

Recent Developments in Climate Change Law

by Lauren E. Schmidt and Geoffrey M. Williamson

The federal government has yet to enact comprehensive legislation to address global climate change. However, through a series of recent legislative proposals and lawsuits seeking to force action by EPA, a federal climate change policy is slowly beginning to emerge.

The scientific community has reached a strong consensus regarding the science of global climate change: there is no question the planet has been warming for some time and continues to warm. The Intergovernmental Panel on Climate Change (IPCC), widely considered to be the leading international scientific body on climate change issues, recently reported that “warming of the climate system is unequivocal,” as evidenced by increases in global average air and ocean temperatures, widespread melting of snow and ice, and a rising global sea level.¹ The IPCC also agrees that most of this observed increase in temperatures in recent decades is very likely due to increasing concentrations of greenhouse gases in the atmosphere caused by human activities.

There is little debate within the scientific community that global warming is largely the result of carbon dioxide and other greenhouse gas emissions from human activities, and there is no doubt that a reduction in the current level of greenhouse gas emissions will be required to avoid the most severe potential environmental and social effects of climate change.² The majority of developed countries already have implemented greenhouse gas reduction programs in some form. In the United States, however, the legal system is just beginning to catch up with what the scientific community and, to a large extent, industry³ have recognized for quite some time.

Despite the recent focus on climate change issues, there are currently no overarching federal laws that explicitly require the government or corporations to mitigate their impact on global climate change. In December 2007, the federal government took a step in this direction when it enacted into law the Energy Independence and Security Act.⁴ That Act, among other measures, raises corpo-

rate average fuel economy (CAFE) standards for automobile emissions for the first time since 1975.

In June 2008, the full U.S. Senate debated the Lieberman-Warner Climate Security Act (CSA),⁵ which contains a comprehensive cap-and-trade program for greenhouse gas emissions. Although debate on the Lieberman-Warner bill has been tabled and almost certainly will be on hold until the next administration, similar legislation is likely to be enacted sometime in 2009.

A series of recent lawsuits by state and local governments and environmental groups suggest the Environmental Protection Agency (EPA) has a duty to address climate change issues under the Clean Air Act (CAA).⁶ Significantly, under the Supreme Court’s 2007 decision in *Massachusetts v. EPA*,⁷ EPA is required to regulate greenhouse gas emissions from new motor vehicles if EPA determines that greenhouse gases “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Also, as the effects of global warming become more apparent, courts are beginning to see climate change-related lawsuits under the National Environmental Policy Act (NEPA),⁸ NEPA’s state law equivalents, and common law theories such as nuisance.

In the absence of strong federal action, state, regional, and local governments are filling the void with a variety of often-conflicting laws and policies designed to inventory and monitor greenhouse gas emissions, limit those emissions, and implement energy efficiency programs. If and when the federal government does enact comprehensive climate change legislation, Congress will have to consider the preemptive effect of such legislation on existing state laws. Complete federal preemption of state laws seems unlikely, because states continue to implement sophisticated climate change

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policies that may be more stringent than what the federal government eventually enacts; however, anything less than complete pre-emption is likely to lead to conflicting approaches.

One thing is certain: as the United States hastens to understand and address climate change, new legislation and policy at all levels of government will continue to be introduced at an ever-increasing pace. This article addresses the current state of federal climate change law, including existing and proposed legislation and recent developments in federal case law, and briefly highlights a few of the key state and regional climate change initiatives currently underway.

U.S. Foreign Policy

The United States is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC), a treaty developed at the Earth Summit in Rio de Janeiro in 1992 and entered into force in March 1994.⁹ The UNFCCC establishes a framework for intergovernmental cooperation to address global climate change. Ratification of the treaty commits signatories to a voluntary goal to reduce greenhouse gas concentrations at a level that would prevent interference with the climate system. These measures were directed primarily at industrialized countries, with the original intention of stabilizing their emissions of greenhouse gases at 1990 levels by the year 2000. To date, 192 countries have ratified the UNFCCC. The Convention itself sets no mandatory limits on greenhouse gas emissions for individual countries and is legally nonbinding, but it contains provisions for future “protocols” that establish mandatory emissions limits.

The UNFCCC resulted in the adoption of the Kyoto Protocol (Protocol), which was adopted in December 1997 and entered into force in February 2005.¹⁰ As of September 2008, 181 countries and the European Union have ratified the Protocol. Of these, approximately thirty-six developed countries—including the European Union as one party—are required to reduce greenhouse gas emissions based on the targets specified in the treaty, which, on average, constitutes a 5 percent reduction against 1990 greenhouse gas levels during the 2008–12 period.¹¹

Approximately 137 developing countries, including India and China, have ratified the Protocol; however, developing countries have no obligations under the Protocol beyond monitoring and reporting emissions. The greenhouse gas reductions agreed to by developed countries under the Protocol are to be achieved by 2012. The Protocol leaves open the question of what reduction commitments, if any, should be made after 2012.

The United States is a signatory to the Protocol, but has neither withdrawn from nor ratified it. Having not been ratified, the Protocol is nonbinding on the United States. In July 1997, the Senate, by a vote of 95–0, passed the Byrd-Hagel resolution, which expressed the sense of the Senate that the United States should not be a signatory to any protocol that does not include binding reduction targets for both developed and developing countries or that “would result in serious harm to the economy of the United States.”¹² The Clinton Administration never submitted the Protocol to the Senate for ratification. The Bush Administration has consistently rejected U.S. participation in the Protocol on the ground that China and India, as developing countries, are not bound by the same restrictions as the United States.¹³ As a result, the United States remains the only major developed country that is not a party to the Protocol.¹⁴

In a potential policy shift, the United States joined 187 nations at a conference in Bali in December 2007 in agreeing to negotiate Kyoto’s successor protocol by the end of 2009.¹⁵ The resulting “Bali Action Plan” contains no binding commitments, but concludes that “deep cuts in global emissions will be required” and provides a timetable of two years to shape the successor protocol to Kyoto when it expires in 2012.¹⁶ However, the Bush Administration continues to express reluctance to sign any agreement that does not require reductions in emissions from developing countries.¹⁷ Because ratification of the Protocol or its successor requires approval by two-thirds of the U.S. Senate, it is questionable whether the United States, even under a new administration, will ratify a protocol that does not include binding reduction targets from both developed and developing countries.

Acronym Key			
The following acronyms are used in this article:			
AB 32	California Assembly Bill 32	IPCC	Intergovernmental Panel on Climate Change
ANPR	Advanced Notice of Proposed Rulemaking	JI	joint implementation (project)
CAA	Clean Air Act	NEPA	National Environmental Policy Act
CAFE	corporate average fuel economy	NSR	new source review (provision of CAA)
CARB	California Air Resources Board	NHTSA	National Highway Traffic Safety Administration
CDM	clean development mechanism (project)	PSD	prevention of significant deterioration (provision of CAA)
CEQA	California Environmental Quality Act	RFS	Renewable Fuels Standard
CER	certified emission reduction (credits)	RGGI	Regional Greenhouse Gas Initiative
CSA	Lieberman-Warner Climate Security Act	UNFCCC	United Nations Framework Convention on Climate Change
EA	environmental assessment	USCAP	U.S. Climate Action Partnership
EIS	environmental impacts statement	WCI	Western Climate Initiative
EPA	Environmental Protection Agency		
ERUs	emission reduction units		
EPCA	1975 Energy Policy and Conservation Act		

Federal Climate Change Law and Legislation

The legal system (federal law in particular) is just beginning to grapple with climate change developments. With the exception of the Energy Independence and Security Act of 2007,¹⁸ which raises CAFE standards for automobile emissions and includes other provisions designed to increase energy efficiency and the availability of renewable energy, federal legislation that squarely addresses climate change has yet to be passed. Following the cessation of debate in the Senate in spring 2008 on the proposed Lieberman-Warner CSA, congressional discussions on new climate change legislation likely will cease until the new administration assumes office in 2009. Based on the positions of both parties' presidential candidates, however, it is likely that federal climate change legislation will be enacted within the early first term of the next President.

Energy Independence and Security Act of 2007

Congress passed the Energy Independence and Security Act on December 18, 2007. This Act is a compromise energy policy law that consists primarily of provisions designed to increase energy efficiency and the availability of renewable energy. The Act raises CAFE standards for the first time since 1975, requiring automakers to raise the fuel economy of cars and light trucks by 40 percent—to an industry average of thirty-five miles per gallon—by 2020.¹⁹

The Act mandates an increase in the Renewable Fuels Standard (RFS) by setting a modified standard that starts at 9 billion gallons

in 2009 and rises to 36 billion gallons by 2022.²⁰ Of the 36 billion gallons, 21 billion gallons must be obtained from cellulosic ethanol and advanced biofuels.²¹

In addition, the Act contains provisions to expand carbon capture and sequestration programs, and includes a variety of new standards for lighting and for residential and commercial appliance equipment. The final version of the Act did not include two controversial provisions: a proposed Renewable Energy Portfolio Standard and the proposed repeal of tax subsidies for oil and gas.²²

Proposed Federal Legislation:

The Lieberman-Warner CSA

Recently, Congress has begun to seriously consider federal climate change legislation. A select number of bills were introduced in both the Senate and House of Representatives in 2007–08 that attempt to propose comprehensive approaches to reducing greenhouse gas emissions and address the potential consequences of climate change.²³ The bill that garnered the most significant public and congressional attention was the Lieberman-Warner CSA, initially sponsored by Senators Joe Lieberman (I., Conn.) and John Warner (R., Va.), and subsequently amended by Senator Barbara Boxer (D., Calif.).²⁴ The CSA was approved by the U.S. Senate Environment and Public Works Committee in December 2007, marking the first time a climate cap-and-trade measure has been voted out of committee to the floor of the full Senate.

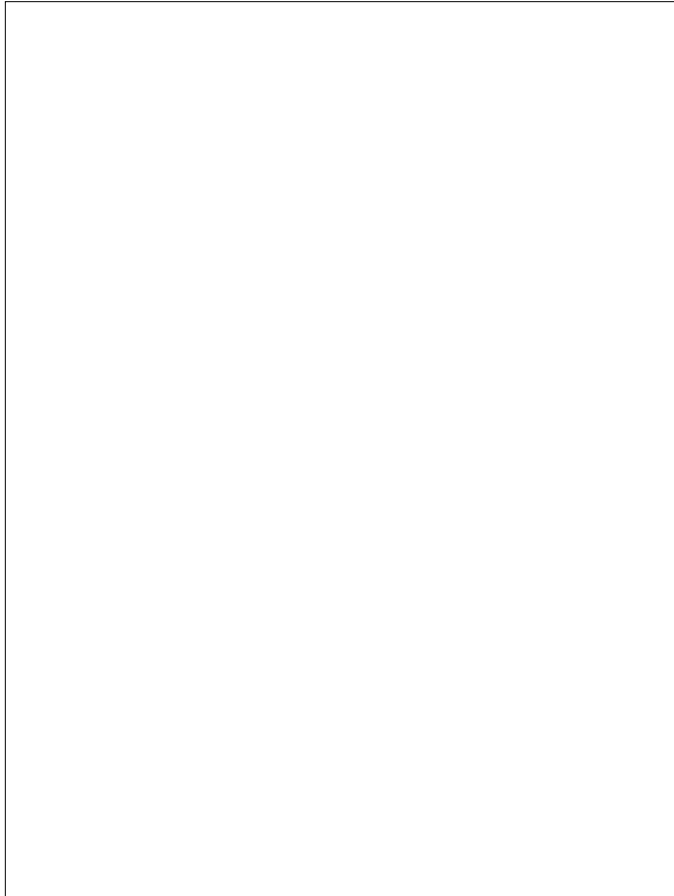
The CSA proposed to establish a comprehensive federal cap-and-trade program to reduce national greenhouse gas emissions by

2050 significantly enough to avoid the negative effects of global warming. The program would create an emissions tracking and monitoring system administered by EPA. Under a cap-and-trade framework, the bill placed a declining cap on emissions of carbon dioxide and several other greenhouse gases²⁵ from certain regulated companies. Emissions theoretically would be reduced by gradually tightening the cap over time. Companies would be permitted to buy and sell allowances to emit greenhouse gases, purportedly allowing market forces to find an efficient allocation of emissions allowances.²⁶

In June 2008, the Senate effectively shelved the CSA after only a few days of procedural debate that underscored the political difficulty of passing any type of groundbreaking climate change legislation. Although it remains unlikely the Senate will reconsider the bill or similar legislation until 2009, the bill has set the framework for future debate on similar measures, particularly as both current presidential candidates have publicly supported some type of cap-and-trade scheme legislation for greenhouse gas emissions.

The Clean Air Act

In the absence of other statutory or regulatory action, state and local governments and private parties recently have tried to force the federal government to address climate change under existing laws (federal case law is discussed below). The majority of this effort has been under the federal CAA.²⁷ The applicability of the CAA to greenhouse gas emissions has been a source of much debate and litigation. The debate can be divided into two primary



categories: (1) what authority, if any, the CAA confers on EPA to regulate climate change, and whether such authority is permissive or mandatory; and (2) whether the CAA preempts state authority to regulate motor vehicle emissions of greenhouse gases.²⁸

Air pollutants. A key ongoing debate is whether greenhouse gases are considered “air pollutants” within the meaning of the CAA and thus within EPA’s regulatory jurisdiction.²⁹ EPA’s position on this issue has changed over the last ten years. The CAA defines an “air pollutant” as any physical, chemical, biological, or radioactive substance or matter that is emitted into or otherwise enters the ambient air.³⁰ In 1998, then-EPA General Counsel Jonathan Cannon affirmed that greenhouse gases were “air pollutants” and were within EPA’s regulatory authority.³¹ Cannon also noted, however, that several CAA provisions potentially applicable to greenhouse gases required a determination by the EPA Administrator regarding the pollutant’s harmful effect on public health, welfare, or the environment.³² EPA’s next General Counsel, Gary Guzy, agreed with Cannon’s conclusions.³³

Robert Fabricant succeeded Guzy as General Counsel of EPA in 2001. Fabricant withdrew Cannon’s memorandum in 2003 as “no longer representing the views of the EPA’s General Counsel,” concluding that the CAA did not authorize EPA to address global climate change and, therefore, precluded greenhouse gases from being considered air pollutants under the CAA.³⁴

New motor vehicles. The CAA provision that has received the most attention is § 202(a)(1), which requires EPA to set standards on emissions of any air pollutant from a class or classes of new motor vehicles that, in EPA’s judgment, “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” In 2003, EPA denied a petition by several environmental organizations seeking to force EPA to regulate emissions of carbon dioxide and other greenhouse gases from motor vehicles under CAA § 202. The Supreme Court overturned EPA’s denial in April 2007, holding that the CAA unambiguously provides EPA with the authority to regulate greenhouse gases and remanding the case to the D.C. Circuit with instructions that EPA make a finding as to whether greenhouse gases endanger public health or welfare.³⁵

New source construction. Regulation of greenhouse gases under the CAA, if permitted, also would apply to new source construction. Section 111 of the CAA directs EPA to set New Source Performance Standards (NSPS) for categories of new or modified stationary sources that the agency determines cause or contribute significantly to air pollution that may reasonably be anticipated to endanger health or human welfare.³⁶ If EPA makes this determination with respect to carbon dioxide or other greenhouse gases, § 111 requires EPA to establish emission performance standards for each category that reflect the best system of emissions reductions that has been adequately demonstrated, taking into account cost and any non-air quality health and environmental impacts. Regulation of greenhouse gases also has been debated in the context of the prevention of significant deterioration (PSD) and new source review (NSR) provisions of the CAA.³⁷

Preemption of state standards. Finally, § 209(a) of the CAA generally preempts states from establishing their own motor vehicle emissions standards.³⁸ Section 209(b), however, provides for a waiver of § 209(a) for any state that adopted motor vehicle emissions standards prior to March 30, 1966, as long as the state has determined that its emissions standards are “at least as protective

of public health and welfare as applicable federal standards.”³⁹ California is the only state that is qualified to obtain a waiver under this section.

Section 177 permits other states to enact emissions standards if they are identical to the California standards and do not, in effect, compel manufacturers to make a car that is different from the type of car required by the California or federal standards.⁴⁰ At the time of publication, fourteen states have adopted California’s standards, and several others (including Colorado) have expressed interest in doing so.⁴¹

On December 19, 2007, EPA announced its decision to disapprove California’s request for a waiver of federal preemption for motor vehicle greenhouse gas emissions standards under § 209.⁴² California’s standards for greenhouse gas emissions are stricter than the standards currently set by the federal government. In its denial, EPA referred to the global nature of greenhouse gases, stating that the challenge posed by greenhouse gases “is not exclusive or unique to California” and therefore differs from California’s prior waiver requests.⁴³ The agency concluded that the revised CAFE standards in the Energy Independence and Security Act will achieve greater greenhouse emissions reductions than the California standard and, therefore, that California does not have a “need to meet compelling and extraordinary conditions” that would justify separate emissions standards for California.⁴⁴

In January 2008, California sued to overturn EPA’s waiver denial, but that lawsuit recently was dismissed by the Ninth Circuit Court of Appeals on the basis that the suit was premature, because the EPA had not yet responded formally to the state’s waiver request. However, a similar suit brought by California and other states in the D.C. Circuit Court of Appeals in March is still pending.⁴⁵

Recent Case Law

Recent legal challenges from environmental groups, industry, and state and local governments have started to shape the landscape of federal climate change law and policy. The majority of federal climate change litigation to date has involved challenges by state governments and environmental organizations to force the federal government to take action to regulate greenhouse gases under the CAA; challenges by the automobile industry to proposed state vehicle emissions standards; statutory claims under NEPA and corresponding state “baby NEPAs” to stop government action that would have a negative effect on climate change; and tort claims against corporate defendants for property damage allegedly caused by greenhouse gas emissions.

The Massachusetts v. EPA Opinion

The most significant development in federal climate change case law is the U.S. Supreme Court’s decision in April 2007 in *Massachusetts v. EPA*.⁴⁶ That case arose from a rulemaking petition brought by several environmental organizations under CAA § 202(a)(1), which, as discussed above, requires EPA to set standards for emissions of any air pollutant from a class or classes of new motor vehicles that in EPA’s judgment “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁴⁷

The petitioners argued that § 202(a)(1) gives EPA a mandatory duty to regulate emissions of carbon dioxide and other greenhouse

gases from motor vehicles. EPA rejected the petition, concluding that the CAA does not authorize regulation to address global climate change.⁴⁸ In the alternative, EPA concluded that even if the CAA does provide it with the statutory authority to regulate greenhouse gases, it would decline to do so based on a number of policy-based arguments.⁴⁹

The Court of Appeals for the D.C. Circuit upheld EPA's decision.⁵⁰ The court concluded in a split decision that even if EPA had statutory authority to regulate greenhouse gases from new motor vehicles, EPA properly declined to exercise that authority by basing its decision on policy considerations, including scientific uncertainty regarding the effect of greenhouse gases on climate change.⁵¹

On April 2, 2007, in a five-to-four decision, the U.S. Supreme Court reversed and remanded.⁵² The Supreme Court held that the current provisions of the CAA unambiguously provide EPA with the authority to regulate carbon dioxide emissions, as well as other greenhouse gases, including methane, nitrous oxide, and hydrofluorocarbons.⁵³ Under the plain language of § 202(a)(1), if the EPA makes a finding that a greenhouse gas "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," EPA is required to regulate emissions of the pollutant from new motor vehicles.⁵⁴ Although the Supreme Court's decision does not require EPA to make an endangerment finding regarding greenhouse gas emissions from motor vehicles, it does require the agency to make a reasoned explanation if it chooses not to do so.⁵⁵

In April 2008, following months of inaction by EPA after the Supreme Court's decision, the petitioners filed a petition for *mandamus* with the D.C. Circuit, asking the court to compel EPA to determine whether greenhouse gases are endangering the public health or welfare. EPA responded that it had the right to put its decision on indefinite hold while the agency solicits public comments. The petition for *mandamus* is currently pending before the D.C. Circuit.

In July 2008, EPA issued an Advanced Notice of Proposed Rule-making (ANPR) in response to *Massachusetts v. EPA*, which solicited public comment on the advantages and disadvantages of regulating greenhouse gas emissions under certain provisions of the CAA, issues relevant to future climate change legislation and how such legislation might overlap with the CAA, and scientific information relevant to an endangerment analysis.⁵⁶ In a preface to the ANPR, EPA Administrator Stephen Johnson emphasized the agency's belief that the Clean Air Act is "ill suited" for the regulation of greenhouse gas emissions. Public comments are due 120 days from the date of the ANPR's publication in the Federal Register.

Other Federal Opinions

In the wake of *Massachusetts v. EPA*, federal courts in California and Vermont rejected similar challenges by the automobile industry to the states' respective greenhouse gas emissions requirements for new automobiles.⁵⁷ California enacted new greenhouse gas emissions standards in accordance with CAA § 209,⁵⁸ Vermont proposed to adopt California's regulations under CAA § 177.⁵⁹ In both cases, auto dealers and manufacturers argued that that states' emissions standards were preempted by the 1975 Energy Policy and Conservation Act (EPCA), which requires the National Highway Traffic Safety Administration (NHTSA) to set minimum CAFE standards for a manufacturer's fleet of new vehicles at the "maximum feasible average fuel economy level."⁶⁰ The EPCA expressly preempts states from adopting laws that regulate fuel economy.⁶¹

Federal district courts in California and Vermont considered and rejected this argument. In *Green Mountain Chrysler Plymouth Dodge Jeep*,⁶² the U.S. District Court for the District of Vermont (in a 105-page opinion) upheld the validity of Vermont's regulations, concluding that the regulations are not preempted by the EPCA. The court also held that Vermont's regulations do not impermissibly intrude on the foreign policy of the United States and the foreign affairs prerogatives of the President and Congress.⁶³

Similarly, in *Central Valley Chrysler-Jeep*,⁶⁴ the U.S. District Court for the Eastern District of California held that California's greenhouse gas emission requirements were not preempted by federal fuel efficiency standards. The court found that EPA is not precluded by the EPCA from promulgating emission control regulations that have an effect on fuel economy, and that state regulations granted a waiver by EPA are no different from federal regulations for preemption purposes. The court also rejected the automakers' claim that California's proposed emissions standards were preempted by U.S. foreign policy.⁶⁵

In the wake of EPA's December 2007 denial of California's request for a waiver of federal preemption with respect to its motor vehicle emissions standards, both California's and Vermont's standards are currently invalid. Nonetheless, at least eighteen states have adopted or are in the process of adopting California's automobile emissions standards.⁶⁶

The Center for Biological Diversity v. NHTSA Opinion

In addition to these CAA and automobile emission requirement cases, courts recently have addressed statutory claims to stop government actions that implicate climate change under NEPA and corresponding state equivalents. For example, in *Center for Biological Diversity v. National Highway Traffic Safety Admin.*,⁶⁷ the Ninth Circuit found that NHTSA's failure to monetize the benefits of greenhouse gas emissions reductions was arbitrary and capricious, and that the environmental assessment (EA) performed by the agency under NEPA was deficient in its attempt to justify its refusal to prepare a complete environmental impacts statement (EIS). As a result, the court ordered the agency to prepare a revised EA or, if necessary, an EIS. The Center for Biological Diversity had challenged NHTSA's final CAFE standards rule for sport utility vehicles, minivans, and pickup trucks for model years 2008–11 based on several grounds, including that the rule was inadequate under NEPA because NHTSA failed to take a "hard look" at the greenhouse gas implications of its rulemaking and failed to analyze a reasonable range of alternatives or examine the rule's cumulative impact.⁶⁸

With respect to the plaintiff's NEPA argument, the court noted that NHTSA would not be serving the purposes of NEPA (informing the public and ensuring agency consideration of the environmental impacts of its actions) by refusing to consider the effect of its rule on climate change.⁶⁹ Further, the court acknowledged that the agency had broad statutory authority to impose or enforce fuel economy standards, and that it could set higher standards if an EIS provided evidence warranting such a decision, rejecting NHTSA's argument that it was constrained from doing so under statutory fuel economy standard requirements.⁷⁰

The court concluded the agency's analysis of cumulative impacts in the EA was inadequate because it did not evaluate the "incremental impact" that the emissions under the new standard would have on "climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions such as other light truck and passenger automobile CAFE standards."⁷¹ The court determined that "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."⁷² Such a determination strongly suggests that future NEPA analyses for a wide range of projects requiring federal approval will need to take into account the impacts of greenhouse gas emissions on climate change.

State Case Law

State courts also recently have considered climate change-related claims under state "baby NEPAs" and are reaching similar con-

clusions to those reached by the Ninth Circuit. Litigation under the California Environmental Quality Act (CEQA), for example, has highlighted how the state's recent passage of AB 32 (discussed below) has given environmental groups and other plaintiffs, including the state itself, an opportunity to argue that the impacts of climate change must be considered and addressed in CEQA analyses.⁷³

Tort Lawsuits

Finally, a new generation of tort-based lawsuits has arisen against corporate defendants alleging that greenhouse gases emitted by those defendants have contributed to climate change that has caused real property damage to plaintiffs. In one case, the community of Kivalina, Alaska sued Exxon-Mobil and a host of other energy companies for damages caused by global warming on the grounds of public and private nuisance and civil conspiracy.⁷⁴ The suit claims that, because of the actions of the defendant corporations, ice that previously protected the village is melting and, as a result, the village is exposed to increasingly severe storms that are eroding the land on which the village sits. A hearing on a motion to dismiss filed by the defendants in the *Kivalina* matter is scheduled for December 2008.

Other cases in recent years highlight some of the difficulties Kivalina might face in recovering on its claims. Federal district courts in New York and Mississippi have dismissed similar actions on the ground that such tort actions raise nonjusticiable political

questions that are outside the court's jurisdiction.⁷⁵ The U.S. District Court for the Southern District of New York found that the "scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation," and would require the court to consider the case without any initial policy determination having been made by the executive or legislative branches.⁷⁶ Whether *Kivalina* will survive the political question issue remains to be seen, but as the effects of climate change become more physically evident, it is likely that courts will see more of these tort-based suits in the future.

Impact of State and Regional Climate Initiatives

While Congress and the current administration continue to spar over climate change policy, several states and regional government coalitions are moving forward with their own plans. These plans may be highly influential and shape any federal legislation that will evolve during the next administration.

An analysis of existing and proposed state and regional climate change laws is critical to understanding current U.S. climate change policy. Although a full discussion of these laws is beyond the scope of this article, the following is a summary of some of the major state and regional climate change initiatives.

California's AB 32

California's Assembly Bill 32 (AB 32)⁷⁷ is considered the "granddaddy" of U.S. climate change initiatives and establishes a range of statewide programs to reduce greenhouse gas emissions

and promote energy efficiency. The measure requires, among other things, the California Air Resources Board (CARB) to establish a statewide greenhouse gas emissions cap for 2020 based on 1990 emissions levels, and adopt a plan by January 1, 2009 indicating the types of regulations and mechanisms under which the state will achieve significant reductions in greenhouse gas emissions. Drafts of the plan to date suggest a mandate for sweeping restructuring of many core greenhouse gas emitting industries.

New Jersey Global Warming Response Act

Similar to California's AB 32, New Jersey's greenhouse gas reduction statute,⁷⁸ enacted in July 2007, seeks to reduce greenhouse gas emissions to 1990 levels by 2020 (roughly a 20 percent reduction), followed by a reduction of emissions to 80 percent below 2006 levels by 2050. The legislation sets deadlines for state agencies to develop a greenhouse gas emission inventory and monitoring system.

Regional Greenhouse Gas Initiative

The Regional Greenhouse Gas Initiative (RGGI)⁷⁹ is a collaboration among several northeastern and mid-Atlantic states to develop a regional strategy for reducing carbon dioxide emissions. The ten states that comprise RGGI plan on launching a cap-and-trade program in 2009 aimed at reducing greenhouse gas emissions from electricity generators within the region. RGGI's first carbon auction took place in September 25, 2008 and drew participants from the energy, environmental, and financial sectors.

Western Climate Initiative

The Western Climate Initiative (WCI)⁸⁰ is a collaboration among several western U.S. states, Canadian provinces, and Mexican states to develop regional strategies to address climate change. Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington are "partners" in the WCI; several other western states, including Colorado, are "observers." In August 2007, the partners set an overall regional goal to reduce aggregate greenhouse gas emissions by 15 percent below 2005 levels by 2020. In July 2008, WCI released a draft design for a regional cap-and-trade program that will cover a variety of major greenhouse gases across a range of industries.⁸¹ Under WCI's plan, regulated entities will need to meet certain monitoring and reporting requirements beginning in 2010, with the actual cap-and-trade activity slated to commence in 2012.

Preemption Issues

Although state and regional efforts likely will drive industry and, possibly, consumer behavior in the absence of federal regulation, these regulatory structures are expected to create preemption issues if and when Congress ultimately passes federal greenhouse gas reduction legislation. Even though it is possible that federal legislation could completely preempt state efforts, express preemption seems unlikely given the recent approach taken by the Lieberman-Warner CSA.

As described above, the CSA, like most other federal environmental legislation, expressly allows states to continue greenhouse gas reduction programs that are at least as stringent as the federal legislation; however, it also offers incentives (in the form of additional allowances) for states to terminate their own programs in favor of the federal program. This type of approach to preemption, if

adopted, would not necessarily solve the problem. The dual implementation of both federal and state or regional schemes likely will present inconsistencies, particularly where state programs are more stringent than the federal scheme.

Some state and regional policies do consider preemption issues. For example, the members of RGGI are directed to transition into a federal program if that program is determined to be “comparable” to RGGI.⁸² The effectiveness of such a provision remains dependent, however, on the language contained in any federal legislation and the similarity between the federal and state or regional program—not to mention the difficulty in determining whether programs are in fact comparable.

Conclusion

Federal courts and Congress have begun to seriously address climate change issues for the first time. Although *Massachusetts v. EPA* and the now-shelved Lieberman-Warner legislation are indicators of judicial and legislative efforts to address the effects and causes of global warming, they also underscore how far the federal government remains behind the curve in comparison to various state and regional programs, such as California’s AB 32 and RGGI. State and local government initiatives will increase, as will private suits to force action by the federal government, as long as no significant federal climate change legislation exists and EPA declines to regulate greenhouse gases under the CAA. Assuming a federal policy ultimately is put in place, there will be no shortage of legal challenges to resolve the complexity of implementing a nationwide limitation on the generation of greenhouse gases.

Notes

1. Intergovernmental Panel on Climate Change (IPCC), “Fourth Assessment Report: Synthesis Report, Summary for Policymakers” 2, 5 (2007), available at www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf. The IPCC, set up by the United Nations Environment Programme and World Meteorological Organization, assesses and reports on the latest scientific evidence and viewpoints relevant to climate change.

2. *See id.* at 7-14 (highlighting the projected effects of existing and future warming).

3. *See, e.g.*, U.S. Climate Action Partnership (USCAP), “A Call for Action: Consensus Principles and Recommendations,” available at www.us-cap.org/USCAPCallForAction.pdf. USCAP is a coalition of industry, climate, and environmental groups that collectively have called on the federal government to enact legislation requiring significant reductions of greenhouse gas emissions.

4. Pub. L. No. 110-140, H.R. 6.

5. S. 3036, 110th Cong. (2008). The Climate Security Act (CSA) originally was introduced and made it out of committee as S. 2191. That version of the Act, with the addition of a provision to ensure that the Act would have no negative effect on the U.S. budget, was introduced in the Senate on May 20, 2008 as S. 3036. Shortly after it was introduced, the CSA was revised significantly by Sen. Boxer, along with Sens. Lieberman and Warner, and reintroduced on May 27, 2008 as the Boxer-Lieberman-Warner substitute amendment to S. 3036. This article addresses S. 3036 as it was reintroduced at that time.

6. Clean Air Act of 1970, codified at 42 U.S.C. §§ 7401 to 7671q.

7. *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

8. National Environmental Policy Act of 1969, codified at 42 U.S.C. §§ 4321 to 4347.

9. The United Nations Framework Convention on Climate Change (UNFCCC) website is unfccc.int/2860.php. The Convention can be found online at unfccc.int/resource/docs/convkp/conveng.pdf.

10. The Kyoto Protocol (Protocol) to the UNFCCC is available online at unfccc.int/resource/docs/convkp/kpeng.pdf.

11. Developed countries must meet their emissions reductions targets through national measures or three market-based mechanisms: (1) emissions trading on the carbon market; (2) “clean development mechanisms” (CDMs); or (3) joint implementation. Emissions trading is set forth in Article 17 of the Protocol and allows countries that have emissions units to spare (emissions permitted to them, but not used) to sell their excess capacity to countries that are over their targets. CDMs, which are defined in Article 12 of the Protocol, allow a country with an emission reduction or limitation commitment (known as an Annex B country) to implement an emission-reduction project in developing countries to earn marketable certified emission reduction (CER) credits, each of which are equivalent to one ton of carbon dioxide and can be counted toward meeting Protocol targets. A CDM project must provide emissions reductions in the developing country that are additional to what otherwise would have occurred. Joint implementation (JI), defined in Article 6 of the Protocol, allows one Annex B country to earn emission reduction units (ERUs) from an emission reduction or removal project in another Annex B country, which can be counted toward meeting its Protocol targets. Like a CDM project, a JI project must be additional to what otherwise would have occurred.

12. S. Res. 98, 105th Cong., 1st Sess. (July 22, 1997).

13. Stolberg, “Bush to Give Goals for Greenhouse Gases,” *The New York Times* 15 (April 16, 2008).

14. Australia, the only major developed country other than that United States that was not a party, ratified the Protocol in March 2008.

15. Fuller and Revkin, “Climate Plan Looks Beyond Bush’s Tenure,” *The New York Times* 1 (Dec. 16, 2007).

16. *Id.* *See also* UNFCCC, “The United Nations Climate Change Conference in Bali,” available at unfccc.int/meetings/cop_13/items/4049.php. The Bali Action Plan is available online at unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf.

17. Fuller and Revkin, *supra* note 15.

18. Pub. L. No. 110-140, H.R. 6.

19. *Id.* *See also* Elliott *et al.*, “Clean Air Act Developments—2008,” ALI-ABA Course of Study 109, 119 (Feb. 6-8 2008).

20. The Energy Independence and Security Act of 2005 also amends Clean Air Act (CAA) § 211(o) (42 U.S.C. § 7545(o)), which requires the Environmental Protection Agency (EPA) to annually determine a renewable fuel standard applicable to importers, refiners, and certain blenders of gasoline.

21. Carothers, “Congressional Research Summary of the Energy Independence and Security Act of 2007,” ALI-ABA Course of Study 65, 70 (Feb. 6-8, 2008).

22. *Id.* at 71.

23. *See, e.g.*, S. 2191 and S. 1766, 110th Cong. (2007).

24. S. 3036, 110th Cong. (2008).

25. The CSA also places an emissions cap on methane, nitrous oxide, sulfur hexafluoride, perfluorocarbons, and hydrofluorocarbons.

26. Regulated companies under the bill included those in the electric power, transportation, manufacturing, and natural gas industries, which accounted for 87 percent of U.S. greenhouse gas emissions when combined. The cap on these regulated sources was designed to start in 2012 at 4 percent below 2005 emissions levels, and then gradually decrease until it reached 19 percent below 2005 emissions levels in 2020 and 71 percent below 2005 emissions levels in 2050. S. 3036 § 201.

27. CAA of 1970, codified at 42 U.S.C. §§ 7401 to 7671q.

28. *See generally* Martel and Stelcen, *Clean Air Regulation*, in *Global Climate Change and U.S. Law* 133-55 (Michael B. Gerrard, ed., ABA 2007).

29. *Id.* at 137-41.

30. CAA § 302(g) (42 U.S.C. § 7602(g)).

31. Martel and Stelcen, *supra* note 28 at 137-38.

32. *Id.*

33. *Id.*

34. *Id.* at 138-39.

35. See “Federal Case Law” discussion, *infra*.
36. 42 U.S.C. § 7411(b)(1).
37. Martel and Stelcen, *supra*, note 28 at 147-48. Prevention of significant deterioration (PSD) rules affect the addition of new sources or modification of existing sources in an area already in attainment with air quality standards, with the goal of keeping such areas in attainment. New source review (NSR) is triggered by proposed construction of a new source in a nonattainment area, but also includes the PSD rules that apply to attainment areas as described above.
38. 42 U.S.C. § 7543(a).
39. 42 U.S.C. § 7543(b)(1).
40. 42 U.S.C. § 7507.
41. Arizona, Connecticut, Florida, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington have adopted California’s motor vehicle emissions standards. At least four states (Colorado, Delaware, Illinois, and Utah) are considering adoption.
42. See generally www.epa.gov/otaq/ca-waiver.htm.
43. Dec. 19, 2007 letter from EPA Administrator Stephen L. Johnson to California Governor Arnold Schwarzenegger, available at www.epa.gov/otaq/climate/20071219-slj.pdf. See also 73 Fed. Reg. 12156 (March 6, 2008).
44. *Id.* CAA § 201(b)(1)(B) allows EPA to deny California’s waiver application if the state does not need the proposed emissions standards “to meet compelling and extraordinary conditions.” 42 U.S.C. § 7543(b)(1)(B).
45. Egelko, “State bid to limit emissions hits court snag,” *San Francisco Chronicle* (July 26, 2008), available at www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/26/BA2111VLHU.DTL.
46. *Massachusetts*, *supra* note 7.
47. 42 U.S.C. § 7521(a)(1).
48. 68 Fed. Reg. 52922 (Sept. 8, 2003).
49. *Id.*
50. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005). Twelve states and a number of local governments joined petitioners in their appeal.
51. *Id.* at 58.
52. *Massachusetts*, *supra* note 7.
53. *Id.* at 1459-62, citing 42 U.S.C. §§ 7601(a)(1) and 7602(g).
54. *Id.* at 1462.
55. *Id.* at 1462. Notably, the Court found that “[t]he harms associated with climate change are serious and well-recognized,” citing a 2001 report from the National Research Council that EPA acknowledged was an “objective and independent assessment of the relevant science.” *Id.* at 1455, citing 68 Fed. Reg. 52930. The Court also significantly relied on EPA’s public statements regarding the need to address global climate change and on the fact that EPA did not dispute the existence of a causal connection between greenhouse gas emissions caused by human activities and global warming. *Id.* at 1457-58.
56. 73 Fed. Reg. 44,354 (July 30, 2008).
57. *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Cal. 2007), as corrected March 26, 2008; *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295 (D. Vt. 2007).
58. 42 U.S.C. § 7543. See CAA discussion, *supra*.
59. 42 U.S.C. § 7507. As discussed above, § 177 permits states to adopt their own motor vehicle emissions standards if they are identical to the California standards.
60. 49 U.S.C. § 32902(a) and (c).
61. 49 U.S.C. § 32919 states:
When an average fuel economy standard prescribed under this chapter is in effect, a State or political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.
62. *Green Mountain Chrysler Plymouth Dodge Jeep*, *supra* note 57 at 343-92.
63. *Id.* at 392-97.
64. *Central Valley Chrysler-Jeep*, *supra* note 57 at 1165-79.
65. *Id.* at 1179-89.
66. See note 41, *supra*.
67. *Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008) (vacating and withdrawing *Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508 (9th Cir. 2007)).
68. *Id.* at 1181.
69. *Id.* at 1213.
70. *Id.*
71. *Id.* at 1216.
72. *Id.* at 1217.
73. See, e.g., *State of California v. County of San Bernardino*, Case No. CIV-5507-00329 (Cal. Super. Ct. 2007) (settled).
74. *Native Village of Kivalina v. Exxon-Mobil*, No. 4:08-CV-01138 (N.D. Cal. filed Feb. 26, 2008).
75. *Connecticut v. American Elec. Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005); *Comer v. Murphy Oil USA*, No. 1:05-cv-00436, slip op. (S.D. Miss. Aug. 30, 2007), appeal docketed No. 07-60756 (5th Cir. Sept. 28, 2007).
76. *American Elec. Power Co.*, *supra* note 75 at 272-73.
77. Cal. Health & Safety Code §§ 38500 *et seq.*
78. N.J.S.A. §§ 26:2C-37 *et seq.*
79. Information about the Regional Greenhouse Gas Initiative (RGGI) is available online at www.rggi.org.
80. Information about the Western Climate Initiative (WCI) is available online at www.westernclimateinitiative.org.
81. WCI, “Draft Design of the Regional Cap-and-Trade Program” (July 23, 2008), available at www.westernclimateinitiative.org/ewebedit/pro/items/O104F18808.PDF.
82. RGGI Memorandum of Understanding ¶ 6(C) (Dec. 20, 2005), available at www.rggi.org/docs/mou_12_20_05.pdf. ■