

Publications

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Sustainability and Climate Change Client Alert

Existing Federal Climate Change Programs and Proposals

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Federal Greenhouse Gas (GHG) Reduction

President-elect Obama has enunciated a clear change in the United States' climate change policy. However, much preparatory work has already been initiated on developing a comprehensive federal climate change program. For example, although Congress has yet to enact a comprehensive climate change program, seven climate change bills are currently pending in the House and Senate and will serve as a starting point for crafting a bill that may pass as early as 2009. This *Update* summarizes some of the existing programs. Other Pepper *Updates* will describe the latest proposals.

Mandatory GHG Reporting Rule

Late last year, President Bush signed into law H.R. 2764, a budget package containing a mandatory GHG reporting provision, which directs the EPA administrator to publish a draft GHG reporting rule by September 2008 and a final rule by June 2009. The law does not specify the industries that must report or the frequency of reporting, leaving the EPA to decide the particulars. H.R. 2764 does not contain a preemption provision that would invalidate state reporting laws.

Voluntary Energy Intensity Goals

In response to the international demand that all nations take action to reduce GHG emissions, the U.S. set a nonbinding goal of reducing the GHG intensity of the U.S. economy (GHG emissions per unit of economic activity) by 18 percent. The goal's deadline is 2012. Using a mixture of regulatory mandates,¹ taxes and other incentives, consumer and education campaigns, and voluntary actions,² this goal would prevent the release of more than 1.83 gigatons³ of carbon dioxide equivalents (CO₂e) into the atmosphere.

For private entities, the primary incentive for joining these voluntary programs is to document GHG emissions and reductions for use in a future mandatory regulatory program. It also enables a company to implement a sustainable or "green" corporate policy.⁴ For example, the DuPont Chemical Company has already succeeded in reducing its GHG emissions to 72 percent below its 1990 levels, which saved the company about \$3 billion and increased business 30 percent. The U.S. is also providing international assistance and technology transfer, performing research, and offering education, training, and outreach.

2007 Energy Independence and Security Act

At the end of 2007, President Bush signed into law the Energy Independence and Security Act (H.R. 6), which begins to address some climate change and energy dependence issues. Some of the key features of the act include:

- an increase of the Corporate Average Fuel Economy, or CAFE, standards to 35 miles per gallon by 2020 – the first Congressional increase in 32 years
- granting authority to the National Highway Traffic Safety Administration to increase the fuel efficiency standards for 2021-2030 model year cars and light trucks
- a renewable fuel mandate that expands U.S.-grown biofuels such as ethanol to 36 billion gallons in 2022, versus current levels near 6.5 billion gallons, including near-term usage requirements of 9 billion gallons in 2008 and 15.2 billion gallons in 2011
- a cap on ethanol supply from corn at 15 billion gallons – the rest must come from non-food "cellulosic" sources such as switchgrass and wood chips
- banning companies from restricting the installation of ethanol pumps as part of service station franchise agreements.

The act also requires a 75 percent increase in the energy efficiency of buildings, homes, appliances and lighting, which includes phasing out most incandescent light bulbs by 2012-2014, and a 28 percent and 40 percent cut in water usage by dishwashers and clothes washers, respectively. The act also provides new incentives for developing energy from wind, solar, geothermal and other renewable sources and new research funding for carbon sequestration technologies.⁵

Green Policies for Federal Agencies

At least twelve federal agencies require new buildings constructed by their agencies or with funds from the federal government to meet specific "green" building requirements. The EPA and the Department of Energy (DOE) have long sponsored programs that encourage energy efficiency (the Energy Star program), development of technologies that produce less pollution (the Clean Energy program), green building construction, and other similar green programs. The following items focus on new green policies designed to reduce the GHG emissions of federal agencies.

The New Federal Green Buildings Initiative

In 2007, the DOE issued regulations requiring new federal buildings to achieve at least 30 percent greater energy efficiency compared to prevailing building codes.⁶ The standards apply to new federal commercial and multifamily buildings, new federal high-rise residential buildings, as well as new federal low-rise residential buildings, for construction that began after January 3, 2007. Estimates project that in the next 10 years, these regulations will save taxpayers \$776 million and more than 40 trillion British Thermal Units (BTUs) of energy, while reducing about two million metric tons of carbon dioxide.

Federal Green Purchasing and Acquisition Programs

After the DOE promulgated its "green federal buildings" rule, the Office of Federal Procurement Policy proposed new "green purchasing policies and affirmative procurement programs" for all government contracts and acquisitions.⁷ If finalized, the policy requires federal agencies to give preference to green products and services, including alternative fuels and alternative fuel vehicles; bio-based products; products designated by Energy Star and the Federal Energy Management Program; electronics registered on the Electronic Product Environmental Assessment Tool; low- or non-toxic chemicals or products; substances that do not deplete ozone; recycled content and/or remanufactured products; renewable energy; and water-efficient products.

The "green procurement plan" required under this policy includes:

- a preference for the acquisition of green products and services, and requirements that agency contractors and subcontractors to adopt this preference
- promotion of the acquisition of green products and services externally to source providers and other government agencies, including agencies at the state and local levels; and annual compliance monitoring, corrective action, and/or auditing of the agency green procurement plan.

Recently, one contractor lost its bid on a \$100 million federal building primarily because of the lack of evidence of its "green building" capabilities and attention to the green procurement requirements.

President-elect Obama has highlighted his intention to accelerate federal green purchasing and acquisition programs. The details of these programs have yet to be determined; thus, potentially affected contractors and materials suppliers may want to provide their input into the process of developing these details. In many respects, the guidance to federal agencies on energy efficiency and climate change requirements have established, in effect, voluntary green standards for the private sector.

Department of Defense Guidance on Assessing the Risk of Climate Change

Congress has directed the Department of Defense to provide guidance for military planners in their assessment of "the risks of projected climate change to current and future missions of the armed forces" and to update defense plans to incorporate climate mitigation strategies, capacity building, and relevant research and development.⁸

Massachusetts v. EPA

In 2007, the U.S. Supreme Court held in *Massachusetts v. EPA* that GHG emissions are "air pollutants" within the jurisdiction of the Clean Air Act, and that it was arbitrary and capricious for the EPA to refuse to decide whether

these emissions "endanger public health and welfare."⁹ After the decision, the EPA stated that it would issue proposed GHG regulations for motor vehicles by the end of 2007, and final regulations by the end of 2008. The EPA has not yet proposed GHG regulations, and controversy surrounds the decision-making process. Some believe these regulations will not move forward until the administration changes or Congress gives unequivocal statutory direction via a comprehensive climate change statute. In this federal vacuum, California has sought to obtain a waiver to allow it to issue its own climate change motor vehicle standards and fifteen states have either followed suit or announced their intention to do so.

The patchwork of state mandatory programs, an increase in *ad hoc* state actions, and the growing perception that voluntary federal programs are insufficient to mitigate climate change provides a strong incentive for federal legislation. The next Pepper *Energy Update* will discuss the pending federal bills, including the Lieberman-Warner Climate Security Act (S. 2191), which is the first GHG cap-and-trade bill to be voted out of a congressional subcommittee.

Endnotes

1 For example, the Corporate Average Fuel Economy Program (U.S. Fourth Climate Change Action Report at 44, available at <http://www.state.gov/documents/organization/89641.pdf> and National Highway Safety Administration CAFE web page, available at <http://www.nhtsa.dot.gov/portal/site/nhtsa/menuitem.d0b5a45b55bfbe582f57529cdba046a0/>), the renewable fuel standard (U.S. Fourth Climate Change Action Report Chapter 4 at 45, available at <http://www.state.gov/documents/organization/89641.pdf>), and the EPA Significant New Alternatives Program (SNAP), which is phasing down the use of ozone-depleting substances (ODSs), such as CFCs and HCFCs (which also are greenhouse gases) (U.S. Fourth Climate Change Action Report Chapter 4 at 47, available at <http://www.state.gov/documents/organization/89641.pdf>).

Similarly, the tire pressure monitoring system rule results in \$120 to \$480 million in fuel savings and \$75-\$165 million in reduced tread wear (Executive summary of White House Climate Change Policy Book, available at <http://www.whitehouse.gov/news/releases/2002/02/climatechange.html>. NHTSA predicts that this rule will save between 0.31 to 1.27 million metric tons (0.00030 to 0.00127 Gt) of carbon equivalents per year.

2 Fourth Climate Change Action Report Chapter 4. For example, the U.S. has established a voluntary U.S. Global Greenhouse Gas Registry and Sequestration program, which: (1) allows companies to record publicly their progress in reducing emission of greenhouse gases (*i.e.*, to measure voluntary, self-imposed company-specific GHG reduction goals); (2) provides public recognition of such accomplishments; and (3) provides and protects transferable greenhouse gas emission credits. In 2004, total U.S. GHG emissions were 7,074.4 Tg CO₂e (7.04 Gt CO₂e). There are U.S. inventories that list the amount of TgCO₂e estimated to be emitted per industry (*see* EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 – 2001, Chapter 3 at 90, 91 (Draft, January 30, 2003), available at: [yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/LHOD5JHTZV/\\$File/2003-industrial_processes.pdf](http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/LHOD5JHTZV/$File/2003-industrial_processes.pdf). From its inception, this inventory had inaccuracies. Credibility, Transparency Called Important To Develop Successful Emissions Registries, Daily Environment. Reporter, No. 123, ISSN 1521-9402, BNA (June 26, 2003) at A-2.

One of the stated purposes of the Greenhouse Gas Registry and Sequestration Program is to protect transferable greenhouse gas emissions credits. EPA, U.S. Emission Inventory 2003, available at: <http://epa.gov/climatechange/emissions/downloads06/07CR.pdf>.

Such protection is necessary because international limits on the amount of greenhouse gas emissions may become mandatory pursuant to international law, even though the U.S. has withdrawn from the Global Warming Convention. U.S. policy must seek to preserve the use of greenhouse emissions credits in case such limits are imposed. These credits would mitigate the cost impact of such limits. For example, a U.S. company could receive enough greenhouse gas emission credits to continue to operate without enormously expensive controls if they installed pollution controls on plants outside of the U.S. that may have been allocated greenhouse gas emission credits.

3 A teragram also is equal to 1 million metric tons. 1 Gt equals 1 billion metric tons. Therefore, 1,833 Tg equals 1.83 Gt, and 1.83 billion metric tons equals 2.02 billion short tons.

4 EPA's efforts to encourage voluntary reductions have been called "regulation-by-information." This approach assumes that companies that sell products to consumers, or companies that sell to companies who market to consumers, will be pressured by their customers and/or consumers to purchase raw materials or component parts that are less polluting. The theory is that consumers are willing to pay more for products that result in less relative

environmental impact on the environment. Examples of this type of approach are the Energy Star program (which rates the relative energy efficiency of companies within the same industry), the EPA toxic release inventory (which lists the total amount of toxic pollutants released each year by companies on a plant-by-plant basis), and the Securities Exchange Commission (SEC) environmental liability disclosure rules (that requires the reporting of environmental liabilities that could affect an investor's decision on what stock to purchase).

5 The full text of H.R. 6 is available at <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.6>.

6 Office of Energy Efficiency and Renewable Energy, Energy Conservation Standards for New Federal Commercial and Multi-Family High-Rise Residential Buildings and New Federal Low-Rise Residential Buildings, 72 Fed. Reg. 72,565 (December 21, 2007) (final rule), available at <http://edocket.access.gpo.gov/2007/pdf/e7-24615.pdf> (Final Energy Conservation Standards for New Federal Buildings); *see also* Daily Environment Reporter, No. 246, ISSN 1521-9402, (December 24, 2007) at A-12.

7 72 Fed. Reg. 73,904. This policy implements Executive Order 13,423 (January 26, 2007), which directs agencies to strengthen the management of environmental, transportation and energy-related activities, as well as various environmental and energy policy statutes.

8 H.R.1585, National Defense Authorization Act for Fiscal Year 2008, §951.

9 *Massachusetts v. EPA*, 127 S. Ct. 1438, 63 ERC 2057 (2007). The court concluded that EPA's primary rationale for refusing to issue regulations (foreign policy concerns) was not a permissible basis pursuant to the Clean Air Act. From a historic perspective, *Massachusetts v. EPA* may be more significant for revealing the five-to-four divide within the court concerning what type of injury needs to be demonstrated to establish legal standing under Article III of the U.S. Constitution to challenge an environmental or safety regulation.

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