Dear Committee Members:

The latest edition of our Committee’s Newsletter includes three interesting articles that collectively cover a range of recent developments. Stephen Humes and Grace Kurdian report on the Draft Model Rule of the Regional Greenhouse Gas Program, a joint initiative of a number of Northeastern states. Judson Starr and Michael Munson contribute a follow-up to their previous article on the growth of government requests for privilege waivers in corporate criminal investigations, entitled “Is the Pendulum Swinging Back on Waiver Issues?” Finally, Lynn Grayson of Jenner & Block provides an overview and analysis of the EPA’s recent foray into online environmental violation reporting. To make the contributions even more useful, we’ve provided clickable links to many of the documents discussed in the articles.

We are always interested in new articles. One simple and effective way to contribute is to adapt an existing client update for the Newsletter. If you would like to discuss a contribution please contact me as noted below. As well, if you are interested in speaking opportunities through our speakers’ roster please call and make sure to get in touch with me.

Cheers,

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Featured Articles

Regional Greenhouse Gas Program Gains Momentum in Northeast
Stephen J. Humes and Grace S. Kurdian

Most of the Northeastern states recently moved a step closer to forming a regulatory framework that would lead to state reductions in greenhouse gas emissions in the name of controlling climate change.

The Regional Greenhouse Gas Initiative (RGGI), a multi-state collaborative to reduce greenhouse gas emissions, released its highly-anticipated Draft Model Rule on March 23, 2006, setting the stage for development of a new regional cap-and-trading program and mandatory greenhouse gas reductions at a time when the federal government remains opposed to mandatory reductions while supporting technologies that address climate change. RGGI
constitutes the first attempt in the United States to establish a regional cooperative effort to reduce emissions by designated amounts on a mandatory basis throughout various states.

Although environmentalists and state regulators are hailing RGGI’s effort to control emissions of carbon dioxide and other greenhouse gases, the regulated community and skeptics warn that the regulators are going too far by seeking to implement "command and control" style restrictions on gases that are naturally occurring and emitted by every vehicle and home and people living in them.

Emissions sources face mandatory emission reductions in the participating states of Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont. The Model Rule sets forth detailed program specifics for the market-based cap and trade program for emissions in these states. Generally, any fossil fuel-fired electric generator with a capacity of 25 MW and greater within the participating states is required to comply. The program starts on January 1, 2009. Significantly, this mandatory program promotes sanctions, so sources that fail to reduce their emissions will be subject to civil penalties.

More...

Is the Pendulum Swinging Back on Waiver Issues?
Judson W. Starr and Michael S. Munson

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Still, the Department of Justice, acting on behalf of various regulatory agencies, including the SEC, IRS, EPA and FEC, continues to seek waivers from corporations under investigation as a demonstration of co-operation. The ABA, which adopted a resolution in August 2005 in favor of preserving attorney-client and work product privileges, along with the Association of Corporate Counsel, have taken the lead in urging Congress and the Department of Justice to address this most pressing issue.

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New EPA Online Environmental Violation Reporting: Is It a Good Thing?
E. Lynn Grayson

EPA recently launched a new initiative encouraging citizens to report potentially harmful activities in their communities and in their work places. An environmental violation now may be reported online at EPA's existing website and the information sent directly to EPA's Office of Enforcement and Compliance Assurance. Whether or not this new source of environmental data proves useful in protecting the environment or assisting EPA in monitoring regulatory compliance remains to be seen. Given the manner in which this information is being solicited, however, it appears unlikely that it is a good thing for the regulated community.

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To review our privacy statement, go to http://www.abanet.org/privacy_statement.html
Regional Greenhouse Gas Program Gains Momentum in Northeast

STEPHEN J. HUMES and GRACE S. KURDIAN,
McCarter & English LLP

Most of the Northeastern states recently moved a step closer to forming a regulatory framework that would lead to state reductions in greenhouse gas emissions in the name of controlling climate change.

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A source that burns biomass for more than 50% of its total fuel is not subject to the RGGI program. There is a further exemption for which a source can apply if it provides less than 10% of its electric output to the grid.

Following a comment period that concluded on May 22, 2006, a Final Model Rule will be issued in July 2006. Each participating state will issue its own individual compliance regulations soon after the Final Model Rule is issued.

Who Needs to Comply with RGGI?

Power plants in the participating states that have a nameplate capacity equal to or

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1 Mr. Humes is a partner in the firm’s Hartford office and Ms. Kurdian is an associate in the firm’s New York office. Both attorneys practice energy, environmental law and litigation and are active in McCarter & English’s climate change and renewable energy practice.
greater than 25 MW and that burn more than 50% fossil fuel are required to comply.

Each source must provide state regulators with periodic compliance certifications as well as quarterly emissions reports. Sources also must maintain greenhouse gas emission records for 10 years for state compliance inspections. The overall emissions levels of the region will be monitored and sources that do not comply will be subject to state environmental enforcement action and incur penalties.

**Emissions Reduction Targets**

From 2009 through 2014, the goal in the Model Rule is to stabilize carbon dioxide emissions from the regional power plants. From 2015 to 2019, greenhouse gas emissions are to be reduced by 10%. Even outside the electric sector, RGGI is promoting additional emissions reductions through various emissions offset projects, such as the increased use of renewable energy.

**General Mechanics of RGGI’s Cap-and-Trade Program**

Similar to programs already in effect in the European Union and elsewhere pursuant to the Kyoto Protocol, RGGI intends to reduce emissions of the gases that cause global warming through a cap-and-trade program. The cap-and-trade program establishes an acceptable emissions “cap” for all regulated sources in a state and then permits sources to trade a certain amount of emissions permits, often referred to as “allowances” or “emissions credits”.

The sources will receive one allowance for each ton of emissions, up to the emissions cap set by the state. Every source is required to have enough allowances to account for all its emissions during the 3-year compliance period. The combined total of allowances issued by each participating state will be equivalent to the total emissions cap for the entire region.

**What if a Source Does Not Have Enough Allowances to Cover its Projected Emissions?**

A source that does not have enough allowances to cover its projected emissions has three options. It may (i) reduce its emissions, (ii) buy allowances on the market, or (iii) generate credits through an emission offset project.

This ability to trade allowances is the key to the cap-and-trade program, allowing sources to reduce their emissions most efficiently. For example, a source that reduces its emissions and has extra allowances may (i) store the allowances for future use or (ii) sell them to a company that has not met its emissions reduction target. At the end of each year, allowances will be submitted/reported to the state’s regulatory agency.

Sources may include some emissions reductions that are achieved outside the region or through programs outside the electric sector (emission offset projects) toward compliance. A source can cover up to 3.3% of its reported emissions for the compliance period through offset projects. Offset projects from the signatory states will be awarded offset allowances for certified reductions on a one ton to one ton basis. Offset projects from other parts of the United States will be eligible for offset allowances, but to a lesser degree. There is, therefore,
an incentive for emissions offset projects to be developed in the region. The signatory states will continue to explore additional types of offset categories and projects. However, sources cannot fully rely on offset projects to comply with RGGI mandates because use of offset projects is limited to 3.3%; sources must also reduce emissions at the power plants.

Emissions offset projects in the following areas (projects outside the electric sector) can be used toward RGGI compliance, according to the Model Rule:

- Natural gas, heating oil and propane energy efficiency;
- Landfill gas capture and combustion;
- Methane capture from animal operations;
- Forestation of non-forested land;
- Reductions of sulfur hexafluoride emissions from electricity transmission and distribution equipment; and
- Reductions in fugitive emissions from natural gas transmission and distribution systems.

There are also price mitigation triggers so that the price of allowances to be traded on the open market is not pushed to a prohibitive level. The offset project limit may be changed (expanded) under certain circumstances and the compliance time period may be extended if certain conditions are met. However, the requirement to reduce emissions by certain levels will not change, the Model Rule indicates.

**Distributing Emissions Allowances in the Emissions Market**

By January 1, 2009, the state regulatory agencies will determine the allowance allocations for 2009 through 2012 in order that sources may plan their emissions for the following three years.

Emissions allowances will be distributed to sources by each participating state. Besides distributing allowances to sources, states will each decide how to distribute allowances in the open emissions market. The participating states have agreed that at least 25% of the emissions allowances will be allocated to a “consumer benefit or strategic energy purpose” so that the revenue from the sale of at least 25% of the allowances will encourage energy efficiency and renewable energy programs, new technology, or consumer rebates. The participating states will decide how to sell this portion of allowances, for example, through an auction.

**Penalties for Failure to Comply with RGGI**

A source that fails to account for all of its emissions with allowances or offset projects may incur penalties on both the state level and from RGGI, with RGGI planning to deduct up to three times the deficit from the source’s future emissions allocations. Furthermore, participating states are expected to include state-specific penalties among the
regulations to be issued this summer.

**Conclusion**

The bottom line is that for emission sources in the Northeast, especially those industrial operations or power plants that generate at least 25 MW, now is the time to seriously consider the potential impact of the Model Rule on business and potential compliance risks. During the public comment phase, some affected businesses in the Northeast have urged appropriate revisions before the Final Model Rule is turned over to the signatory states for regulatory roll-out. In short, climate change regulation is arriving in the Northeast after years of debate and the regulated community has an opportunity to evaluate its potential costs, mitigation options and argue for changes to the proposed rules to address individual concerns.
Is the Pendulum Swinging Back on Waiver Issues?

JUDSON W. STARR and MICHAEL S. MUNSON,
Venable LLP

Last spring we published an article in this Newsletter entitled “Waiving Goodbye to the Internal Investigation.” In it, we explored the practice and practical consequences of government requests for privilege waivers in the context of corporate criminal investigations. Because this issue has been hotly debated in multiple venues since that publication, an update is in order. Although we are pleased to report some good news for advocates of the privilege, the issue appears far from an acceptable resolution.

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The coalition presented the results of the survey to the U.S. Sentencing Commission on November 15, 2005. The Commission approached the results with much
interest, requesting additional data on the frequency and effect of waiver requests. In response, the coalition and the ABA Task Force on Attorney-Client Privilege conducted a second online survey early this year.

According to the follow-up survey, nearly 75% of both inside and outside counsel stated that government agencies expect a company under investigation to waive attorney-client and work product protections. Of the outside counsel whose clients had been recently investigated, approximately 51% of respondents said that the government expected waiver in exchange for lenient treatment, and 55% said that a privilege waiver was sought directly or indirectly.

Amendment to the U.S. Sentencing Guidelines

In November, 2004, the U.S. Sentencing Commission added the following language to note 12 of the Commentary for Section 8C2.5 of the Federal Sentencing Guidelines:

Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government] … unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

Because there was no standard in place to determine when a waiver was “necessary,” it appeared to many in the defense bar as though the exception eclipsed the rule. In June 2005 the Sentencing Commission revealed its tentative plans to reconsider the 2004 privilege waiver amendment during the next amendment cycle. Later that year, the ABA and several organizations from the coalition testified before the Sentencing Commission. In a March 28, 2006 letter to the Commission, the ABA strongly advocated removal of the waiver language from the Commentary to Section 8C2.5.

With increasing pressure from the ABA, ACC and a host of other prominent legal organizations, the U.S. Sentencing Commission recently decided to abandon the policy. At its April 5 meeting, the Commission unanimously agreed to amend its Guidelines by deleting the Commentary for Section 8C2.5. Unless Congress disapproves, the change is scheduled to take effect on November 1, 2006.

In a response to the proposed amendment, ABA President Michael S. Greco publicly challenged the Department of Justice to take a hard look at its own policy. Greco said the ABA “urges the U.S. Department of Justice to protect the same broad societal interests that support the Sentencing Commission’s decision by reviewing its own policy of forcing corporate waiver ….”

The Department of Justice Policy

The Department of Justice also has a policy that encourages prosecutors to seek privilege waivers from corporations under investigation. Unlike the U.S. Sentencing Commission, the DOJ has not yet taken steps to reexamine that policy.
The Justice Department’s privilege waiver policy originated with the 1999 “Holder Memorandum,” which urged federal prosecutors to seek waiver in exchange for credit during corporate investigations. This policy was expanded upon by then-Deputy Attorney General Larry Thompson in a January 2003 document known as the “Thompson Memorandum.”

On October 21, 2005, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads instructing them to adopt a written waiver review process. While the “McCallum Memorandum” is meant to require supervisory approval for all waiver requests, it establishes no minimum standards for privilege waiver demands. Nor does the guidance suggest a uniform approach to a waiver review process. Even with the new directive, the current practice erodes the attorney-client privilege by requiring businesses that conduct internal investigations to waive privileges in exchange for leniency.

McCallum appeared before the House Subcommittee on Crime, Terrorism and Homeland Security on March 7, 2006 to answer questions about the status of the waiver policy. According to a transcript of those hearings, McCallum told the Subcommittee that the Department of Justice would probably support the decision of the Sentencing Commission to revert to the position it held prior to the 2004 amendment. At a Sentencing Commission meeting on March 27, however, a DOJ representative denied that this was the Department’s position.

Meanwhile, another provision of the Thompson Memorandum is currently under review in the massive KPMG prosecution in the Southern District of New York. At a May 8, 2006 hearing, U.S. District Judge Lewis Kaplan addressed defendants’ complaints that federal prosecutors had pressed KPMG to cut off legal support for former employees, interfering with their right to counsel. The challenged action stems from a provision of the Thompson Memorandum that allows prosecutors to consider “a corporation’s promise of support to culpable employees and agents … through the advancing of attorneys fees,” as a sign of non-cooperation with the government investigation.

The fact that prosecutor Justin Weddle acknowledged he raised the issue with KPMG in the early stages of the investigation was enough for Judge Kaplan to want a closer look at the issue. In the Memorandum and Order setting the hearing date, Judge Kaplan expressed concern that, “against the background of the Thompson memorandum, the inquiry itself arguably was a signal to KPMG as to actions that would promote its chances of avoiding prosecution.” Judge Kaplan asked the parties to submit briefs on a number of legal issues, including a possible violation of the defendants’ Sixth Amendment right to counsel.

3 United States v. Jeffrey Stein, No. S1 05 Cr. 888 (S.D.N.Y.)
4 Memorandum and Order (Corrected), United States v. Jeffrey Stein, No. S1 05 Cr. 888 (S.D.N.Y. filed Apr. 13, 2006).
Selective Waiver and Proposed Evidence Rule 502(b)(3)

Surely one of the more troubling aspects of the waiver trend is heightened exposure to lawsuits from third parties. Most courts that have considered the issue of “selective waiver” in recent years have rejected the concept, holding instead that waiver of privileged material as to one party for a specific purpose constitutes a waiver as to all parties for any purpose.5

With an eye towards alleviating this concern, the Judicial Conference Advisory Committee on Evidence Rules has drafted a proposed rule of evidence which provides for selective waiver if the initial disclosure is made to “a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.”6

Unfortunately, the proposed Rule may be a step in the wrong direction. As corporations would no longer have this valid justification for asserting privilege, the result would likely be an increase in prosecutorial requests for waiver. Prominent members of the ABA Task Force on the Attorney-Client Privilege have recommended that the Advisory Committee not adopt Rule 502(b)(3), stating that the proposed rule “continues the alarming trend threatening the viability of the corporate attorney-client privilege.”7

Waiver Remains a Key Factor In Charging Decisions

The U.S. Sentencing Commission’s decision to abandon its waiver policy is a triumph for proponents of preserving and upholding corporate privilege, and signals a cognizance on behalf of federal lawmakers as to the dangers inherent in the erosion of privilege.

But while the battle may have been won, the war is far from over. Federal prosecutors and regulatory agencies are still authorized to seek waiver from corporations under investigation. They will still take a corporation’s response into account when making charging decisions. This policy has had, and will continue to have, profound effects on the administration of justice by undermining a company’s trust and confidence in its counsel and by discouraging companies from self-policing through internal investigations. Moreover, both the waiver policy, and the related policy that discourages companies from advancing attorneys fees to culpable employees, infringe upon the individual rights of employees.

That this issue has received such attention from prominent legal organizations, as well as all three branches of the federal government, is a testament to the vital importance

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5 See, e.g., In re Martin Marietta Corp., 856 F.2d 619, 622 (4th Cir. 1988); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981).
7 Written testimony of David M. Brodsky, Steven Hazen, R. William Ide, and Mark Kasanin, members of the ABA Task Force on the Attorney-Client Privilege, submitted April 19, 2006, for use at the Hearing of the Judicial Conference Advisory Committee on Evidence Rules, April 24, 2006.
of the privilege. The upcoming year promises to bring about substantial developments in the on-going debate. We only hope that these developments advance the cause of justice by safeguarding this bedrock principle of the legal profession.
New EPA Online Environmental Violation Reporting: It’s a Good Thing?

E. LYNN GRAYSON,
Jenner & Block LLP

EPA recently launched a new initiative encouraging citizens to report potentially harmful activities in their communities and in their workplaces. An environmental violation now may be reported online at EPA’s existing website and the information sent directly to EPA’s Office of Enforcement and Compliance Assurance. Whether or not this new source of environmental data proves useful in protecting the environment or assisting EPA in monitoring regulatory compliance remains to be seen. Given the manner in which this information is being solicited, however, it appears unlikely that it is a good thing for the regulated community.

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In the alternative, EPA offers the opportunity for factual observations to be reported as environmental violations. Once again, EPA’s helpful preamble advises that environmental violations “…take many forms,…are common place,… [may be] done intentionally to save time or money….” At this juncture, you are encouraged to evaluate whether or not what you are viewing is an environmental crime, i.e. a negligent, knowing or willful violation of environmental law.

Assuming you have resisted the temptation to report an environmental emergency to the NRC or advised EPA of environmental criminal activity, EPA invites you to report an environmental violation. To assist in your public service endeavor, EPA identifies obvious signs of environmental trouble:

- unusual amount of smoke in the air;
- strong, foul-smelling odors emitted from drain pipes or exhaust systems;
- oily-looking water in streams, rivers or lakes;
- disposal of large containers at odd hours or out-of-the-way places;

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1 E. Lynn Grayson is a Partner in the Environmental, Energy and Natural Resources Practice Group at Jenner & Block in Chicago, Illinois. She is the Past Chair of the ABA Business Law Section Environment, Energy and Natural Resources Committee.
• large amounts of litter or tires;
• large numbers of dead animals or fish;
• demolition that may involve illegal removal of asbestos or other hazardous materials; and,
• corroded, leaking waste containers.

To report the environmental violation, EPA seeks the following information:

• information about the suspected violator;
• whether the suspected violation is ongoing;
• whether the state or tribal authorities have been notified;
• detailed description of the incident or hazard;
• directions to the site of the suspected violation; and,
• reporter contact information (which is, of course, optional).

A reporter also is asked to characterize the environmental violation further by evaluating the inquiries below:

• Is the environmental violation being caused in an accidental, intentional or unknown manner?
• Does the environmental violation result from a release, dump-buried, spill, spray or fill?
• Does it relate to land, water, air or worker?
• Finally, is the environmental violation caused by an individual, company, government, military or an unknown source?

In closing, EPA allows the reporter to check the following certification, if appropriate.

In filing this complaint, I understand that the EPA represents the public and has specific powers by law to address certain violations of environmental laws. I understand that I do not have to identify myself in order for this tip to be investigated. I understand that the EPA will review all information provided, at its discretion, and will determine whether an investigation is warranted. The above complaint is true and accurate to the best of my knowledge.

It is that easy to report an environmental violation. On its webpage, EPA comments that not all environmental violations break federal laws. A reporter need not worry that his/her efforts to save the environment will go unheeded as EPA commits to pass appropriate information along to state, tribal or local authorities.
If critically examined, EPA’s latest community relations endeavor seems somewhat misguided. While EPA probably envisioned this online reporting mechanism might provide some helpful information from time to time, it is highly unlikely that EPA planned to act on legal determinations made by non-lawyer members of the general public. Whether or not an environmental violation has occurred or the burden of proof has been met for an environmental crime are complex legal conclusions. The correctness of such legal conclusions is often at the heart of enforcement actions that environmental attorneys for both sides spend weeks, months and even years attempting to understand and resolve. It is preposterous to contemplate that meaningful regulatory or legal determinations can be achieved in a few moments of online reporting. Moreover, EPA’s limited resources to manage its programs, including the ability to investigate or to follow up on disclosed information, may further diminish the effectiveness of the data overall.

While some truly meaningful and useful information may reach EPA, the new online reporting also presents a forum for disgruntled employees and disfavored environmental activists to express their concerns about a particular business and its impacts on the community. EPA’s efforts to engage the public in policing the environment undoubtedly will adversely impact some segments of the regulated community. The nature and extent of such impacts are unknown but it is all too clear that EPA’s environmental online reporting probably is not a good thing for environmental professionals and the businesses that employ them.