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## *Climate Change and the Environment – Law Firms*

# Regulating Climate Change: A Summary Of Federal And State Action

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Climate change regulation is coming “whether you would risk it or not.”<sup>1</sup> What the International Policy Network called a “myth” in November 2004,<sup>2</sup> is now accepted fact in most corners of the scientific community and the world.<sup>3</sup> You might ask why we need climate change regulation in the United States. The short answer is because the United States has committed to play a role in the worldwide effort to reduce greenhouse gas emissions. This article is a brief primer on what regulation you can expect now and in the near future.

### **The International Landscape**

In December 2007, the Government of Indonesia hosted the United Nations Climate Change Conference which included participants from 180 countries. The conference culminated in the adoption of the Bali Roadmap, consisting of a number of forward-looking tracks to worldwide greenhouse gas emissions reduction. A major component of the Roadmap is the Bali Action Plan. The Plan authorized the creation of an Ad Hoc Working Group on Long-term Cooperative Action.

The Ad Hoc Working Group will hold quarterly meetings in 2008 to negotiate

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the terms of an agreement on climate change issues. The first meeting will be held from March 31 – April 4 in Bangkok, Thailand. The issues to be addressed include, among others, measurable, reportable and verifiable national commitments to quantified greenhouse gas emissions limitations and reduction objectives. The Ad Hoc Working Group will present its work product in 2009, when all countries will be expected to sign a binding agreement. Because the United States committed to the Bali Roadmap, there will be tremendous pressure on the United States to participate in whatever agreement the Working Group presents; participation will require implementing legislation if none exists beforehand.

### **The Domestic Landscape – State Action**

In the absence of federal legislation, states have moved to fill the vacuum of climate change regulation. State action has been of two types – state legislation and regional initiatives. A good example of state legislation is the New Jersey Global Warming Response Act.<sup>4</sup> Signed into law on July 6, 2007, the Act establishes greenhouse gas emission reduction requirements in New Jersey to 1990 levels by 2020 and by 80 percent of 2006 levels by 2050.

The Act requires the New Jersey Department of Environmental Protection (NJDEP) to develop a New Jersey greenhouse gas inventory and an emission monitoring and reporting program. A draft inventory was presented by the NJDEP in February 2008 for public comment.<sup>5</sup> Comments will be considered until March 20, 2008. The inventory must be finalized by June 30, 2008. The draft report also contains suggestions for potential reductions in emissions where the NJDEP anticipates reductions can be achieved with strategies consistent with New Jersey’s overall goal of reducing its energy use to 1990 levels by 2020 (about a 20 percent reduction from currently anticipated 2020 levels).

The Act regulates greenhouse gas emissions from numerous sources, including sources associated with fossil fuels used in New Jersey. These sources include entities who manufacture and distribute fossil fuels, generate electricity in the State or outside the State to be used inside the state, gas public utilities, and

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other significant sources of greenhouse gas emissions that the NJDEP identifies. By January 1, 2009, NJDEP must file the first of a series of biennial reports evaluating the status of the greenhouse gas emission monitoring and reporting program, the current level of greenhouse gas emissions in the State, and progress toward meeting the 2020 and 2050 emissions levels. By June 30, 2010, NJDEP must report on measures necessary to meet the 2050 emissions limit.<sup>6</sup> This report must include specific recommendations for statutory or regulatory measures that will be necessary to meet the 2050 limit.

The Regional Greenhouse Gas Initiative (RGGI) is a good example of a regional initiative.<sup>7</sup> RGGI is a cooperative effort by ten Northeast and Mid-Atlantic states to design and operate a regional cap-and-trade program covering carbon dioxide (CO<sub>2</sub>) emissions from power plants in the region. Participating states include Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. The Initiative has made substantial progress since New York Governor George Pataki sent letters, in 2003, to eleven governors from Maine to Maryland inviting participation to develop a regional cap-and-trade program. The initial auction of emissions credits is scheduled for 2009.

RGGI is designed to stabilize and then reduce CO<sub>2</sub> emissions. It is applicable to electric generating units with a rated capacity of 25 megawatts or greater. The Initiative establishes a CO<sub>2</sub> emission budget and allowance trading program, designed to reduce current emissions levels in each of the ten states by 10 percent in the year 2018. In addition to the purchase of emissions credits, regulated entities will be permitted to use emissions offsets like landfill gas capture and destruction. Regulated entities may also take advantage of early reduction credits for CO<sub>2</sub> emissions reduction projects undertaken after the December 20, 2005 and before January 1, 2009.

Finally, RGGI anticipates subsequent federal legislation and all ten states have agreed to transition into a future federal program if one is adopted that is "comparable" to RGGI.

### The Federal Government – Proposed Action

While there are several competing bills in Congress, the bill with the greatest traction is sponsored by Senators Joe Lieberman and John Warner (S.2191).<sup>8</sup> The Lieberman-Warner Climate Security Act of 2007, which reported out of the Senate Environment and Public Works Committee on December 5, 2007, applies to coal-burning power plants and industries, natural-gas processing plants and importers, petroleum- or coal-based fuel producers and importers, and facilities that produce or import (for sale) greenhouse gases such as sulfur hexafluoride or perfluorocarbons. The bill establishes an economy-wide cap covering over 87 percent of United States greenhouse gas emitters, with a goal of reducing greenhouse gas emissions "substantially enough between 2007 and 2050 to avert catastrophic impacts of global climate change."

The bill proposes to regulate emissions of CO<sub>2</sub>, methane, NO<sub>2</sub>, sulfur hexafluoride, perfluoro-carbons and hydro-fluorocarbons, and sets emission reduction objectives for greenhouse gas emissions in 2012 to 2005 levels (5.775 billion tons CO<sub>2</sub> equivalents<sup>9</sup>) and in 2050 to 1.732 billion tons CO<sub>2</sub> equivalents (a 70 percent reduction from 2005). To achieve these results, Lieberman-Warner establishes a national cap-and-trade system of emissions "allowances."

The newly created Climate Change Credit Corporation will create and conduct the allowance auction, selling all allowances by the end of 2011. To facilitate the reduction of greenhouse gas emissions, the Climate Change Credit Corporation will reduce the number of allowances that it sells at auction by 96 million tons of CO<sub>2</sub> equivalents each year. The funds raised by the auction will be used for technology development, worker training, low income assistance programs and United States and international adaptation programs.

Under Lieberman-Warner, the United States Environmental Protection Agency (EPA) must promulgate regulations to ensure accuracy, completeness, consistency and transparency of data on greenhouse gas emissions and fuel usage. The bill also requires emissions reporting by regulated entities, including continuous emissions monitoring where technologically feasible. The bill creates a Federal

Greenhouse Gas Registry to maintain information, verify and audit regulated entities' submissions, develop greenhouse gas emissions calculation methods and publish non-confidential information from regulated entities on the Internet.

### Summing Up

There are a variety of competing regulatory programs in effect and in design. The programs all have similar goals, but often use different methods for achieving them. Members of the regulated community are understandably confused about how, if at all, to react to these programs now.

While a comprehensive answer to that question is beyond the scope of this article, companies should be careful not to hide their individual or collective heads in the sand. The regulated community should pay careful attention to the laws on the books and in the legislative pipeline, stay involved in the regulatory process, and provide comments on proposed regulations when given the opportunity.

Above all, companies that are in the process of making changes now to reduce their greenhouse gas emissions, by changing to low-watt light bulbs, recycling, printing on double-sided paper, changing processes to reduce waste or energy use, and/or buying electricity from renewable sources like wind or hydroelectric, should consult all applicable laws to take advantage of early action credits that may be available.

Climate change regulation is coming – get ready and be prepared.

<sup>1</sup> *Aragorn speaking of "Open War" with King Théoden. Lord of the Rings: The Two Towers.*

<sup>2</sup> *The Impacts of Climate Change: An appraisal for the future (multiple authors November 9, 2004).*

<sup>3</sup> IPCC (Intergovernmental Panel on Climate Change) Fourth Assessment Report: Climate Change 2007 (February 2007).

<sup>4</sup> *Codified as N.J.S.A. 26:2C-37 et seq.*

<sup>5</sup> <http://www.nj.gov/globalwarming>.

<sup>6</sup> *Legislation signed into law by Governor Corzine on January 13, 2008 requires NJDEP to establish regulations to implement the sale, exchange, allocation or auction of State CO<sub>2</sub> allowances. P.L.2007, c.340.*

<sup>7</sup> *The other regional initiatives are the Western Regional Climate Action Initiative (WCI), including, Washington, Oregon, Arizona, New Mexico, California, Utah, and British Columbia, and the Midwestern Greenhouse Gas Reduction Accord (MGA), including Minnesota, Wisconsin, Illinois, Indiana, Iowa, Michigan, Kansas, Ohio, South Dakota, and Manitoba.*

<sup>8</sup> *Other bills include Lieberman-McCain (S.280), Bingaman-Specter (S.1766), Feinstein-Carper (S.317) and Olver-Gilchrest (H.R. 620).*

<sup>9</sup> *A CO<sub>2</sub> equivalent has the same global climate change impact as 1 metric ton of CO<sub>2</sub>.*