*
  - EPA still must make an “endangerment finding” before regulating
  - If EPA makes an endangerment finding, then section 202(a)(1) of the Clean Air Act requires EPA to set standards governing such emissions from motor vehicles
  - ANPRM looks more broadly at regulations across all sectors of the economy

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Clean Air Act ANPRM
  - Does not offer specifics of a proposed regulatory program
  - Offers four examples of a “market-oriented” approach:
    - A Cap and Trade program
    - A rate based emissions credit program
    - An emissions fee
    - A hybrid approach

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Clean Air Act ANPRM
  - Former Administrator Johnson: “The Clean Air Act ... is ill suited for the task of regulating global greenhouse gases.”
  - John Dingell: Regulating greenhouse gases under the Clean Air Act would lead to a “glorious mess.”
    - How do you set a NAAQS for CO<sub>2</sub> and how do you measure attainment?
    - How do you handle New Source Review where the threshold is 250 tons per year?
    - What does this mean for Title V permits?

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Clean Air Act ANPRM
  - Indications are that the Administration wants to move quickly on implementing *Massachusetts v. EPA* but does not know how
    - Lisa Jackson appointed Lisa Heinzerling as top climate change regulatory adviser
      - Lead author on Supreme Court briefs in *Massachusetts v. EPA*
    - Lisa Jackson's memo to EPA employees: "we will move ahead to comply with the Supreme Court's decision recognizing EPA's obligation to address climate change under the Clean Air Act."
    - However, President Obama did not mention the ANPRM in his January 26 press conference.

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Permitting and New Source Review
  - Are GHG emissions currently subject to permitting requirements and NSR?
    - *Friends of the Chattahoochee, Inc. v. Couch* (Ga. Super. Ct. June 30, 2008): “carbon dioxide is a “pollutant subject to regulation under the [Clean Air] Act” and therefore “a PSD permit cannot issue for [the new or modified facility] without CO2 emissions limitations based on a BACT analysis.”
    - *In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008) remanded a decision by Region 8 that they are not.

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Permitting and New Source Review
  - Are CO<sub>2</sub> emissions currently subject to permitting requirements and NSR?
    - December 18, 2008 Memo from Administrator Johnson
      - “Regulated Pollutant” does not include “pollutants for which EPA regulations only require monitoring or reporting.”
      - So CO<sub>2</sub> emissions are not currently covered under PSD
      - However, if EPA makes an endangerment finding, “the interpretation established here would require PSD permits to contain limitations on carbon dioxide when, and if, EPA promulgates regulations establishing those controls.”

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Permitting and New Source Review
  - Are CO2 emissions currently subject to permitting requirements and NSR?
    - Desert Rock Energy Company
      - Permit under review by Appeals Board.
      - EPA's regional office for New Mexico withdrew its decision not to impose limits on the plant's carbon dioxide emissions.
      - That portion of the permit awaits direction from the agency's new administrator.

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Options
  - The environment is a “luxury good”
    - In a recent poll by Pew Research Center, global warming came in last among 20 voter concerns (behind addressing moral decline and decreasing the influence of lobbyists)
    - Set cap-and-trade aside until the economy recovers
    - Focus on "five million green jobs" to bolster the economy
      - Improving the electrical grid
      - Constructing new "green" buildings
      - Improving the energy efficiency of existing infrastructure
      - Investments in renewable energy and other "green" technologies

# *Anticipated Developments in Climate Change Legislation and Regulation*

- Options
  - Climate change regulation can be good for the economy
    - Barbara Boxer: “If we don't put a price on carbon, we'll never get these clean energy sources online.”
    - Push aggressively ahead with proposed "cap and trade" program
    - Invest proceeds from allowances in renewable energy
    - Increase CAFE standards
    - Grant California's waiver request

# *Anticipated Regulatory Programs For Hazardous Substances*

# Perchlorate

- Background
- Sites & Statistics
- EPA's Fluctuating Position
- Public Pressure & EPA Reformulation
- Future Regulation
- Congressional Action

# Perchlorate

## *Background*

- Naturally occurring and man-made anion, typically associated with solid salts
- Ammonium perchlorate (“AP”) as rocket fuel
- Characteristics conducive to groundwater contamination (e.g. solubility)
- Health effects – impedes iodide uptake affecting thyroid hormone levels
- Scope of the contamination

# Perchlorate

## *Sites & Statistics*

- Rialto-Colton Groundwater Basin
- Redlands
- Aerojet Sacramento
- Santa Clarita
- Settlements – Boeing Santa Susanna Hills;  
Tronox Henderson Site

# Perchlorate

## *EPA's Fluctuating Position*

- 1992 Provisional Reference Dose of .0001 mg/kg/day
- 1998 Interim Assessment Guidance
- 2005 National Research Council of the National Academies of Sciences—Health Implication of Perchlorate Ingestion
- 2006 Official Reference Dose of .0007 mg/kg/day
- Preliminary Remediation Goal of 24.5 ppb at NPL Sites

# Perchlorate

## *Public Pressure & EPA Reformulation*

- Dissenting voices: internal criticism, environmental groups & political pressure
- Department of Defense and industry perspective
- January 8, 2009 EPA action: (1) Renewed call for National Academies of Science review; (2) Interim health advisory of 15 ppb (recommended preliminary remediation goal for AP at Superfund sites)

# Perchlorate

## *Future Regulation*

- SDWA – no decision yet
- Democrats in Control: Senator Barbra Boxer, Chairwoman of the Senate Environment and Public Works Committee
- Confirmation hearing of Lisa Jackson: “Do you commit to us to immediately review this failure to establish a drinking water standard for perchlorate and act to address the threat to pregnant women and children caused by this dangerous toxin?” “Yes Madam Chair.”

# Perchlorate

## *Congressional Action & State Efforts*

- Protecting Pregnant Women & Children From Perchlorate Act
- Perchlorate Monitoring & Right to Know Act
- Status/Impact
- States: California (6 ppb) & Massachusetts (2 ppb)

# TCE

## *Background*

- Ubiquitous groundwater contaminant and often an indoor air/soil vapor contaminant as well.
- Still the focus of significant toxic tort and cost recovery activity, as well as remediation efforts.
- Major sites still provide headline news and new litigation

# TCE

## *Background*

- 1998 Draft EPA TCE Risk Assessment
  - Potential carcinogen
  - Kidney, NHL, liver
- National Research Council follow-up study to the Draft EPA Risk Assessment – 2006
- New TCE risk assessment not currently expected from EPA until 2011

# TCE

## *Current Status*

- Bill would amend SDWA, add TCE funding and require EPA to:
  - Issue health advisory w/in 6 months;
  - Issue revised draft drinking water stds w/in 12 mos;
  - Issue health advisory w/in 12 mos. for vapor intrusion;
  - Establish IRIS reference concentration for TCE vapor in 18 months;
  - Ensure protections of sensitive individuals

# TCE

## *Current Status*

- IBM worker study at Endicott Facility in New York by CDC and funding by NIOSH – not completed for at least two years;
- University of Kentucky study recently showing an association between TCE exposure and parkinsonism.
- CDC survey of Marines at Camp Lejeune.

# TCE

## *Anticipated Government Action*

- Given the strong political support in both the House and Senate, anticipate federal legislation to compel EPA to speed up its evaluation and set standards.
- Anticipate vapor intrusion component to be significant and to give rise to new standards that will affect cleanup costs and toxic tort litigation

# Chrome 6

## *Background*

- History as the compound of concern in the “Erin Brockovitch” Film;
- Substantial emphasis on its regulation by California legislature and regulatory agencies;
- Still a compound that is the basis for toxic tort claims;
- Given California’s likely future regulation, it is likely to continue be the basis for cost recovery litigation.

# Chrome 6

## *Background*

- Scientific consensus that chrome 6 is a human lung carcinogen by the inhalation pathway at sufficient doses;
- Brockovitch Film suggested it is a human carcinogen by ingestion and not limited to lung cancer;
- Substantial scientific controversy over pathways and endpoints

# Chrome 6

## *Current Status*

- In early 2000 California legislature mandated an MCL for chrome 6 by 2004;
- OEHHA established Blue Ribbon Panel in early 2000s to look at ingestion pathway issue;
- Blue Ribbon Panel's conclusions were rejected by Cal-EPA based on allegations of bias.

# Chrome 6

## *Current Status*

- OEHHA has been studying chrome 6 ever since and the recent NTP study results suggesting an association between chrome 6 ingestion and gastrointestinal or other cancers, as well as reproductive effects, in rodents
- The depublication of the second Zhang study by JOEM added further support to the controversy

# Chrome 6

## *Current Status*

- Dr. Phillip Cole's Chrome VI Meta Analysis of Epidemiology a few years ago provided more support for the inhalation only/lung cancer conclusion.
- OEHHA scientists' publication of chrome review paper
- OSHA's PEL (5 ug/m<sup>3</sup>) under review by Third Circuit
- NIOSH and ATSDR reviews underway.

# Chrome 6

## *Anticipated Government Action*

- Expect California's OEHHA to issue draft risk assessment for chrome 6 soon;
- Likely 30-70 part per trillion ("ppt") standard will set a very stringent level for the regulated community;
- May be based upon cancer outcomes due to ingestion;
- May provide a baseline for other regulatory actions and alleged support for toxic tort claims.
- Other federal agency pronouncements (OSHA, NIOSH, ATSDR)



# Find Us

## *Domestic Offices:*

### **Los Angeles**

333 South Grand Avenue  
Los Angeles, California 90071-3197  
(213) 229-7000

### **Orange County**

3161 Michelson Drive  
Irvine, California 92612-4412  
(949) 451-3800

### **Century City**

2029 Century Park East  
Los Angeles, California 90067-3026  
(310) 552-8500

### **New York**

200 Park Avenue  
New York, New York 10166-0193  
(212) 351-4000

### **San Francisco**

One Montgomery Street  
San Francisco, California 94104-4505  
(415) 393-8200

### **Dallas**

2100 McKinney Avenue, Suite 1100  
Dallas, Texas 75201-6911  
(214) 698-3100

### **Washington, D.C.**

1050 Connecticut Avenue, N. W.  
Washington, D. C. 20036-5306  
(202) 955-8500

### **Palo Alto**

1881 Page Mill Road  
Palo Alto, California 94304-1125  
(650) 849-5300

### **Denver**

1801 California Street, Suite 4200  
Denver, Colorado 80202-2641  
(303) 298-5700

## *International Offices:*

### **London**

Telephone House  
2-4 Temple Avenue  
London EC4Y 0HB, United Kingdom  
44-20-7071-4000

### **Brussels**

Avenue Louise 480  
1050 Brussels, Belgium  
32-2-554-70-00

### **Paris**

166 rue du Faubourg Saint Honoré  
75008 Paris, France  
33-1-56-43-13-00

### **Dubai**

Level 12, The Gate  
Dubai International Finance Centre  
PO Box 506654, Dubai  
United Arab Emirates  
971-4-365-0470

### **Munich**

Widenmayerstraße 10  
80538 Munich, Germany  
49-89-189-33-0

### **Singapore**

One Raffles Quay  
Level 37#01, North Tower  
Singapore 048583  
65-6507-3600