

## *Climate Change: What To Expect in 2007*

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During 2007, climate change issues will be at the forefront of the environmental, legal, economic and political news. This article identifies the climate change issues, events and trends to watch this year.

### **I. SETTING THE STAGE: 2006 CLIMATE CHANGE OVERVIEW**

To begin, a brief overview of 2006 climate change events provides background for what can be expected on the 2007 climate change agenda.

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### **A. Legal Developments**

In 2006, both litigation and regulatory developments occurred that will have ripple effects on American business for years to come. Much of the legal news focused on *Massachusetts v. EPA*, the case argued before the U.S. Supreme Court on November 29, 2006. In *Massachusetts*, several states and other groups petitioned EPA to regulate carbon dioxide ("CO<sub>2</sub>") emissions and other greenhouse gas ("GHG") from motor vehicles as a pollutant under the Clean Air Act. The Court is wrestling with several important issues, including:

(a) whether the parties have standing to raise climate change issues; (b) statutory interpretation under the Clean Air Act; and (c) federal agency discretion. The Court's decision, to be announced in 2007, will affect whether and how federal climate change policy can be addressed under current statutory constructs.

In addition to the *Massachusetts* case, in 2006, states took other legal initiatives to try to prompt change on climate change issues. In September 2006, California filed nuisance claims against the six

major car manufacturers. California also passed legislation requiring a statewide cap on GHG emissions, the first state ever to do so. In the Northeastern U.S., the Regional Greenhouse Gas Initiative ("RGGI"), a group of seven states, established a formal regional authority and created a model rule for implementing a CO<sub>2</sub> cap-and-trade program. Illinois announced it will join New Mexico to become the second state to join the Chicago Climate Exchange, a private organization whose members have a legally binding commitment to reduce GHG emissions and who can use a cap-and-trade system to help meet their reduction targets. In 2006, many states announced programs to reduce GHG emissions from state operations, invest in new technologies, and, in general, promote a wide range of new policy and program initiatives addressing climate change.

### **B. Business Developments**

Although the Bush administration resisted taking a regulatory approach to climate change, EPA has been working with industry on structured, voluntary efforts to

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reduce GHG emissions. The principal federal climate change initiative is Climate Leaders, an industry-government partnership created by EPA to develop long-term comprehensive climate change solutions. Climate Leaders was created in 2002, and in 2006 saw its membership grow to over 100 members. These Climate Leaders members account for nearly ten percent of the U.S. gross domestic product and also represent almost ten percent of total U.S. GHG emissions. Climate Leaders member companies include industry leaders such as GE, General Motors, U.S. Steel, and Johnson & Johnson. Industry's willingness to participate in GHG reduction programs portends further market-driven initiatives to address climate change in 2007.

### **C. International Developments**

On the international front, 2006 had several major events pushing the climate change agenda to the top of the news. In November 2006, Kenya hosted delegates for the United Nations Climate Change Conference. Parties to the United Nations Framework Convention on Climate Change and parties to the Kyoto Protocol participated in the conference. The parties debated, but did not make significant progress to

create any new international agreements on how to proceed beyond 2012, when current commitments under the Kyoto Protocol expire. Another significant issue discussed at the conference was the distribution of clean development mechanism ("CDM") projects. The Kyoto Protocol allows CDM projects in developing nations to create tradable emissions credits. This program is designed to financially aid developing nations while also promoting clean technologies. Most CDM projects take place in China, India, and Brazil, with only a few in African nations. UN Secretary-General Kofi Annan announced the formation of the "Nairobi Framework," a joint initiative of the UN Climate Secretariat, the United Nations Development Programme, the United Nations Environment Programme, the World Bank Group, and the African Development Bank aimed at creating more opportunities for CDM projects in African nations.

In 2006, industry also helped spur efforts to reduce GHG emissions on the international front. As announced in the October 2006 report, *State and Trends of the Carbon Market 2006*, sponsored by the World Bank and the International Emissions Trading Association, international trading of CO<sub>2</sub> emission credits nearly

doubled in value during the first nine months of 2006. The value of the carbon emissions market increased from \$11 billion in 2005 to \$21.5 billion by September 2006, with the European Union's Emissions Trading Scheme accounting for \$19 billion of the \$21.5 billion emissions market.

### **D. Political Developments**

Perhaps the most significant change to affect the climate change agenda in 2006 occurred in November, when the American public elected Democratic majorities in both the House of Representatives and the Senate. Although more than 100 bills addressing climate change had been introduced in the last Congress, no significant legislation had been enacted. House and Senate leaders for the new Congress announced that the future legislative agenda would have climate change as a top priority.

The national conversation on climate change also was influenced by the release in theatres nationwide of former Vice President Al Gore's movie, "An Inconvenient Truth." Regardless of one's views on the topic or the film, it made climate change a major media event and popularized some of the basic terminology and concerns by using powerful imagery.

In sum, 2006 was a year of change and fermentation for the climate change agenda on legal, economic, and domestic political fronts. With this background, 2007 portends to be a year during which fundamental legal and political issues affecting climate change policies will occur.

## II. CLIMATE CHANGE: TRENDS AND EVENTS TO WATCH

With events in 2006 having spurred new climate change initiatives and interest, the following events and trends should be tracked throughout 2007:

### A. Litigation Events

- The Supreme Court's Decision

In Spring 2007, the U.S. Supreme Court is expected to announce its opinion in the controversial climate change case, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005). The principal issues on review to the Supreme Court are whether the states have standing to sue and whether the Clean Air Act gives EPA the authority and/or the discretion to regulate GHG emissions. Regardless of the Court's ruling, its impact on federal and state governments' approach to climate change will be significant. If the Court rules that the states do not have standing to

sue, it may be more difficult for future plaintiffs to establish standing in any form of litigation seeking to force the government or private parties to address GHG emissions. At the other end of the spectrum, even if the Court rules that the states have standing and the Clean Air Act not only allows but requires EPA to regulate GHG emissions, unless the Bush administration changes its policy, new regulations limiting GHG emissions are not likely to be promulgated any time soon, and certainly not during 2007.

- Public Nuisance Lawsuits

2007 will see developments in several lawsuits against various industries alleging damages caused by the effects of climate change. In the California lawsuit against six major automakers, which asserts that their vehicles created a public nuisance by emitting GHGs and contributing to global warming, the trial court will consider the automakers' pending motion to dismiss. California, with former governor Jerry Brown as the new Attorney General, may seek to negotiate with the auto industry regarding not only the pending lawsuit, but one filed by the automakers in December 2004. In the 2004 lawsuit, the car industry seeks to enjoin California's 2002 law requiring GHG tailpipe emission reductions.

Other pending litigation to be watched is the class action suit by Gulf Coast residents who sued several oil companies, utilities, and coal producers, claiming the companies' contribution to climate change warmed the water in the Gulf of Mexico, which caused Hurricane Katrina to be more severe, and therefore injured them.

As discussed above, the fate of these lawsuits likely will be affected by the Supreme Court's decision in *Massachusetts v. EPA*. The Supreme Court's ruling regarding standing could affect both federal and state nuisance claims. On the other hand, if the Supreme Court rules that EPA must regulate GHG emissions, courts could decide that EPA regulations will preempt any other court action in the area of GHG emissions and may stay any court-ordered remedy. Concerns that corporate America may be the subject of future lawsuits in this area will increase industry's call for a regulatory or legislative approach shielding them from future litigation risk.

- NEPA Lawsuits

Environmental groups should be expected to continue to use litigation under the National Environmental Policy Act to force federal agencies to consider climate change impacts. Two such cases currently pending demand

that federal agencies consider climate change impacts as part of the Environmental Impact Statement for a federal project. In *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, the U.S. Court of Appeals for the Ninth Circuit is considering a challenge to the agency's fuel economy standards for light trucks because it failed to evaluate the effect of CO<sub>2</sub> emissions. In *Friends of the Earth, et al. v. Watson*, a federal trial court in California has been asked to rule on environmentalists' demand that the Export-Import Bank consider climate change impacts before conducting its oversight and funding activities. Given the Bush administration's past position, environmental groups hope to use these lawsuits to change federal policy by requiring climate change impacts to be considered before undertaking federal projects. Even if won, however, NEPA lawsuits cannot require federal agencies to do anything more than evaluate climate change impacts. More such lawsuits should be expected to be filed in 2007.

## **B. Legislative and Political Trends**

Both The 110th Congress and the President have made climate change policy a top priority for 2007. Lawmakers will be considering various proposals

addressing climate change including: reducing carbon dioxide emissions; increasing fuel efficiency standards; and mandating or encouraging renewable and alternative fuel usage. House Speaker Pelosi has announced a new select Committee on Global Warming and Climate Change which, although it will not have legislative authority, will serve to focus attention on the issue. Speaker Pelosi wants to move aggressively and to have an energy independence legislative package ready by July 4th.

Primary jurisdiction in the House for climate change issues lies with the Energy and Commerce Committee led by Chairman Dingell (D-MI). It is not clear whether Chairman Dingell will meet the timetable for legislation sought by the Speaker. Chairman Dingell is likely to take a more deliberate approach to drafting legislation and will seek consensus in his committee. The committee plans to hold at least nine hearings examining: (1) causes of climate change; (2) consequences of climate change; (3) state and local climate change initiatives; (4) federal climate change programs; (5) private sector climate change action; (6) technologies and techniques for reducing GHG emissions; (7) international climate change

policies; (8) regulating global change in the transportation sector; and (9) domestic policy options. The first of these hearings will be held in March when the Committee takes testimony from former Vice President, Al Gore.

The Senate began 2007 by introducing several bills addressing climate change. Many of those bills, introduced by leading Senators, require mandatory reductions on GHG emissions. Most of the proposals, in addition to setting reduction limits, propose a market-based trading mechanism – “cap-and-trade” – to allow companies who cannot meet reduction caps to purchase other companies' “excess” reductions. At least one proposal also establishes a “safety valve” price in an effort to lower the cost of reduction compliance. The Senate Energy and Natural Resources Committee has started the year by examining a draft proposal by its Chairman, Senator Bingaman (D-NM). In early February, the Senate Environment and Public Works Committee chaired by Senator Boxer (D-CA), held its first hearing on climate change legislation. The Committee heard from its fellow Senators, several of whom have introduced their own bills addressing GHG emissions. Her committee will hold at least two hearings in March, one with

California Governor Schwarzenegger as the chief witness and another hearing on March 21 with former Vice President Al Gore as a witness. Senator Boxer also has written to President Bush asking that he convene an international summit on global warming. Thus, 2007 will be an active legislative year on these issues.

In addition to considering legislative proposals, in 2007, Members of Congress will seek political advantage by focusing on climate change. Congress began the session by embarking on an oversight process of the government's response to climate change. Two committees held hearings accusing the Administration of suppressing scientific evidence that global warming is due to fossil fuel use. Hearing in this oversight capacity will continue throughout the session.

For its part, the Administration is announcing its own policy initiatives addressing climate change. In his State of the Union address, President Bush called for increasing fuel emission standards for cars and light trucks and to reduce gasoline consumption through the increased use of renewable and alternative fuels, such as ethanol to 35 billion gallons in ten years. The Administration thus far has

rejected mandatory reduction of GHG emissions as too costly and instead is focusing on voluntary measures to cut emissions.

Although it is too early to determine where the consensus will develop on legislation, it is clear that throughout 2007, Congress, the Administration, consumer groups, environmentalists and industry will be fully engaged. Despite all this activity in the beginning of the year, stumbling blocks remain to achieving legislation in the near term, including the significant cost associated in developing new emission reduction technologies. However, as more states move to consider legislation or regulation in this area, there is an air of inevitability that Congress will adopt some form of national legislation.

### C. Regulatory Trends

Even if federal legislation were to be enacted in 2007, the only regulatory changes likely to occur this year will be those on the state level.

- RGGI

As discussed above, the Regional Greenhouse Gas Initiative ("RGGI") is a cooperative effort by several Northeastern states to create a regional CO<sub>2</sub> cap-and-trade program designed to lower GHG emissions and reduce the

effects of climate change. By the end of 2006, the participating RGGI state were Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York and Vermont. Maryland will participate in RGGI by June 30, 2007, and the Governors of Massachusetts and Rhode Island announced early in 2007 that their states will join RGGI. The cap-and-trade program will not begin until 2009, but many of the participating states will be introducing state legislation to implement the model rule for the RGGI program. One important decision for the state legislators will be how to allocate initial CO<sub>2</sub> allowances to regulated industries. Industry prefers a system through which allowances are given to all regulated emitters based on current levels of emissions. New York recently stirred controversy by proposing legislation that would implement the RGGI model rule including plans to allocate 100% of allowances in a public auction. Throughout 2007, RGGI should be expected to wrestle with plans to implement its unique regional approach.

- California

California should be expected to continue to act as a leader among states attempting to regulate GHG emissions. California will be working with other Western states and RGGI to create a large-scale CO<sub>2</sub> cap-and-trade program.

Business throughout California will be engaged in the implementation and interpretation of California's new regulations for inventorying and reporting GHG emissions. Other states and industry will be watching closely to determine whether California can establish a workable regulatory approach for reducing emissions. Litigation over regulatory approaches may very well develop.

Governor Schwarzenegger also announced early in 2007 that he will issue an Executive Order establishing a low carbon fuel standard ("LCFS") for all transportation fuels sold in California. The governor's executive order will begin a complex regulatory process and may result in the new LCFS being implemented in 2008.

#### **D. Scientific Events**

Throughout the year, the Intergovernmental Panel on Climate Change ("IPCC"), operating under the United Nations, will be releasing sections of its report titled *Climate Change 2007*. The complete peer-reviewed scientific report will be issued in four phases over the year. The first installment, issued on February 2, 2007, reports that, to a 90% degree of certainty, global climate change is occurring as a result of human-caused activities. Specific remedies will

be addressed in later installments. The report is expected to include new data on observations of current global warming and will discuss how climate change is impacting health, species, engineering, and food production.

EPA will be establishing expert panels to review two separate EPA studies on the risks to the environment and to human health of climate change. EPA plans to publish its draft of these reports in 2007 and have them reviewed by the expert panels prior to final publication by the end of 2007 or early in 2008.

#### **E. Business Response**

Faced with the growing pressure of potential state and federal regulation of GHG emissions, industry interest in voluntary climate change programs will increase in the coming year. Programs like the Chicago Climate Exchange, EPA's Climate Leaders, and the California Climate Action Registry will likely grow in popularity as companies look for ways to prepare for governmental regulation. These programs will also become more attractive as the public becomes more concerned about climate change and industry seeks to derive market-based benefits from its voluntary efforts.

Contrary to many companies' public response in the past,

several powerful business leaders began the year by calling for national regulation addressing climate change issues. Specifically, immediately before the President's State of the Union address, the CEOs of ten of America's major corporations, including GE, DuPont, Caterpillar, and BP America called for federal climate change legislation. The CEOs suggested establishment of both mandatory reductions of GHG emissions and a cap-and-trade system. However, industry is not united on these issues, as the Chamber of Commerce and other groups oppose such suggestions. With investors placing increasing pressure on public companies to address climate change and other energy issues, 2007 will be a pivotal year for corporate response to climate change issues. •

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