

I N S I D E T H E M I N D S

Working with Government Agencies in Climate Change Law

*Leading Lawyers on Communicating with
Government Officials, Understanding
Legal Challenges, and Navigating Recent and
Upcoming Climate Change Regulations*



ASPATORE

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Federal Regulation of
Greenhouse Gases:
Where We've Been and
Where We're Going

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ASPATORE

Introduction

American business, particularly in the energy and manufacturing sectors, now faces a dizzying array of actual and potential requirements to control greenhouse gas (“GHG”) emissions from a variety of regulatory bodies. Perversely, these myriad requirements can be traced to the failure of Congress over the last two decades to adopt a single national program of GHG controls. Frustrated by the lack of action in Congress, advocates of GHG regulation have sought regulatory controls from virtually any governmental body they could think of, and those efforts have borne fruit in a variety of ways. Numerous states have adopted either their own parochial programs or created multistate bodies such as the Northeast Regional Greenhouse Gas Initiative to develop regional GHG control programs; the Environmental Protection Agency (“EPA”) has been pressed to adopt GHG controls under the federal Clean Air Act; the Securities and Exchange Commission has been petitioned to require explicit disclosure requirements for publicly-traded companies that produce or consume fossil fuels; the Endangered Species Act has been enlisted as a major weapon to control development activity that results in increased GHG emissions; the National Environmental Policy Act (“NEPA”) and state equivalents have been utilized to delay development in a number of different contexts; major GHG emitters will shortly be obligated to monitor and periodically report their GHG emissions; and state and federal tort law are now used as weapons to attempt to impose GHG control requirements.

With the election of Barack Obama as the nation’s forty-fourth president, and with the Democratic Party having solid control of both Houses of Congress, the nation seems ready to adopt national GHG-control legislation. The president in his Inaugural Address called for Congress to send him a GHG cap-and-trade bill for his signature this year, and his first budget assumes the adoption of a cap-and-trade program to be effective in 2012 that will generate hundreds of billions, an perhaps trillions, of dollars in revenues from the auction of GHG emissions permits. Considerably less certain, however, is the exact timing and character of cap-and-trade legislation, and whether adoption of such legislation will supersede—or duplicate—the various regulatory mechanisms that have already been put in place or likely will be by the time a national program becomes effective.

Businesses Affected by GHG Regulation

The effect of GHG regulation is being felt and will continue in the future to be felt across the entire economy. The most ubiquitous GHG is carbon dioxide (“CO₂”), which is created through the combustion of any fossil fuel. Since approximately 70 percent of the energy used in the United States is derived from fossil fuels, and since every business and residence uses energy, GHG regulation will affect all aspects of economic life.

Other GHGs include methane, emitted primarily by agriculture, natural gas systems, coal mining and landfills; nitrogen oxides, emitted primarily by agriculture and motor vehicle fuel production, as well as by chemical production processes and liquid waste management; and hydrofluorocarbons (“HFCs”), perfluorocarbons (“PFCs”) and sulfur hexafluoride, with HFCs and to a lesser extent PFCs used as replacements for ozone layer-depleting chemicals, principally in air conditioning and refrigeration. See *Regulating Greenhouse Gas Emissions under the Clean Air Act, Advance Notice of Proposed Rulemaking*, 73 Fed. Reg. 44,354, 44,401-02 (Jul. 30, 2008). Looking at all GHGs combined, the power sector accounts for about one-third of all GHG emissions; the transportation sector accounts for about 28 percent; the industrial sector accounts for about 20 percent; residential and commercial end use accounts for about 4.8 percent and 5.6 percent, respectively; and agriculture accounts for about 6.4 percent. *Id.* at 44,402-03.

Regulation of GHGs poses unique issues, not just because fossil fuels dominate U.S. energy usage but also because GHGs circulate globally and are well mixed in the global atmosphere. As a result, atmospheric concentrations of GHGs are essentially uniform worldwide, and a ton of GHGs emitted anywhere in the world has the same effect on global atmospheric concentrations as a ton of GHGs emitted anywhere else. Thus, without global participation, domestic GHG controls are unlikely to materially affect global atmospheric GHG levels. The U.S. share of global GHG emissions in 2000 was about 21 percent and is increasing as the Third World continues to develop. *Id.* at 44,400. Reports indicate that China may have recently surpassed the United States as the leading GHG-emitting country.

Historical Context

Efforts in Congress to control GHG emissions date back to the late 1970s and achieved national prominence during hearings in July 1988 before the Senate Committee on Environment and Public Works chaired by then Senator Al Gore. During a sweltering Washington, D.C. mid-summer heat wave, NASA scientist James Hansen testified that “[t]he greenhouse effect has been detected and it is changing our climate now.” A number of bills were introduced to impose mandatory limits on GHG emissions, both stand-alone and as a part of the legislation that became the Clean Air Act Amendments of 1990. See, e.g., Title VII of S. 1630, entitled the “Stratospheric Ozone and Climate Protection Act,” as reported by the Senate Committee on Environment and Public Works as part of its consideration of the Clean Air Act Amendments of 1990, reprinted in S. Rep. No. 228, 101st Cong., 1st Sess. (1989); see also the so-called Cooper-Synar bill, originally introduced as H.R. 5966 in the 101st Congress and again as H.R. 2663 in the 102^d Congress.

While the administration of George H. W. Bush opposed legislation to control GHG emissions, President Bush did sign several pieces of legislation into law entailing research and monitoring of GHG emissions, including the National Climate Program Act on December 22, 1987, Pub. L. No. 95-367, codified at 15 U.S.C. § 2901 *et seq.*, the Global Change Research Act on November 16, 1990, Pub. L. No. 101-606 (1990), and Title XXIV of the Food and Agriculture Act of 1990, 7 U.S.C. § 6701 note. Moreover, the Bush Administration entered into the 1992 Framework Convention on Climate Change, the so-called Rio Treaty. The U.S. government has been extensively involved in international discussions concerning human impacts on the global climate at least since 1979 when the first conference of the World Meteorological Organization (“WMO”), the United Nations Environment Program (“UNEP”), and the International Council of Scientific Unions (“ICSU”) was held. After a number of additional international conferences during the 1980s, the Intergovernmental Panel on Climate Change (“IPCC”) was created to address the issue of climate change. The IPCC produces reports on global warming science, potential environmental and economic impacts, and potential response strategies. It also advises the International Negotiating Committee (“INC”). See Exec. Rep. No. 102-55 on the United Nations

Framework Convention on Climate Change, 102d Cong., 2d Sess. (1992) at 9-10.

The INC was established by the United Nations General Assembly on December 21, 1990 to coordinate negotiation of an international treaty dealing with potential climate change. These negotiations led to adoption, on May 9, 1992, of the Rio Treaty by the resumed fifth session of the INC. The Treaty was signed on behalf of the United States on June 12, 1992. S. Treaty Doc. No. 38, 102d Cong., 2d Sess. (1992). The Senate ratified the Framework Convention on October 7, 1992 by the required two-thirds vote. See 138 Cong. Rec. S17149-S17156 (daily ed. Oct. 7, 1992). The Framework Convention called for the U.S., on a non-binding basis, to reduce GHG emissions to 1990 levels by the year 2000. It was ratified by the Senate with the clear understanding that the reductions called for in the treaty were purely voluntary. See Hearing Before the Senate Committee on Foreign Relations on the U.N. Framework Convention on Climate Change, 100th Cong., 2d Sess. (Sep. 18, 1992), at 91-110.

Following adoption of the Framework Convention, the international community continued negotiations on a climate change treaty that would impose mandatory GHG-reduction obligations culminating in the Kyoto Protocol in December 1997. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, available at <http://unfccc.int/resource/docs/convkp/kpeng.html>. Unlike the Rio Treaty, the Kyoto Protocol created legally binding mandates on certain countries, including the United States, to restrict GHG emissions by certain amounts as of certain dates. See Kyoto Protocol, Article 3 and Annex B. Prior to the negotiation of the Kyoto Protocol, however, the Senate, by a vote of 95-0, passed a resolution stating that the Senate would not ratify any treaty absent meaningful participation from Third World countries and if the treaty would damage the U.S. economy. See 143 Cong. Rec. S8138-39 (daily ed. Jul. 25, 1997).

Although then Vice-President Al Gore made a dramatic last-minute appearance in Kyoto leading to a final treaty document that the Clinton Administration signed, the administration never submitted the Protocol to the Senate for ratification. Moreover, the Clinton Administration did not press for adoption of national GHG-control legislation, and Congress likely

would not have enacted such legislation if the administration had pushed for it. Instead, the centerpiece of climate change activity during the Clinton Administration was its voluntary plan aimed at returning GHG emissions to 1990 levels by 2000. See *The Climate Change Action Plan*, available at <http://www.gcrio.org/USCCAP/toc.html>. Adopted on October 13, 2003, the Plan contained a wide variety of elements to increase energy efficiency in residences and businesses, reduce GHG emissions from the transportation sector, promote the use of natural gas and renewable energy, promote methane recovery and storage, reduce the use of HFCs and PFCs, work with farmers on soil management to reduce the use of fertilizers, promote tree-planting, and increase joint implementation projects whereby domestic companies would fund CO₂ reduction projects overseas.

Although there had been some anticipation at the outset of the administration of George W. Bush that a GHG control program might be pursued, the administration made clear soon after taking office that it would oppose mandatory controls. The administration focused on voluntary emission reduction partnerships with industry. In 2002, the president adopted the goal of reducing the GHG intensity of the economy—defined as GHG emissions per unit of economic output—by 18 percent by 2012. In an April 2008 speech, the president adopted the goal of halting the increase in GHG emissions by 2025.

Mandatory control legislation was introduced in Congress at various times during the Bush Administration but did not progress until after the mid-term elections in 2006 when the Democrats took control of the House and Senate. America's Climate Security Act of 2007, sponsored by Senators Lieberman and Warner, which would have established a nationwide GHG cap-and-trade program covering most of the economy, was voted out of the Senate Committee on Environment and Public Works, becoming the first bill setting forth mandatory GHG controls to ever be reported from a congressional committee. See S. Rep. 110-337 (110th Cong., 2d Sess.). The bill was debated on the floor of the Senate in June 2008 but failed to survive a cloture vote. See 154 Cong. Rec. S5334 (daily ed. Jun. 6, 2008).

The eight-year period of the Bush Administration, however, did not lack for activity on climate change regulation. With regulatory advocates intensely frustrated at the lack of a national control program, efforts were directed at

achieving controls through other approaches, accounting for the multifaceted regulatory framework in place today.

Clean Air Act Regulation

Background

A nearly decade-long debate about whether the existing Clean Air Act (“CAA”) could be used as a vehicle for mandating GHG controls was resolved in favor of such regulation in the April 2007 decision of the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The debate began during the Clinton Administration when then EPA Administrator Carol M. Browner testified at a congressional hearing that the EPA had authority to adopt GHG regulations under the CAA if it so chose, and did not need new legislative authority. See Departments of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act 1999, Hearings before a Subcommittee of the House Committee on Appropriations, 105th Cong., 2d Sess. (1998) at 199-200. Her testimony was followed by an April 10, 1998 memorandum to her by EPA General Counsel Jonathan Z. Cannon confirming EPA legal authority in this regard. See Memorandum of Jonathan Z. Cannon, General Counsel, to Carol M. Browner, Administrator, Apr. 10, 1998, *available at* www.virginialawreview.org/inbrief/2007/05/21/cannon-memorandum.pdf

Although the Browner EPA did not initiate regulatory proceedings, a group of environmental interest groups filed a petition with EPA demanding that EPA utilize the authority EPA said it had, and proceed with rulemaking proceedings to adopt GHG regulations. See Petition of the International Center for Technology Assessment, *et al.* (October 20, 1999) *available at* <http://icta.org/doc/ghgpet2.pdf>. The relief requested in the petition was limited to motor vehicle emission controls, but it was widely understood that if EPA regulated motor vehicle GHG emissions, it would likely also adopt regulations for other GHG-emitting sources. The petition was filed under section 202(a) of the CAA, 42 U.S.C. § 7521(a), which provides that if the EPA Administrator finds that emissions of an “air pollutant” from new motor vehicles or new motor vehicle engines “in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,” the Administrator shall adopt emission

standards to limit such emissions. As EPA has noted, other sections of the CAA authorize or mandate regulation of other mobile and stationary sources to the extent EPA makes a similar finding—a so-called “Endangerment Finding”—that such sources emit an “air pollutant” that endangers public health or welfare. *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. at 44,418. Thus, if EPA were to make a finding under section 202(a) that motor vehicle GHG emissions endanger public health or welfare and on that basis issue regulations, it would be hard-pressed not to make a similar Endangerment Findings and regulate GHG emissions from other sources under other CAA programs.

The petition sat dormant through the beginning of the Bush Administration. When the original petitioners and other parties eventually filed judicial proceedings to compel EPA action on the petition, *Massachusetts et al v. Horinko*, No. 03-CV-984 (D. Conn., filed Jun. 4, 2003), EPA responded by denying the petition. See *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922 (Sept. 8, 2003). Stating that it had changed its view on this point, EPA found that it did not have legal authority to regulate GHGs under the CAA on the ground that GHGs were not “air pollutants” within the meaning of the CAA. EPA also stated that, even if it had such authority, it would decline to regulate on the ground that global warming science was too uncertain to justify regulations and because the CAA represented a poor vehicle as a matter of policy for trying to control GHG emissions.

The Bush Administration decision was appealed to the United States Court of Appeals for the D.C. Circuit by a coalition of environmental interest groups, states, and local governments in the case of *Massachusetts v. EPA*. A large number of industry groups, conservative interest groups, and other states intervened to oppose the appeal. The D.C. Circuit, with each of the three panelists expressing different views, refused to overturn EPA’s denial of the rulemaking petition. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005). The Supreme Court, however, accepted certiorari of the case and, in a 5-4 decision, reversed the D.C. Circuit decision. *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Court ruled that GHGs meet the CAA definition of “air pollutant” and that, therefore, EPA has authority to regulate GHGs from new motor vehicles and new motor vehicle engines under section 202(a) if the agency makes the predicate finding that GHG emissions from

such sources endanger public health or welfare. The Court, however, did not order EPA to make the Endangerment Finding and regulate. Instead, the Court gave EPA three choices on remand: (1) make an endangerment finding and regulate; (2) make a finding of non-endangerment and do not regulate; or (3) rule that the agency cannot make either an endangerment or non-endangerment finding at this time because of a reason based in the CAA, such as uncertain climate change science, and defer a regulatory determination.

The ANPR

Following the Supreme Court's decision, it appeared that the Bush Administration EPA would adopt regulations under the CAA controlling motor vehicle GHG emissions. The Bush Administration saw the CAA as providing authority the administration needed for attaining the president's "20 in 10" goal, announced in the 2007 State of the Union, of reducing gasoline usage by 20 percent in ten years.

The administration changed its intention in this regard, however, when Congress in December 2007 adopted the Energy Independence and Security Act ("EISA"), Pub. L. No. 110-140, which mandated increased corporate average fuel economy ("CAFE") standards and increased use of renewable automotive fuels such as ethanol. Stating that EISA now provided the framework for attaining the president's "20 in 10" goal, the administration decided to address possible GHG regulation under the CAA by issuing an Advance Notice of Proposed Rulemaking ("ANPR") seeking comment on a wide variety of issues engendered by potential GHG regulation under the CAA. See *Regulating Greenhouse Gas Emissions under the Clean Air Act, Advance Notice of Proposed Rulemaking*, 73 Fed. Reg. 44,354 (Jul. 30, 2008) (hereinafter "ANPR"). The ANPR responded not just to the remand in *Massachusetts* and the need to assess potential regulation of motor vehicle GHG emissions under section 202(a), but also to a number of other petitions that had been filed with the agency seeking regulation of GHG emissions from a variety of stationary and mobile sources, including electric generating stations, other large industrial plants, airplanes, railroads, vessels, and mobile engines. *Id.* at 44,399-40. The ANPR consisted of more than 550 pages of text and many thousands of pages of supporting technical

material, and examined numerous potential regulatory mechanisms to address GHGs under the CAA.

Published in the Federal Register in July 2008 with a 120-day comment period, the ANPR had the effect of deferring a decision on actual GHG regulation under the CAA in response to *Massachusetts v. EPA* until the next administration. Comments on the ANPR were filed by an extraordinarily large number of entities both opposing and supporting GHG regulation under the CAA. See www.regulations.gov, docket EPA–HQ–OAR–2008–0318.

No further action in direct response to the *Massachusetts* remand was taken before the Bush Administration left office. An action filed by Massachusetts and other parties in the D.C. Circuit on the one-year anniversary of the *Massachusetts* decision to compel a more substantive response to the Supreme Court decision failed. *Massachusetts v. EPA*, No. 03-1361 (D.C. Cir. Jun. 26, 2008).

GHG Control Options Considered in ANPR

Title II

Title II of the CAA contains authority for the EPA to regulate air pollutants from mobile sources. Since the petition that led to the *Massachusetts* case sought regulation of GHG emissions from new motor vehicles and new motor vehicle engines under section 202(a), the ANPR contained an extensive discussion of the costs and benefits of such regulations. As the ANPR noted, since no tailpipe devices exist to control motor vehicle GHG emissions, the principal way of reducing such emissions is by improving the fuel economy of the motor vehicle fleet. Although EISA set new fuel economy standards, the ANPR discussed the burdens and benefits of setting more aggressive standards.

Title II also contains authority to control GHG emissions from other types of mobile sources, assuming the EPA makes an Endangerment Finding as to GHG emissions from those sources. Section 213, 42 U.S.C. § 7547, provides broad authority to regulate emissions from non-road vehicles and a large and diverse variety of engines. Those mobile sources include vessels,

locomotives, construction equipment, farm tractors, forklifts, harbor crafts, and even lawn and garden equipment. If EPA makes an Endangerment Finding with respect to emissions from non-road vehicles and engines (except locomotives), then the Agency may promulgate standards that it deems appropriate, including technology-forcing standards after consideration of relevant statutory factors. CAA § 213(a)(4), 42 U.S.C. § 7547(a)(4). Conversely, Section 213 does not require an Endangerment Finding before EPA may regulate locomotive emissions. EPA may adopt standards for new locomotives and new locomotive engines that achieve “the greatest degree of emission reduction achievable through the application of technology..., giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology.” CAA § 213(a)(5), 42 U.S.C. § 7547 (a)(5).

Section 231 of the Act, 42 U.S.C. § 7571, authorizes EPA to establish emission standards for any class of aircraft engines. As is the case for motor vehicles under section 202(a), if EPA makes an Endangerment Finding with respect to emissions of any pollutant from any class or classes of aircraft engines, then EPA must regulate those aircraft emissions.

Title I

Title I of the CAA provides for regulation of stationary sources under a number of CAA programs.

1) Sections 107-110 - National Ambient Air Quality Standards

Sections 107-110 of the Act, 42 U.S.C. §§ 7407-10, establish the National Ambient Air Quality Standards (“NAAQS”) regulatory program, often referred to as the cornerstone of the CAA. Under this program, EPA establishes air quality standards for air pollutants, termed “criteria pollutants,” that are emitted by numerous and diverse stationary and mobile sources. These standards are set based on the maximum concentration of such pollutants in the ambient air that is consistent with the public health and welfare without consideration given to the cost of compliance. Once EPA has established a NAAQS, states must designate areas of the state where air quality is equal to or better than the NAAQS (attainment areas) or

where air quality is poorer than the NAAQS (nonattainment areas). States are also required to develop state implementation plans (“SIPs”) containing various emission control measures in order to bring nonattainment areas into attainment and to maintain the NAAQS in attainment areas.

As was recognized in the ANPR, establishment of a NAAQS for GHGs would raise a host of unprecedented and difficult issues. Because GHGs circulate in the global atmosphere, states are incapable of adopting SIPs that will affect the ambient concentrations of GHGs within their borders. Yet the statutory NAAQS program sanctions states for their failure to maintain or attain the NAAQS. Moreover, because global atmospheric concentrations of GHGs are uniform, the entire U.S. will either be in attainment or nonattainment of a GHG NAAQS depending on the level at which the NAAQS is set. Either way, sources will be subject to significant development constraints under a NAAQS program, and if the NAAQS is set at a level that results in the entire country being nonattainment for the NAAQS, development throughout the country will be severely constrained. For instance, new and modified sources emitting just one hundred tons per year (tpy) or more of GHGs would be required to obtain pre-construction air quality permits requiring installation of stringent Lowest Achievable Emission Rate (“LAER”) technology to control GHG emissions. See CAA § 173(a)(2), 42 U.S.C. § 7503(a)(2). In addition, these sources would be required to obtain “offsets,” i.e., contemporaneous emission GHG reductions from existing sources that would offset the increased emissions from the new or modified source. See CAA § 173(a)(1)(A), 42 U.S.C. § 7503(a)(1)(A).

The ANPR and comments contained a great deal of discussion as to whether EPA would be required to establish a GHG NAAQS if it finds that GHGs endanger public health or welfare, and if so, whether there is flexibility in the NAAQS statutory requirements to limit or delay GHG NAAQS regulation. As of this writing, the new administrator has not taken an official position on the issue, but has signaled her view that EPA likely has flexibility to limit GHG regulation generally under the CAA.

2) Section 111 - New Source Performance Standards

If EPA proceeds with GHG regulation under the CAA, the most likely program under which GHG emissions from large stationary sources will

be regulated is the New Source Performance Standards (“NSPS”) program under section 111 of the Act, 42 U.S.C. § 7411. Section 111 authorizes EPA to establish NSPS for categories of new sources and to require that states adopt NSPS for categories of existing sources. Section 111 defines a “standard of performance” to mean “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” CAA § 111(a), 42 U.S.C. § 7411(a). Although NSPS is commonly referred to as “best demonstrated technology” or “BDT,” the D.C. Circuit has held that NSPS does not constitute “the maximum degree of pollution control technologically achievable.” *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981). According to the court, EPA is required to first identify emission levels that are “achievable” with “adequately demonstrated technology,” and then select that emission level which represents the best balance of economic, environmental, and energy considerations. *Id.* Moreover, for EPA to find an emission level to be “achievable,” the Agency “must (1) identify variable conditions that might contribute to the amount of expected emissions, and (2) establish that the test data relied on by the agency are representative of potential industry-wide performance, given the range of variables that affect the achievability of the standard.” *Id.* at 377.

One issue explored in the ANPR is the fact that, at the present time, there do not appear to be “add-on” or “end-of-pipe” control technologies for CO₂ or other GHGs capable of achieving the substantive emission reductions expected from GHG regulation. Until such GHG control technologies are “adequately demonstrated” so that their “achievable” levels of controlled emissions can be fully characterized, any NSPS regulation of GHGs may only be minimally effective, achieving modest reductions due to existing technologies that increase energy and operating efficiencies. On the other hand, the ANPR discussed the pace of technological development that may ultimately make NSPS standards more effective in achieving sizable GHG emission reductions.

3) Sections 165-169, 173 - Major New Source Review

The CAA requires “major” stationary sources of air pollutants to obtain pre-construction air quality permits. Sources located in NAAQS nonattainment areas must obtain a Nonattainment New Source Review (“NSR”) permit under sections 172(b)(6) and 173, 42 U.S.C. §§ 7502(b)(6) and 7503. Sources located in a NAAQS attainment area, or which are “major” sources of air pollutants that are regulated under the CAA but for which there is no NAAQS, must obtain a Prevention of Significant Deterioration (“PSD”) permit under sections 165-169 of the Act, 42 U.S.C. §§ 7475-7479.

A source is considered to be “major” for purposes of the Nonattainment NSR program if it has the potential to emit (“PTE”) at least one hundred tpy of a regulated air pollutant. A source is considered to be “major” for purposes of the PSD program if it has a PTE of (a) at least one hundred tons per year of a regulated air pollutant if the source is in one of twenty-eight source categories listed in section 169(1), 42 U.S.C. § 7479(1), or (b) at least 250 tons per year of a regulated air pollutant if it is not in one of those source categories. Both the Nonattainment NSR and PSD permit requirements apply to new sources with PTEs above the relevant thresholds and to “major modifications.” A “major modification” is an existing source that emits above the relevant threshold and undertakes a physical or operational change that results in a “significant” increase of the applicable pollutant.

Both Nonattainment NSR and PSD permits subject the permittee to various emission control requirements. As stated above, Nonattainment NSR permittees must undertake stringent LAER controls and obtain offsets. PSD permittees must install Best Available Technology (“BACT”) controls.

The PSD program is largely implemented through a state-administered permitting system. Seven states administer the program through “delegated” authority from EPA; they essentially act as EPA’s agent in administering EPA’s PSD permit requirements. The remaining forty-three states administer their own PSD programs for which EPA regulations prescribe the minimum CAA requirements. These states promulgate their own PSD regulations and submit them to EPA for approval in their SIPs.

In a few instances, such as a project being located in Indian country, EPA itself directly administers the PSD permit system.

In the past, the NSR Nonattainment and PSD permit programs applied only to a relatively small number of truly large industrial sources, because 100/250 tpy is a great deal of the traditional type of air pollution that these programs have historically regulated. If EPA were to regulate GHGs under the CAA, however, these permit programs could potentially apply to a considerably greater universe of sources. This is because a great many sources—including office buildings, hotels, residential buildings, educational buildings, malls, big box stores, large houses of worship, sports arenas, and many more—emit more than 100/250 tpy of CO₂ because their heating systems combust natural gas or oil as fuel. One study estimated that about 1.2 million sources actually emit 250 tpy of GHGs, the overwhelming majority of which have never been regulated under either the NSR Nonattainment or PSD permit program because they emit no or very small amounts of traditional pollution. See United States Chamber of Commerce, *A Regulatory Burden, The Compliance Dimension of Regulating CO₂ as a Pollutant* (2008) available at <http://www.uschamber.com/assets/env/regulatory-burden0809.pdf>.

The ANPR recognized that regulation of GHGs in response to *Massachusetts* would potentially trigger PSD regulation of a very large number of sources—both for new sources that emit GHGs above the statutory thresholds and existing sources that emit above the statutory threshold to the extent these existing sources undertake modifications that increase their GHG emissions. See *Regulating Greenhouse Gas Emission Under the Clean Air Act*, 73 Fed. Reg. at 44,499, 44,504 (Jul. 30 2008). As the ANPR stated, triggering PSD for a very large number of sources could create permit-overload at state and federal permitting agencies, effectively freezing the permit system. *Id.* at 44,507. The ANPR examined a number of legal theories under which the effect of the PSD program could be restricted to larger sources, and these theories were both supported and opposed in ANPR comments. *Id.* at 44,503-11. The prospect that any GHG regulation under the CAA could trigger regulation of a very large number of small sources is one of the most contentious issues in using the CAA as a vehicle to regulate GHGs.

Title V

Title V of the Act, CAA §§ 501-507, establishes a federal operating permit program. Title V does not establish new regulatory obligations for permittees; it simply consolidates into one permit all obligations to which a permittee is otherwise subject under the CAA. Title V applies to emissions of regulated air pollutants from “major” stationary sources. In general, for purposes of Title V, a source is “major” if it can emit at least one hundred tpy of a regulated pollutant. CAA § 501(2), 42 U.S.C. § 7661(2). Consequently, if CO₂ or other GHGs become regulated air pollutants under the Act, the scope of Title V applicability, like that of PSD, would be greatly expanded by the hundreds of thousands, if not millions, of buildings and related kinds of small facilities using natural gas or oil as a heating system fuel.

What's Next on the Massachusetts Remand?

With the advent of the Obama Administration, EPA is likely to move quickly on regulating GHGs under the CAA. Administrator Jackson has already signaled her intent to move forward on an Endangerment Finding. As of this writing, documents were recently leaked by EPA indicating that it intends to propose and seek comment on an Endangerment Finding under section 202(a) in April 2009. Apparently, EPA does not intend to propose actual motor vehicle or other regulations at that time and will take that step in the future. Regardless, it seems plain that the new EPA will eventually—probably in 2009—propose GHG controls on motor vehicles, electric generating stations and possibly other large stationary sources. Although the new Administrator has stated that EPA can limit CAA regulations to only the largest categories of GHG emissions, she faces difficult questions on whether EPA must issue GHG NAAQS or require Nonattainment NSR/PSD permits or Title V permits for relatively small stationary sources.

Other Avenues under the CAA to Control GHG Emissions

Although the remand of *Massachusetts* remains the central avenue in which GHG regulation under the CAA is being prosecuted, it is not the only avenue. GHG regulatory advocates are seeking to use the CAA to leverage GHG controls in two other ways: they are asking EPA to authorize

California and other states to adopt their own motor vehicle GHG regulations, and they are seeking to impose GHG emission controls on large stationary sources through the CAA pre-construction air permit program.

State GHG Motor Vehicle Regulation

Section 209(a) of the CAA preempts states from adopting more stringent motor vehicle emission standards than those promulgated by EPA, but Section 209(b) requires the administrator, after notice and opportunity for public hearing, to grant a waiver to California if the state determines that the state standards “will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.” See 42 U.S.C. § 7543(a) and (b). The administrator must grant a waiver unless she finds that (1) California’s determination regarding the protectiveness of its standards is arbitrary and capricious, (2) California does not need the state standards to meet “compelling and extraordinary conditions,” or (3) California’s standards and accompanying enforcement procedures are not consistent with section 202(a). See 42 U.S.C. § 7543(b)(A)-(C). If a waiver is granted, other states may adopt California’s standards. See 42 U.S.C. § 7507.

On December 21, 2005, the California Air Resources Board submitted a request that EPA grant a waiver for motor vehicle GHG regulations it adopted in September 2004. See www.regulations.gov, docket no. EPA-HQ-OAR-2006-0173. Thirteen other states representing about 40 percent of the U.S. population adopted the California requirements contingent on EPA granting the waiver. *Id.* EPA, however, denied the waiver request on March 6, 2008. See *California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 73 Fed. Reg. 12156 (Mar. 6, 2008).

Two types of litigation have resulted from the effort of California and other states to adopt their own state GHG emission control requirements. First, even before EPA denied the waiver, the motor vehicle industry brought federal lawsuits challenging the authority of states to adopt GHG motor vehicle requirements even if the waiver were granted. These lawsuits have not so far been successful at the District Court stage. *Green Mountain*

Chrysler-Plymouth-Dodge-Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007) (app. pending, No. 07-4342, 2d Cir); *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (app. pending, Nos. 08-17378, 08-17380, 9th Cir.); *Lincoln Dodge, Inc. v. Sullivan*, 588 F.Supp.2d 224 (D. R.I. 2008).

Second, California and its allies challenged EPA's denial of the waiver decision in court. After an abortive attempt to have the case heard in the United States Court of Appeals for the Ninth Circuit, *California et al v. EPA*, No. 08-70011 (9th Cir. July 25, 2008), the case was re-filed and is pending as of this date in the United States Court of Appeals for the D.C. Circuit. *California v. Environmental Protection Agency*, No. 08-1178 (D.C. Cir. filed Jan. 23 2009).

The D.C. Circuit lawsuit challenging EPA's waiver denial, however, may be cut short by action of the Obama Administration. One of the first actions the new president took was to issue a January 26, 2009 memorandum to incoming EPA Administrator Jackson asking her to reconsider denial of the waiver. See Memorandum for the Administrator of the Environmental Protection Agency, available at http://www.whitehouse.gov/the_press_office/Presidential_Memorandum_EPA_Waiver/. On February 6, 2009, the administrator announced that she would do so and asked for public comment within sixty days. See *California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption*, 74 Fed. Reg. 7040 (Feb. 12, 2009).

The California waiver issue puts the automobile industry in a difficult position, because it is now facing three sets of regulatory proceedings to determine requirements to limit motor vehicle GHG emissions: ongoing rulemakings to implement the CAFE and renewable fuel standards of EISA, which was just adopted at the end of 2007; proceedings to determine automotive GHG standards on remand of *Massachusetts*; and proceedings to reconsider denial of the California waiver. As of this writing, reports were circulating that the automobile manufacturers were in discussion with EPA and California about potentially establishing a uniform set of standards applicable nationwide. The fact that the automobile industry was severely affected by recession and that two of the major domestic manufacturers are receiving federal financial support will likely have a significant impact on this issue.

Preconstruction Air Quality Permits

Concerned at the number of new coal-fueled electric generating stations that have been proposed, environmental organizations have attempted to utilize the CAA PSD program to impose GHG limitations on these plants. Because these generating stations have the potential to emit traditional air pollutants in quantities exceeding the PSD permit program thresholds, they are required to obtain PSD pre-construction air quality permits. Under section 165(a)(4) of the CAA, those permits must contain Best Available Control Technology (“BACT”) emission limitations for each pollutant that is “subject to regulation” under the CAA. 42 U.S.C. § 7475(a)(4).

Environmental organizations have argued in these PSD permit proceedings that BACT emission limitations must be set for CO₂ on the theory that CO₂ is currently “subject to regulation” under the CAA, even though EPA has not at this point adopted regulations in response to *Massachusetts*. They have argued that electric utilities are required to monitor and report CO₂ emissions under section 821 of the 1990 Clean Air Act Amendments and that this monitoring and reporting requirement makes CO₂ “subject to regulation” under the Act. Those opposing this argument maintain that “subject to regulation” means subject to actual emission control requirements, not monitoring and reporting, and that, in any event, the Title IV monitoring provision is not a part of the CAA. More recently, environmental groups have argued that CO₂ is “subject to regulation” for the further reasons that EPA approved certain state implementation plans containing CO₂ control requirements and because New Source Performance Standards applicable to municipal solid waste facilities amount to CO₂ regulations.

Environmental interest groups have pressed their argument that PSD permits must contain BACT emission limits for CO₂ in every permit application proceeding for a new coal-fueled electric generating station. Their arguments have succeeded in creating delay in some instances, but their only success on the merits at the state level to date involved permitting for the proposed Longleaf facility in Georgia. The Georgia Environmental Protection Division (“GEPD”) issued the PSD permit without BACT requirements. See Georgia Department of Natural Resources, Environmental Protection Division, Air Protection Branch, Prevention of

Significant Air Quality Deterioration Review of the Longleaf Energy Associates, LLC Longleaf Energy Station, *Final Determination*, SIP Permit Application No. 15846 (May 2007) available at <http://www.georgiaair.org/airpermit/html/permits/psd/dockets/longleaf/epddocs.htm>. That decision was affirmed in an administrative appeal, see State of Georgia, Office of Administrative Hearings, *Final Decision*, Docket No. OSAH-BNR-AQ-07321-39-60 (Jan. 11, 2008), but was reversed by a Georgia Superior Court. The Superior Court ruled that CO₂ is “subject to regulation” under the CAA and that, therefore, the Georgia EPD should have considered requiring BACT emission limits. *Friends of the Chattahoochee, Inc. et al. v. Couch*, Docket No. 2008-CV-146398 (Sup’r Ct. Jun. 30, 2008). The case was appealed to the Georgia Court of Appeals and is pending as of this writing. *Couch v. Friends of the Chattahoochee, Inc. et al.*, Docket No. A09A0388 (Ga. App.).

At the federal level, the leading case involved the Bonanza Power Project proposed by Deseret Power Electric Cooperative over which EPA Region 8 had permitting jurisdiction because the project was located on Indian land. Region 8 issued the permit without CO₂ emission limitations. On appeal, the EPA Environmental Appeals Board reversed and remanded the permit on the CO₂ issue, but it did not rule that CO₂ is “subject to regulation” and, therefore, that BACT emission limits must be imposed. Instead, the Board stated that the phrase “subject to regulation” is ambiguous and that EPA has discretion to decide that the section 821 monitoring and reporting obligation either is or is not the type of regulation contemplated by that phrase. The Board rejected Region 8’s argument that EPA had a longstanding interpretation of the phrase “subject to regulation” that compelled it to rule that monitoring and reporting did not constitute regulation for PSD purposes, and it remanded the case to the Region for further consideration of what type of regulation is encompassed by the phrase “subject to regulation.” See U.S. Environmental Protection Agency, Environmental Appeals Board, *Order Denying Review in Part and Remanding in Part*, Deseret Electric Power Cooperative, PSD Appeal No. 07-03 (Nov. 13, 2008). See also *In re Northern Michigan University Ripley Heating Plant*, PSD Appeal No. 08-02 (Feb. 18, 2009) (EAB remands permit that did not include CO₂ BACT emissions limits for further consideration in light of *Deseret* decision).

The effect of the EAB's *Deseret* decision was to leave open the question of whether CO₂ BACT limitations should be included in PSD permits. In the waning days of the Bush Administration, the EPA Administrator attempted to resolve that question by issuing a memorandum providing guidance to the EPA Regional Administrators on his "definitive interpretation" of the phrase "subject to regulation." See Memorandum of Stephen A. Johnson to Regional Administrators, *EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program* (Dec. 18, 2008), published at 70 Fed. Reg. 80,300 (Dec. 31, 2008). The memorandum stated that EPA had implemented the mandate to impose BACT controls on all pollutants that were "subject to regulation" by adopting 40 C.F.R. § 52.21(b)(50)(vi), which required BACT controls for all "regulated NSR pollutants." The memorandum stated that EPA did not interpret the phrases "regulated NSR pollutants" and "subject to regulation" as applying to monitoring and reporting requirements, and stated that these provisions apply only to regulations imposing actual control requirements. Therefore, according to the memorandum, until and unless EPA adopts CO₂ controls in response to *Massachusetts* or otherwise, EPA does not believe that CO₂ BACT requirements should be applied to PSD permit decisions.

The memorandum, however, specifically stated that it applied only to federal PSD permit decisions and permit decisions by the seven states exercising "delegated" PSD authority. The "non-delegated" states, therefore, remain free to supply their own interpretations of the phrase "subject to regulation."

One immediate effect of the December 31, 2008 Johnson Memorandum occurred in another proceeding involving a federally issued PSD permit. See *Desert Rock Energy Company, LLC*, PSD Appeal No. 08-03, 08-04, 08-05 & 08-06. In the *Desert Rock* case, EPA Region 9 had issued a PSD permit for a coal-fueled electric generating facility without imposing CO₂ BACT emissions limitations. The case was appealed to the EAB on various grounds, but Region 9 asked the EAB to sever the CO₂ BACT issue from the case in order to allow Region 9 to consider the effect of the EAB's *Deseret* decision. The Board granted the request. On January 14, 2009, Region 9 decided again not to impose CO₂ BACT requirements, this time citing the rationale set forth in the administrator's December 18, 2008

memorandum. See EPA Region 9, *Addendum to Statement of Basis for the Desert Rock Energy Facility PSD Permit*, NSR-4-1-3 and AZP 04-01 available at www.epa.gov/region09/air/permit/desert-rock/desertRockSBaddendum.pdf. As of this writing, the EAB has not decided when it will hear the CO₂ issue in the *Desert Rock* case.

Another case involving the administrator's December 18, 2008 memorandum involved the Nevada Department of Environmental Protection Division of Air Pollution Control ("NDEP"). In a document dated February 2009, the NDEP issued a Determination of Greenhouse Gas Regulation Pursuant to the Clean Air Act on which it sought public comment. The document recited that NDEP had processed three PSD permits for coal-fueled electric generating stations and in each instance had ruled that CO₂ BACT controls are not required. The document stated that NDEP continues to advance the rationales for not requiring CO₂ BACT as set forth in those permitting decisions and, as additional rationale, NDEP adopted the analysis set forth in the administrator's December 18, 2008 memorandum. See News Release, Nevada Division of Environmental Protection, available at http://ndep.nv.gov/pio/file/02-11-09-white_pine_energyc02.pdf. See also *Determination of Greenhouse Gas Regulation Pursuant to the Clean Air Act* (Feb. 2009), published at 70 Fed. Reg. 80,300 (Dec. 31, 2008).

Meanwhile, environmental organizations brought a lawsuit challenging the administrator's December 18, 2008 memorandum and additionally filed a petition with the administrator asking for reconsideration of the document. See United States Environmental Protection Agency, In the Matter of: EPA Final Action Published at 73 Fed. Reg. 80,300 (Dec. 31, 2008), entitled "Clean Air Act Prevention of Significant Deterioration (PSD) Construction Permit Program; Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program," *Petition for Reconsideration* (Jan. 6, 2009).

On February 17, 2009, new Administrator Jackson granted the petition for reconsideration and stated that she would shortly issue a Notice of Proposed Rulemaking on issues raised in the memorandum and in the EAB *Deseret* decision. The administrator, however, did not grant the request that the memorandum be stayed, although she noted that the memorandum

does not bind state PSD permitting authorities and that “other PSD permitting authorities should not assume that the Memorandum is the final word on the appropriate interpretation of Clean Air Act requirements.” See Letter from Lisa Jackson, Administrator, Environmental Protection Agency, to David Bookbinder, Chief Climate Counsel, Sierra Club (Feb. 17, 2009).

Although the issue of whether CO₂ is currently “subject to regulation” under the CAA has been litigated in the context of large coal-fired electric generating stations, the issue has implications far beyond those types of sources. If, as environmental groups contend, CO₂ is currently regulated under the CAA even in advance of the adoption of control regulations on remand of *Massachusetts*, then PSD and NSR requirements may currently be applicable to any stationary source that emits above the 100/250 tpy threshold discussed above—and that could sweep into the PSD program a very large number of relatively small GHG-emitting sources.

Mandatory GHG Reporting

With the FY2008 Consolidated Appropriations Act, Congress directed EPA to use its existing authority under the Clean Air Act to develop a rule to require mandatory reporting of GHG emissions above appropriate thresholds in all sectors of the economy. Congress defined GHGs to include CO₂, methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). The objective of the rule is to collect comprehensive and accurate data relevant to future climate policy decisions.

The new reporting rule must address emissions resulting from upstream production and downstream sources, to the extent deemed appropriate by EPA. Examples of “upstream production” include fossil fuel and chemical producers. Types of “downstream sources” include fossil fuel-fired power plants and a variety of large industrial facilities.

EPA issued a Notice of Proposed Rulemaking for this matter on March 10, 2009. The rule applies to a wide range of facilities with direct emissions equivalent to 25,000 metric tons of CO₂-equivalent emissions per year or more. According to EPA, the rule would cover roughly 13,000 facilities that

account for 85 to 90 percent of U.S. emissions. The first annual reports would be submitted to EPA in 2011 for the 2010 calendar year, although vehicle and engine makers would begin reporting with model year 2011. EPA stated that the rule would allow the collection of information to guide future efforts to control GHG emissions.

National Environmental Policy Act/Endangered Species Act

NEPA

The National Environmental Policy Act, or “NEPA,” is a procedural statute designed to ensure that federal agencies gather information on and consider the environmental impacts of actions they authorize, fund, assist, or carry out. NEPA requires that all federal agencies prepare an environmental impact statement (“EIS”) for “major federal actions significantly affecting the quality of the human environment.” See 42 U.S.C. § 4332(C). If it is uncertain whether a given action rises to this level, the agency prepares an environmental assessment (“EA”), which can lead to a finding of no significant impact (“FONSI”) or to an EIS. See 40 C.F.R. §§ 1501.4(e), 1502.9(a). Except in the procedural sense, NEPA is not action-forcing. It does not require an agency to take a particular path with regard to a project; rather, it forces the agency to *consider* reasonably foreseeable environmental consequences of its actions, as well as more environmentally beneficial alternatives to its actions, including no action (i.e., no project authorization or permit). Agencies must consider direct, indirect, and cumulative effects of major federal actions.

NEPA applies not just to projects directly undertaken by the federal government but also to projects undertaken by private actors where the project is federally funded, authorized, licensed, or permitted. Where private interests are involved, the project proponents frequently fund preparation of the EA or EIS documents for the agency. Because of its strict procedural requirements, NEPA has been an effective tool for project opponents seeking to delay or stop a given project.

In October 1997, the Counsel on Environmental Quality (“CEQ”) (which oversees NEPA implementation and promulgates NEPA regulations) circulated draft guidelines on how to address climate change in NEPA

reviews. See Draft Memorandum, Kathleen A. McGinty, Chairman Counsel of Environmental Quality, *Guidance Regarding Consideration of Global Climatic Change in Environmental Documents Prepared Pursuant to the National Environmental Policy Act* (Oct. 8, 1997), available at <http://www.mms.gov/eppd/compliance/reports/ceqmemo.pdf>. The guidelines found that the “vast majority of scientific evidence” indicates climate change is a reasonably foreseeable impact of greenhouse gas emissions. Accordingly, impacts on climate change should be considered for projects that may impact sources or sinks of GHGs. While never finalized, the guidance is influential, and courts have been willing to require as much or more consideration of climate change in NEPA reviews. Additionally, in February 2008, a coalition of environmental groups petitioned CEQ to amend its NEPA regulations to include language on the inclusion of climate change effects analysis in agency environmental compliance documents and to issue a Guidance Memorandum on climate change analysis. See International Center for Technology Assessment, *et al.*, *Petition Requesting that the Council on Environmental Quality Amend Its Regulations to Clarify that Climate Change Analyses Be Included in Environmental Review Documents* (Feb. 28, 2008).

Increasingly, projects are being challenged to the extent the environmental analysis did not adequately consider project impacts of GHG emissions. Courts have been clear that the environmental analysis must include direct GHG emissions of the project itself as well as the indirect GHG emissions that the project enables. For instance, in *Border Power Plant Working Group v. Dept. of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003), environmental organizations successfully challenged approval of a transmission line because the Department of Energy failed to consider the GHG emissions from a Mexican gas-fired power plant to which the transmission line would connect.

Similarly, environmental plaintiffs successfully challenged an EIS prepared by the Surface Transportation Board (“STB”) for its approval of a rail project that would transport coal from coal mines to distant power plants. The court agreed with the plaintiffs that, among other things, NEPA required consideration of GHG emissions from the power plants. See *Mid States Coalition for Progress v. Surface Trans. Bd.*, 345 F.3d 520 (8th Cir. 2003); *Mayo Found. v. Surface Trans. Bd.*, 472 F. 3d. 545 (8th Cir. 2006). And in

February 2009, several environmental organizations and U.S. cities claimed victory following a settlement with the Overseas Private Investment Corporation and the Export-Import Bank of the United States in a case involving lending by these organizations to overseas energy projects that would produce GHGs. See Media Release, *Landmark Global Warming Lawsuit Settled*, Friends of the Earth (Feb. 17, 2009) at <http://www.foe.org/landmark-global-warming-lawsuit-settled>; *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007); *Friends of the Earth v. Watson*, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).

A number of other lawsuits, both under NEPA and state equivalent statutes, have been used to challenge projects based on their GHG emissions. See, e.g., *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508 (9th Cir. 2007) (“The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct”).

Endangered Species Act

The Endangered Species Act (“ESA”) has also been enlisted as a tool to constrain development projects that emit GHGs. Section 4 of the ESA establishes a process for the “listing” of threatened or endangered species. Section 7 obligates all federal agencies to consult with the Fish & Wildlife Service (“FWS”) or National Marine Fisheries Service (“NMFS”) to insure that federally funded, authorized, or implemented activities are not likely to jeopardize the continued existence or result in the destruction or adverse modification of habitat of listed species. Where the service finds jeopardy to a given species or habitat, it must propose reasonable and prudent alternatives to federal action, including no action, to ensure that the species or habitat are not jeopardized. Section 9 prohibits any person from “taking” a listed species, including harming a species through habitat loss leading to death or injury.

The recently listed polar bear is now at the forefront of the use of ESA to restrict GHG emissions. Under section 4 litigation pressure from environmental groups, Department of the Interior Secretary Dirk Kempthorne listed the polar bear as threatened. See *Determination of Threatened Status for the Polar Bear*, 73 Fed. Reg. 28,212 (May 15, 2008).

Although noting that the number of polar bears had increased in recent decades, Secretary Kempthorne cited the current and prospective loss of sea ice habitat as the reason for his conclusion that the survival of polar bears as a species was threatened.

In his May 14, 2008 remarks announcing the listing decision, Secretary Kempthorne also cautioned that the listing decision “should not open the door to use the ESA to regulate GHG emissions from automobiles, power plants, and other sources.” The Secretary’s concern was based on the fact that the listing could expose literally any federally funded or authorized project having direct or indirect GHG emissions to section 7 consultation requirements. Indeed, depending on where the line is drawn as to whether a particular project’s direct or indirect GHG emissions are considered to be a material contributor to climate change and loss of sea ice, the listing could prevent numerous projects anywhere in the United States from being built and result in the ESA becoming one of the primary drivers of U.S. energy and climate policy.

Cognizant of these concerns, Secretary Kempthorne took steps to attempt to limit the impact of the listing. First the Interior Department issued a rule stating that none of the Department’s rules regarding the “taking” of a threatened species would apply to (a) the “taking” of polar bears outside of Alaska where the taking was incidental to, but not the purpose of, an action that was otherwise lawful, except for any incidental taking caused by activities in areas subject to the jurisdiction or sovereign rights of the United States within the current range of the polar bear and (2) actions authorized or exempted under the Marine Mammals Protection Act, 16 U.S.C. § 1361 *et seq.*, or the Convention on International Trade in Endangered Species of Wild Fauna or Flora. See *Special Rule for the Polar Bear*, 73 Fed. Reg. 28,306 (May 15, 2008) (Interim final rule); *Special Rule for the Polar Bear*, 73 Fed. Reg. 76,249 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 17). Second the Interior Department and the Department of Commerce issued a joint rule providing that ESA consultation is not required “where the effects of the action are the result of global processes and cannot be reliably predicted or measured or would result in an insignificant impact to listed species or are such that the potential risk of harm to a species is remote.” See *Interagency Cooperation Under the Endangered*

Species Act, 73 Fed. Reg. 76,272 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 402).

The listing decision and these regulations generated numerous challenges from business groups, the State of Alaska, and environmental groups. These actions were consolidated for pre-trial purposes in *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, No. 1:08-mc-0764 (EGS) (D.D.C.). On March 3, 2009, President Obama issued a memorandum directing the Interior Department and Commerce Department to reconsider portions of their proposed joint rule. See President Barrack Obama, Memorandum for the Heads of Executive Departments and Agencies re The Endangered Species Act (Mar. 3, 2009) available at http://whitehouse.gov/the_press_office/Memorandum-for-the-heads-of-executive-departments-and-agencies-3-9-09/. As of this writing, efforts were also underway in Congress to reexamine these rules.

Securities Law

Another source of existing law that has been tapped in the effort to address GHG emissions is securities disclosure laws. Generally, securities law prohibits corporations from misleading the public by omitting material information in submitting reports required under the law and in their efforts to market their securities. See, e.g., Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (making it unlawful to “use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device”); Securities Act of 1934 § 17(a)(1), 15 U.S.C. § 77q(a)(1) (making it unlawful “to employ any device, scheme, or artifice to defraud” in connection with the sale of securities by means of communication in interstate commerce). The regulations that implement these laws require corporations to disclose any known trends or uncertainties that could have a favorable or unfavorable impact on the business.

Securities law and climate change have intersected recently as various individuals and organizations have begun to assert that publicly-traded corporations must report the potential impact that future GHG regulations may have on their business. The argument essentially suggests that corporations are misleading the public by failing to disclose detailed

information on GHG emissions and potential costs associated with curtailing those emissions. Specifically, in September 2007, a national network of investors, environmental organizations, and other public interest groups petitioned the Securities and Exchange Commission to require corporations to disclose: (1) physical risks associated with climate change that are material to the company's operations or financial condition, (2) financial risks and opportunities associated with present or probable greenhouse gas regulation, and (3) legal proceedings relating to climate change. The petition was supplemented in June 2008, and a new petition was filed by a similar coalition on September 9, 2008 with respect to the oil, gas, and coal industries. Congress has also begun to debate the possibility of specifically requiring corporations to disclose concerns associated with climate change.

Another notable application of securities laws to address climate change is the issuance of several subpoenas by Andrew Cuomo, the Attorney General for the State of New York, to five energy companies in the fall of 2007 asking for information related to climate change under the authority of New York's "Martin Act." The Martin Act is a New York state securities law that provides even broader authority than the federal laws to investigate and prosecute "fraudulent activities" related to the sale or exchange of securities. The two primary differences between the Martin Act and the federal securities laws is that the Martin Act does not require that a fraudulent practice be intentional and also allows the Attorney General to seek restitution of any financial benefit received by the offending company. Two of the subpoenaed companies entered into agreements with the New York Attorney General as to how they would address GHG disclosures.

Potential Federal Cap-and-Trade Legislation

With the election of President Obama, activity has accelerated on potential congressional adoption of a national GHG cap-and-trade program. The president has called for adoption of a bill this year, and has included auction revenue from such a program in the budget he proposed on February 26, 2009. Supporters of aggressive cap-and-trade legislation now lead the two key congressional committees that will consider cap-and-trade programs—Rep. Henry Waxman (D. Cal.), Chair of the House Committee on Energy

and Commerce, and Senator Barbara Boxer (D. Cal.), Chair of the Senate Committee on Environment and Public Works.

“Cap-and-trade” refers to a regulatory approach in which a hard cap on total emissions is established and then divided up into one-ton “allowances” to be bought and sold on an open market. Under a “cap-and-trade” program, emissions sources must possess one allowance for every ton of a pollutant they emit each year. The cap declines over time, requiring national emissions to decline accordingly. The model for a GHG cap-and-trade program is the cap-and-trade program used to control sulfur dioxide emissions from electric utility sources under Title IV of the Clean Air Act. A GHG cap-and-trade program, however, is likely to be considerably more complex and to apply to a great many additional sources. The European nations have employed a cap-and-trade program to meet their Kyoto Protocol emission reduction obligations with mixed results.

A number of key issues must be worked out in cap-and-trade legislation. The complexity and controversial nature of these issues is generally understood as a key reason why the Lieberman-Warner bill did not succeed in the 110th Congress. Some of the key issues include:

- The “targets and timetables” of the caps—that is, the overall stringency of the program. President Obama states that he supports stringent targets and timetables—a 14 percent reduction from 2005 levels by 2020 and an 83 percent reduction from 2005 levels by 2050.
- The segments of the economy that will be covered by the program. The Lieberman-Warner proposal applied to almost the entire economy; other proposals are restricted to just the electric utility sector.
- Whether allowances will be auctioned or allocated at no cost to sources, or some combination of the two. The president’s proposal would auction all of the allowances, and the auction revenues would become a very large source of revenue to the government. The Lieberman-Warner bill would have allocated most allowances at no cost in the early years of the program, and then phased out the allocations over time in favor of auctioning allowances. Environmental groups see no-cost allowances as windfall subsidies

to business; business groups see auctioning of allowances as imposing a significant energy tax on business that will be passed on to consumers.

- The extent to which offsets obtained from carbon sequestration or other carbon reduction activities may be substituted for allowances, and the extent to which those offsets can be obtained from international sources.
- Whether there will be a cap on allowance prices or some other way of controlling the cost of the program.
- If allowances are auctioned, the use to which the auction revenue will be placed.
- Whether and how the domestic program will be integrated into an international program. Emission reduction commitments under the Kyoto Protocol, which the United States did not ratify, end in 2012. Negotiations are underway on a post-Kyoto agreement that could include the United States.

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