Climate Change: Treaties, Legislation, Due Diligence and Litigation Update

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I. Introduction

11 of the last 12 years (1995 - 2006) rank among the 12 hottest years in the instrumental record of global surface temperatures (since 1850).


“The effect of greenhouse gases on global warming is... the most important environmental issue facing the world today. Our knowledge of the underlying causes of climate change is growing, but the problem brims with uncertainties, raising serious scientific and ethical questions.”

- Veerabhadran Ramanathan, Meeting of the American Academy, University of California, San Diego (11/21/05)
II. International Agreements

• Montreal Protocol (O$_3$)

• U.N. Framework Convention on Climate Change (03/1994)
  – Kyoto Protocol
U.N. Framework Convention on Climate Change

• Key principle:
  – No binding GGE limits
  – Developed countries (40+ EU)
  – Developing countries
  – All parties:
    • National inventories
    • Develop national CC programs
    • Consider CC impacts

• Developed Country Commitments:
  – Voluntary target: 1990 GGE by 2000
  – Support CC activities in developing countries via grants and loans

• GHGs: CO₂, CH₄, N₂O, PFCs, HFCs, SF₆, [water vapor, O₃, CFCs]
Kyoto Protocol

- Adopted in 1997, effective in 2005
- Detailed provision contained in 2001 Marrakesh Accords
- 175 signatories (not including U.S.)
- 36 industrialized nations to reduce GGE
- Key commitments expire 2012
Kyoto Protocol (cont.)

- Nation-by-nation GGE limits (5% of 1990 levels) by developed signatories
  - Developed country target levels
    - Developing countries exempt

- Compliance options
  - Emissions trading, “the carbon market”
  - Clean development mechanism (CDM)
  - Joint implementation (JI)

- Enforcement
  - Potential economic sanctions
  - Medellin v. Texas (U.S. S.Ct., 2007)
Post Kyoto

- Kyoto Protocol an important first step towards a truly global emission reduction regime that will stabilize GHG emissions

- It provides the essential architecture for any future international agreement on climate change

- By the end of the first commitment period of the Kyoto Protocol in 2012, a new international framework needs to have been negotiated and ratified

- 2009 goal to reach new agreement
  - Avoid Kyoto gap
III. Legislation & Initiatives

• United States

  – Clean Air Act of 1970

  – National Climate Program Act of 1978

  – Global Climate Protection Act of 1987

  – Global Change Research Act of 1990
## Federal Proposed Climate Change Legislation

<table>
<thead>
<tr>
<th>Bill Title</th>
<th>Bill No.</th>
<th>Author(s)</th>
<th>Coverage</th>
<th>Regulated Sources</th>
<th>Emission Targets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Climate Stewardship and Innovation Act</td>
<td>S. 280</td>
<td>Lieberman-McCain</td>
<td>75%</td>
<td>Economy-wide cap; downstream for utilities and large sources; upstream for transportation</td>
<td>2012: 2004 level 2020: 1990 level 2030: 20% below 1990 2050: 60% below 1990</td>
</tr>
<tr>
<td>Global Warming Pollution Reduction Act</td>
<td>S. 309</td>
<td>Sanders-Boxer</td>
<td>100% (EPA)</td>
<td>Economy-wide cap; EPA has discretion to implement market-based program to achieve cap</td>
<td>2010-2020: 2%/year 2020: 1990 level 2030: 27% below 1990 2040: 53% below 1990 2050: 80% below 1990</td>
</tr>
<tr>
<td>Global Warming Reduction Act</td>
<td>S. 485</td>
<td>Kerry-Snowe</td>
<td>100% (EPA)</td>
<td>Economy-wide cap; EPA has discretion to implement market-based program to achieve cap</td>
<td>2020: 1990 level 2020-2029: 2.5%/year 2030-2050: 3.5%/year 2050: 62% below 1990</td>
</tr>
<tr>
<td>Safe Climate Act</td>
<td>H.R. 1590</td>
<td>Waxman</td>
<td>100% (EPA)</td>
<td>Economy-wide cap; EPA has discretion to implement market-based program to achieve cap</td>
<td>2011-2020: 2%/year 2020: 1990 level 2030-2050: 5%/year 2050: 80% below 1990 (President sets)</td>
</tr>
<tr>
<td>Liberman-Warner Climate Security Act</td>
<td>S. 2191</td>
<td>Liberman-Warner</td>
<td>80-85%</td>
<td>Economy-wide cap; upstream for transportation fuels and natural gas; downstream for coal and GHG producers; HFC cap</td>
<td>2012: 4% below 2005 2020: 19% below 2005 2050: 71% below 2005</td>
</tr>
</tbody>
</table>
Legislation & Initiatives – States

• California
  – Created ARB (Mulford-Carrell Act, 1967)
  – CEC, ARB and other agencies to study implications of GGE on environment, economy and waters (AB 4420, 1988)
  – In 2004, ARB determined:
    • 38% of CA GGE is from transportation,
    • 25% from electricity,
    • 20% from industrial and
    • 6% from agriculture
  – Executive Order S-3-05: Governor called for:
    • Reduction of GGE to 1990 levels by 2020
    • 80% reduction by 2050
    • Secretary of Cal. EPA to lead effort to evaluate and recommend measures
    • No mention of CEQA
California Enacts Assembly Bill 32

- CA Global Warming Solutions Act of 2006 (H&S § 38500, AB 32)
  - CA is 2nd highest GGE in U.S.
  - Global warming is a serious threat to economic well-being, public health, natural resources and the environment
    - Air quality problems
    - Reduction in quality and supply of water
    - Rise in sea level
    - Damage to marine ecosystems
    - Increase in incidents of infectious diseases, asthma and other human health problems
Legislation & Initiatives – States

• AB 32 critical elements:
  – ARB to adopt “mandatory” statewide GGE limit
    • 1990 levels by 2020
  – Maximum “technologically feasible” and “cost-effective” GGE reduction
  – ARB authorized to adopt market-based mechanisms
  – Fees (carbon tax & allowance auctions)
  – Monitor and enforce (criminal)
AB 32 Reduction Requirements

- 1990 Baseline (426 MMT)
- 28% Reduction (-173 MMT)
- 80% Reduction (to 85 MMT)
AB 32 Timeline

- Approve Early Action List
  Jun 30, 2007

- Mandatory Reporting to Develop 1990 Baseline
  Jan 1, 2008

- Prepare and Approve Scoping Plan
  Jan 1, 2009

- Adopt Regulations Implementing Early Action Measures
  Jan 1, 2010

- Adopt Final GGE Reduction Regulations
  Jan 1, 2011

- GGE Reduction Regulations Effective
  Jan 1, 2012

- Achieve 1990 GGE Levels
  Jan 1, 2020
Legislation & Initiatives – States

• AB 32 Scoping Plan – comprehensive framework addressing all significant sources of GGE
  – By 2020, reduce GGE to 1990 levels
  – Mix of strategies: market mechanisms, regulations, voluntary and fees
  – Key elements
    • Cap and trade program linked to WCI
    • Energy efficiency programs
    • State government reduction efforts
    • Local government programs
    • Industrial sources
    • Economic impacts
    • Public health
    • Fees to fund implementation
Legislation & Initiatives – States

- Scoping Plan (cont.)
  - CA cap and trade program linked to WCI
    - Capped sectors: electricity, natural gas, transportation, industry (refineries, boilers and stationary engines, glass and cement)
    - Cap declines over time to meet 2020 targets
    - Allowances distributed by state equal to total emissions
    - Limited use of offsets: rigorous criteria necessary, growing market for offsetting GGE, part of compliance cap and trade, regulatory or carbon fee approach
    - Safeguards for regional and local co-pollutants
  - Uncapped sectors
    - High GWP possible fees and standards to reduce leakage
    - Recycling and waste: landfill methane, recycling and composting
    - Agriculture possible mandatory program 2013
    - Water focus on efficiency in delivery and treatment programs
    - Forest preserve carbon sequestration potential
Legislation & Initiatives – States

- Scoping Plan (cont.)
  - Energy efficiency programs
    - More stringent building and appliance standards
    - Utility companies to increase energy efficiency programs
    - Achieve 33% renewable power source for all utilities
    - Million Solar Roofs
  - State government to set example by reducing carbon footprint 30% from expected 2020 levels
    - State Green Building Initiative
    - State motor vehicle fleet cleanup
    - Procurement practices
    - Alternative transportation for state employees
    - “Carbon Shadow” evaluation of government policies and decisions
Legislation & Initiatives – States

• Scoping Plan (cont.)
  – Local governments
    • Encourage local climate action plans and local targets
    • ARB to provide GGE reduction targets from 2020 – 2035
    • Land use planning and CEQA significant impacts of climate change
      – OPR to issue climate change guidelines for CEQA by 1/2010
    • Collaborative approach to regional targets
    • SB375 sustainable communities strategies as part of regional transportation plan to achieve reduction of GGE from automobiles and light trucks in the region
  – Industrial sources
    • Report baseline emissions
    • Require efficiencies and audit large sources
    • Evaluate potential to reduce GGE, criteria pollutants and air toxics
Legislation & Initiatives – States

• Scoping Plan (cont.)
  
  – Economic Impacts
    • Savings believed to outweigh costs due to energy efficiency (e.g., Pavley regulations)
    • Choice of economic model important
    • Lively debate concerning analysis and models
  
  – Public health benefits
    • Reduced illnesses and deaths due to respiratory, cardiovascular and other causes
    • Avoid work loss days and restricted activities
Legislation & Initiatives – States

• AB 32

  – Business opportunities and future demand
    • Governor’s Executive Order (S-03-05), 80% reduction from 1990 levels by 2050
    • California leadership could influence other jurisdictions whose participation is crucial
    • Green technology: sustainable energy and buildings
      – New technology provides opportunities
      – Rapidly growing revenues
      – Venture investments > $1B

  – Obstacles
    • California’s high standards may disadvantage its regulated community
    • Need WCI, national and international cap and trade participation
Legislation & Initiatives – Other States

- 23 States: commissions or advisory groups
- 18 States: GGE targets
- 14 States: adopted or adopting CA’s automobile GGE standards
- 24 States: require power from renewable resources

Compiled by National Caucus of Environmental Legislators (2/21/2008)
Legislation & Initiatives – Regional

Source: Pew Center on Global Climate Change: Regional Initiatives (www.pewclimate.org)
IV. Climate Change Risks: Due Diligence & Disclosures

• Climate change is important for businesses and investors:
  – Investment planning – Equity and Debt financing, capital expenditures, utility costs, change in product demand, new technology and regulations
  – M&A, IPOs, corporate environmental reporting
  – Relations with shareholders, employees, suppliers and customers
    • Shareholder activism - resolutions and litigation
    • Exxon-Mobil
IV. Climate Change Risks: Due Diligence & Disclosures (cont.)

• SEC disclosures:
  – Capital expenditures:
    • Actual and contingent material effects
  – Material legal proceedings
  – Management discussions and analysis:
    • Currently known material trends, events or uncertainties reasonably expected

• Will CC disclosures be required?
IV. Climate Change Risks: Due Diligence & Disclosures (cont.)

• SEC Disclosures (cont.)

  – SEC has not issued any CC disclosure guidance

  – Legislation (S.309 and S.485) would require disclosure re: “financial exposure of the issuer” and the “potential economic impacts”

  – Public companies need to conduct DD related to GGE to ensure adequate disclosures
    • Moving target - must be closely monitored
    • Impacts can last for many years
IV. Climate Change Risks: Due Diligence & Disclosures (cont.)

• Due Diligence in Asset and Real Estate Transactions:

  – Environmental Due Diligence:
    • Hazardous materials and substances investigation not sufficient
      – Environmental compliance, proper permits
      – Adequate capital reserved for expenditures?

  – Climate change is a unique category for DD
    • Cumulative effect is global
    • International treaties and domestic regulations which can be local
    • Future regulation is largely unknown
    • Cost and availability of emission reductions is uncertain
IV. Climate Change Risks: Due Diligence & Disclosures (cont.)

• Need new design to DD to include CC
  – Assessing CC liabilities
    • Scientific debate, technical solutions and politics
    • Balance sheet projections
  – Company emissions obligations and compliance
  – Rising sea level and salt water intrusion
  – Energy costs, water supply, extreme weather conditions
  – Insurance costs
  – The future?
V. Climate Change Litigation

a) Types of Cases
b) Class of Plaintiffs/Defendants
c) Obstacles
d) Current Cases
e) Future Actions
V. Climate Change Litigation

(a) Types of Cases

– Statutory
  • Clean Air Act
  • Endangered Species Act
    – Polar bear case
  • NEPA and CEQA

– Common law theories and remedies
  • Torts
  • Natural trust litigation

– Pre-emptive litigation
V. Climate Change Litigation (cont.)

(b) Plaintiffs and Defendants

– Plaintiffs:
  • States, municipalities and federal agencies
  • Environmental groups
  • Private property owners
    – Nuisance: Katrina and Rita

– Defendants
  • Generators of energy, oil and gas companies, auto manufacturers, petrochemical, factories, developers, etc.
V. Climate Change Litigation (cont.)

(c) Obstacles

1. Standing
2. Judicial reluctance / competency
3. Political Questions
4. Causation
5. Remedies
V. Climate Change Litigation (cont.)

(d) Current Cases

1. Statutory - CAA
     - States have standing to file suit based on threat of climate change impacts
     - GHGs are “air pollutants” under CAA
     - EPA required to regulate GGE from cars, unless it determines GGE do not contribute to CC
     - Stationary sources as well as mobile
V. Climate Change Litigation (cont.)

(d) Current Cases

1. Statutory (cont.) - CAA
   - California v. U.S. EPA (D.C. Cir. 2007)
     - CA sued to require EPA to grant or deny CA’s request for a waiver of preemption (§ 209(b) of CAA) for motor vehicle GGE
     - AB 1493 required CARB to develop/adopt GGE regulations for light-duty motor vehicles
     - December 2005 CARB applied for waiver
     - November 2007 AG filed mandamus
     - December 2007 waiver denied
     - CA appealed
V. Climate Change Litigation (cont.)

(d) Current Cases

1. Statutory (cont.) - ESA
   
   • Center for Biological Diversity v. Kempthorne (N.D. CA 2008)
     
     – Court orders FWS to make final decision whether to list polar bear as threatened or endangered species before May 15, 2008
     
     – May 14, 2008: Fish & Wildlife Service list Polar Bears as “threatened”
     
     – Kempthorne: ESA not intended to regulate global CC, not the right tool to set U.S. CC policy

   • Alaska filed suit against FWS alleging harm to oil and fishing industries due to listing
V. Climate Change Litigation (cont.)

(d) Current Cases

1. Statutory (cont.) - NEPA
   • Center for Biological Diversity v. NHTSA (9th Cir. 2007)
     – Set aside NHTSA’s (CAFE) standards for light trucks
     – CAFE standards have direct effect of GGEs
     – NHTSA action is “legally relevant cause” of cumulative GGE
     – Evidentiary record included numerous reports from IPCC
     – GGE are “precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct”
V. Climate Change Litigation (cont.)

(d) Current Cases

1. Statutory (cont.) - CEQA
   - Center for Biological Diversity v. City of Banning (2006)
     - 1500 home development failed to consider GGE
     - Court held no law required the City to consider CC impacts of project
   - California v. San Bernardino County (2007)
     - General plan failed to consider GGE impacts
     - County agreed to incorporate GGE reduction plan
V. Climate Change Litigation (cont.)

(d) Current Cases

1. Statutory (cont.) - CEQA
   • NRDC v. Reclamation Board of the Resources Agency of the State of CA (Sac. County Sup.Ct., 2007)
     – Petitioner claimed new information: effect of CC on super levees
     – Higher-severity events (100-year or 200-year floods) are likely to be more frequent, which leads to more significant project effects
     – CC is occurring and will effect hydrology of Delta; frequency and severity of flood episodes is not “new information” under PRC § 21166
     – No evidence to support the impacts on CC
V. Climate Change Litigation (cont.)

(d) Current Cases

3. Common law

- CA v. GM (9th Cir., 2008)
  - California sued six largest auto manufacturers for public nuisance
  - Claim for damages to coastline and other natural resources
  - Dismissed as political question
  - Appealed to 9th Circuit
V. Climate Change Litigation (cont.)

d) Current Cases

3. Common Law

- Comer v. Murphy Oil (D.C. Miss 2006)
  - Nuisance class action against oil, coal, chemical and insurance companies for GGE that increase frequency and intensity of hurricanes (i.e., Hurricane Katrina)
  - Several common law claims related to GGE
  - Dismissed on standing and political question basis
V. Climate Change Litigation (cont.)

(d) Current Cases

3. Common Law (cont.)

• Open Space Institute v. American Electric Power Co. (2nd Cir. 2007)
  – Interstate public nuisance claim filed by New England states and environmental groups against power companies
  – Eight states sued for abatement order to lower GGEs
  – Court dismissed as political question
  – Scope and magnitude of relief sought would impose GGE cap before legislature acts
V. Climate Change Litigation (cont.)

(d) Current Cases

3. Common Law (cont.)

• Kivalina v. Exxon Mobile Corp. (N.D. Cal. 2008)
  – Inupiat village 400 people, 70 miles north of Arctic Circle sued 19 national oil, power and coal companies
  – U.S. Army Corps and GAO – village must be relocated due to CC (cost between $95-400 million)
  – Plaintiffs allege public and private nuisance and conspiracy to misinform (fraud)
  – No trial to date
V. Climate Change Litigation (cont.)

(d) Current Cases

4. Preemption
   • Green Mountain v. Crombie (D.Vt. 2007)
     – GM, Daimler-Chrysler and other manufacturers brought federal preemption to invalidate Vermont’s adoption of the California automobile GGE regulations
     – District court rejected the claim September 2007
(e) Future Cases

- Professional liability claims
- D&O liability claims
- Product liability and construction defect
- New federal statutory litigation
- State and local regulations
- CEQA and NEPA challenges
- Natural trust litigation
Observations

- **Science**
  - How is success measured?
  - Effect of local emissions on global pollution

- **Policy**
  - Politicians’ delight
  - Coordination of local, regional, state, national and international programs
  - Environmental justice

- **Ripple effects (cost / benefits)**
  - Economic modeling of regulatory impacts
  - Price increases: food, water, energy
  - Re-placed resources (ethanol)
  - Who pays?