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CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT PRACTICE GROUP

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About the Climate Change and Sustainable Development Group

Committed to meeting client needs as they are affected by a rapidly changing environment, Wiggin and Dana's Climate Change and Sustainable Development Practice Group advises clients reacting to new mandates for change. In particular, the Practice Group advises with regard to the adoption of environmentally-desirable business practices, emerging business opportunities, and litigation associated with climate change and a sustainable development. As a firm, Wiggin and Dana is committed to reducing the environmental impact of its offices. Wiggin and Dana's Green Team is implementing a plan to achieve the firm's goal of creating an environmentally sustainable workplace.

About Wiggin and Dana LLP

Celebrating our 75th Anniversary in 2009, Wiggin and Dana is a full service firm, with 150 attorneys, serving clients domestically and abroad from offices in Connecticut, New York and Philadelphia. For more information on the firm, visit our website at www.wiggin.com.

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Recent Developments in Climate Change Litigation

As public debate about climate change has increased in recent years, so too has litigation over its causes, effects, and mitigation. This advisory provides a snapshot of recent significant litigation, encompassing such disparate topics as contractual disputes over sustainable development tax credits, the constitutionality of a new municipal "green" building code, the construction of new coal power plants, and the liability of energy companies for their greenhouse gas emissions. These cases demonstrate the extent to which parties grappling with the issue of climate change have begun turning to the courts and how this trend will likely continue as government increasingly regulates greenhouse gas emissions and their effects.

"Green" Construction

To encourage sustainable building practices, many states have enacted tax credits, which may total hundreds of thousands of dollars and typically benefit large construction projects. Last year, the developer of a new condominium complex in Maryland sued the project's builder for breach of contract after the complex failed to qualify for over $635,000 in sustainable development state tax credits. Counter-Complaint, *Shaw Development, LLC v. Southern Builders, Inc.*, No. 19-C-07-011405 (Md. Cir. Ct. Feb. 16, 2007). Although the contract did not mention tax subsidies, it did contain a provision requiring the complex to attain the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) Silver Certification. The project's failure to meet the LEED standard resulted in its inability to qualify for the tax credits, and the developer sought to recover that loss from the builder. The case, which later settled out of court, is the first dispute over green development tax credits in the United States and demonstrates the importance of specifically addressing green building subsidies in construction contracts.

Municipalities increasingly are adopting stringent building codes in an effort to reduce energy consumption by residential and commercial users. The City of Albuquerque, New Mexico, recently began requiring, among other things, that all new heating, ventilation, and air conditioning systems exceed the federal energy efficiency standards by thirty percent. A group of plaintiffs sued to prevent the enforcement of these standards, claiming that they conflicted with federal law. *The Air Conditioning, Heating, & Refrigeration Institute v. City of Albuquerque*, Civ. No. 08-633 MV/RLP (D.N.M. Aug. 29, 2008). A federal court enjoined the city from enforcing the building code, agreeing with the plaintiffs that federal energy efficiency standards preempt any conflicting municipal or state requirements. As more cities enact green building codes, affected industries may use this preemption argument to try to block overreaching code provisions.

Coal Power Plants

Environmental groups frequently have opposed the construction of new coal power plants by claiming that their carbon dioxide emissions pose a risk of serious injury to the environment. In South Dakota, environmental groups sued after a state regulatory agency approved a new 600-megawatt coal power plant over the groups' objection to the new plant's predicted emissions of approximately 4.7 million tons of carbon dioxide per year. *In re Otter Tail Power Co.*, 744 N.W.2d 594 (S.D. 2008). The South Dakota Supreme Court affirmed the agency's approval of the plant, holding that the agency adequately addressed the groups' arguments by reasonably concluding that the 0.0007 percent increase in total United States carbon dioxide emissions did not pose a serious risk. The court also highlighted the need for the executive and legislative branches, rather than the judiciary, to address climate change.

Other environmental groups, however, have had more success in opposing new power plants. After the United States Environmental Protection Agency (EPA) approved a new coal-fired power plant in Utah, the Sierra Club appealed the decision to the EPA's Environmental Appeals Board. *In re Deseret Power Electric Cooperative*, Appeal No. 07-03 (EAB Nov. 13, 2008). The Board remanded the decision, holding that the EPA erred in limiting its discretion to regulate carbon dioxide emissions based on its prior interpretation of the Clean Air Act. This Appeals Board decision may signal the far-reaching consequence that the EPA is seriously considering regulating carbon dioxide emissions.

Liability for Effects of Climate Change

In the past few years, plaintiffs have sued energy and automobile companies for the adverse effects of climate change, claiming that these effects constitute a public nuisance. Two federal district courts, however, have dismissed these claims as non-justiciable "political questions," meaning that they require policy determinations that courts are not equipped to decide. *Connecticut v. American Electrical Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *California v. General Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

A Native-American Inupiat village recently filed a federal lawsuit alleging that several energy companies (1) created a public nuisance by releasing greenhouses gases into the atmosphere and (2) engaged in a civil conspiracy to mislead the public about the reality of climate change. Complaint, *Native Vill. of Kivalina v. ExxonMobil Corp.*, CV-08-1138 SBA (N.D. Cal. Feb. 26, 2008). The village, located on a barrier island along the Alaskan coast, alleges that climate change is causing it to sink into the ocean because higher Arctic temperatures have thinned the sea ice that protects the village from erosive winter storms. Relying on government estimates, the village asserts that its relocation will cost from $100 to $400 million. This case is currently pending. The village's strategic decision to plead a claim for civil conspiracy demonstrates a recognition that claims based on the public nuisance doctrine, which other courts have declined to address in a similar context, have proven ineffective. Use of a civil conspiracy claim also suggests that future litigation may contain allegations of misrepresentations about the effects of greenhouse gas emissions rather than the actual production of those emissions.

Conclusion

The scope of subject matters and issues in this snapshot of climate change litigation is extensive. As recognition of climate change and its adverse effects increases, litigation will surely ensue over who should take responsibility for ameliorating and compensating for these effects. While the case law that develops remains to be seen, the decisions rendered in these cases will certainly affect the way businesses plan and function. Climate change litigation has already begun to influence contract negotiations, building construction, energy production, and corporate reactions to claims of present and future liability for climate change. We will continue to update you as courts decide new and important cases relating to the impacts of climate change which directly affect you and your business.