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Sustainable Development, Ecosystems and Climate Change Committee Newsletter

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MESSAGE FROM THE CHAIR

Ira Feldman

This installment of our Committee newsletter focuses on climate change and provides an overview of the latest developments in that arena. Once again, our editor, Amy Royden-Bloom, has done an outstanding job in pulling together a superior collection of articles. Given the quality of the contributions, this issue deserves wide distribution to your colleagues, clients and others looking for an in depth discussion of some of the most significant greenhouse gas-related topics.

In their piece, Jim Chen and Joanne Rotondi take a comprehensive look at the most significant U.S. litigation activities relating to climate change, including state litigation against power companies; state litigation against EPA regarding regulation of carbon dioxide from motor vehicles; and litigation relating to California's regulation of carbon dioxide from new vehicles. Also included is a discussion of the Inuit petition alleging human rights violations. In his article, Gordon Mathews addresses the importance of the World Bank's Prototype Carbon Fund and explains its link to existing Kyoto mechanisms such as Joint Implementation (JI) and Clean Development Mechanism (CDM). Gordon discusses the specifics of several CDM projects to support his perspective. Former Committee Chair Kyle Danish offers a cogent update on the EU's Emissions Trading Scheme (ETS), which took effect in early 2005. Another informative contribution to the climate change package is from Amy Royden-Bloom, who reviews activities underway at the state and local level to reduce greenhouse gas emissions.

With respect to our Ecosystems component, this issue also contains a brief introduction to the Millennium Ecosystem Assessment, which was released by the UN as we went to print with this issue. No doubt we will plan further Committee activities relating to the release of this long-awaited report. Meanwhile, we provide a summary and a link to the full text to facilitate your review.

In our Sustainable Development segment, I have provided a preview of the next phase of the Global Reporting Initiative (GRI) – its so-called "G3" initiative. I have also included a list of upcoming sustainability events: the Conference Board's annual "Business and Sustainability" conference (where we have arranged for the legal issues component to be covered by representatives of the Section's ongoing sustainable development initiative) and the ABA Standing Committee on Environmental Law (SCEL) meeting in Baltimore in June; the Section is a cosponsor of this one-day event looking at business drivers for the evolution of U.S. environmental laws and practice.

As our members know, this Committee's newsletter rotates its three focus topics. Our editor is already hard at work with our Ecosystems vice chairs and our Sustainable Development vice chairs in planning the next two newsletter issues for this ABA cycle. Please do not hesitate to contact me or Amy if you have an idea for an article or other contribution.

Sustainable Development, Ecosystems and Climate Change Committee Newsletter
Vol. 8, No. 2, April 2005
Amy Royden-Bloom, Editor

In this issue:

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.

RAISING THE HEAT: CLIMATE CHANGE LITIGATION IN THE UNITED STATES

James C. Chen
Joanne Rotondi

As the Kyoto Protocol enters into force without ratification by the United States, and the Congress and administration spar over whether to enact climate change legislation, the states are taking matters into their own hands with regard to climate change controls. Even though the United States' participation in international climate change reduction programs seems unlikely and federal limitations on climate change emissions promise to be slow in coming – despite recent activity in Congress – state, local and regional governing bodies, as well as non-governmental organizations, are mounting pressure on industry and the federal government by implementing their own emission regulations and/or initiating litigation to force climate change controls. These actions have lead to a flurry of climate change-related litigation in the United States in the past year. Following is a summary of significant climate change-related lawsuits or petitions currently pending in the United States: (1) the public nuisance suit by several states against the top five power producers in the U.S. seeking reductions in carbon dioxide (CO_2) emissions, (2) the lawsuit by various states and cities against the Environmental Protection Agency (EPA) to regulate CO_2 emissions under the Clean Air Act (CAA), (3) the legal challenges by automobile manufacturers to California's landmark regulation of greenhouse gas (GHG) emissions by motor vehicles and (4) the human rights petition by the Inuit against the United States as the largest contributor to global climate change. If the litigation or settlement of any of these cases requires industry to implement CO_2 reductions, then the federal government may have no choice but to address climate change emissions through regulation or legislation. Simply the pressure of these lawsuits could lead industry to lobby for such regulation to alleviate the burdens and risks associated with compliance with multi-state requirements. As a result, the existence and possible outcomes of any one of these cases could serve as a turning point for U.S. policy toward climate change emissions.

State Litigation Against Power Companies

In July 2004, eight states (California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin) plus New York City and three environmental organizations sued the nation's five largest power producers to try to force reductions in their CO_2 emissions. These power producers are American Electric Power, the Southern Company, the Tennessee Valley Authority, Xcel Energy, Inc. and Cinergy Corporation. Together, they own or operate 174 power plants in 20 states, emitting an estimated 650 million tons of CO_2 a year. These emissions amount to almost a quarter of the utility industry's annual CO_2 emissions and about 10 percent of the nation's total. The states claim that the power companies are the nation's largest "global warming polluters" in the United States. *See, e.g.*, New York State Press Release, *Eight States & NYC Sue Top Five U.S. Global Warming Polluters* (July 21, 2004); State of Connecticut Press Release, *Attorney General, Seven Other States, NYC Sue Top Global Warming Polluters to Force CO_2 Reductions* (July 21, 2004).

The states' and organizations' lawsuits were filed in the U.S. District Court for the Southern District of New York on July 21, 2004. *See State of Connecticut v. American Electric Power Co.*, No. 1:04-cv-05669 (S.D.N.Y., *filed* July 21, 2004) (consolidated with *Open Space Institute v. American Electric Power Co.*, No. 1:04-cv-05670 (S.D.N.Y., *filed* July 21, 2004)). The states seek equitable relief, rather than monetary damages, under a theory of public nuisance law. They allege that the defendant power companies are liable under the federal common law of public nuisance by "knowingly, intentionally or negligently creating, maintaining or contributing to a public nuisance – global warming – injurious to the plaintiffs and their citizens and residents." *State of Connecticut et al. Complaint* at 43. In an alternative theory, the states also allege that the power companies are liable under state public nuisance laws for each of the states where their fossil fuel-fired electric generating facilities are located. *See id*. at 45-47. In support of their allegations, the states cite the defendants' voluntary participation in climate change initiatives to show that the power companies can control CO_2 emissions and are aware that these emissions contribute to global warming. The states seek a court order requiring the five power companies to cut CO_2 emissions every year for at least 10 years by an amount that would be determined by the court – although some attorneys general have suggested that 3 percent annual reductions would be reasonable. *See id*. at 49.

By Sept. 30, 2004, each of the five power companies had filed motions to dismiss the plaintiffs' complaint with the court. The companies assert that the Southern District Court in New York does not have jurisdiction to enjoin them from conducting lawful activities outside of New York or to apply the law of jurisdictions outside of New York. The power companies also allege that the plaintiffs failed to state a claim and lack standing because they have raised only speculative claims about global warming and a remedy can only be fashioned by the federal government, which has declined to do so thus far. *Memorandum of Law in Support of Motions to Dismiss for Lack of Jurisdiction and Failure to State a Claim Upon Which Relief Can be Granted*, at 4-6 (Sept. 30, 2004). Plaintiffs filed oppositions to the motions to dismiss by mid-November and defendants' reply motions were filed by mid-December 2004. On Feb. 23, 2005 plaintiffs filed a surreply in opposition to the motions to dismiss and on March 4, 2005 defendants responded to the surreply. The court has not yet ruled on the motions to dismiss.

The states' lawsuit marks the first time state and local governments have sued private companies to require reductions in CO_2 emissions. The states' effort is reminiscent of the tobacco litigation in which 44 states sued tobacco companies to recover costs related to health care for diseases caused by smoking. Settlement of the state tobacco litigation in 1998 ultimately resulted in dramatic changes for the tobacco industry – most notably in the areas of advertising and marketing. If the states are successful in asserting a claim of global warming public nuisance against the five largest power companies in the United States, the case would immediately impact both state and federal efforts to reduce climate change emissions from all industry sectors and could likely lead to additional

cases as plaintiffs attorneys join the fray. A favorable settlement in the case also could lead to dramatic changes as companies will be forced to focus on CO_2 liability, even in the absence of a regulatory regime.

State Litigation Against EPA Regarding CO_2 from Motor Vehicles

In October 2003, 12 states, two territories, three cities and 11 environmental organizations initiated litigation in the U.S. Court of Appeals for the District of Columbia against EPA arguing that the agency is required to regulate CO_2 emissions under the CAA. Specifically, the petitioners, which include the states of California, Connecticut, Illinois, Massachusetts, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington plus the cities of Baltimore, the District of Columbia and New York, petitioned for review of EPA's denial of a 1999 petition for rulemaking to regulate CO_2 from motor vehicles. *See Commonwealth of Massachusetts v. EPA*, No. 03-1361 (and consolidated cases) (D.C. Cir., filed Oct. 23, 2003). The lawsuit also challenged an EPA memorandum that concluded that EPA does not have authority to regulate CO_2 under the CAA. S*ee* Memorandum from R.E. Fabricant, General Counsel, EPA to M. Horinko, Acting Administrator, EPA, *EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act* (Aug. 28, 2003).

In June 2004, the states, territories, cities and organizations filed a joint brief with the D.C. Circuit, which was supported by a July 2004 amicus brief filed by additional environmental organizations. The petitioners argued that EPA erred in its determination that the CAA did not allow for regulation of CO_2, as well as other GHGs. They specifically pointed to the express language of section 202(a)(1) authorizing EPA to regulate "any air pollutant" that may adversely affected "public health or welfare." Moreover, they noted that the definitions section of the act expressly provides that effects on "welfare" include effects on "weather" and "climate." In addition, the definition of "air pollutant" was sufficiently broad to encompass any agent, substance or matter "which is emitted into or otherwise enters ambient air." With respect to motor vehicles specifically, the petitioners note that there was no conflict between regulation of CO_2 and the Energy Policy and Conservation Act of 1975 (EPCA). By refusing to regulate GHGs from motor vehicles, petitioners asserted that EPA acted in an arbitrary and capricious manner and avoided the agency's non-discretionary obligation under the CAA to establish regulations regarding air pollutants – including GHGs.

In October 2004, EPA filed a response brief with the court. As a response to the petitioners' argument, EPA asserted that based on a "thoughtful and detailed analysis," the agency did not believe it erred in determining that the CAA did not infer authority to regulate GHGs. Citing to other provisions in the CAA that mention CO_2 or global warming, EPA noted that those provisions only provide for information development and non-regulatory strategies and clearly evidence Congress' intent not to require mandatory regulation of GHGs. Even assuming that EPA had the authority to regulate GHGs, the agency further asserted that a finding of "endangerment" was required prior to development of regulation. EPA has not made such a finding. Finally, EPA argued that CO_2 regulation and fuel economy are irrefutably intertwined. Congress spoke to the issue of CO_2 regulation for motor vehicles in the EPCA when it expressly reserved regulation of fuel economy to the Department of Transportation.

In addition to the parties above, a number of additional states and several industry groups filed as intervenors in support of EPA. These intervenors include the states of Alaska, Kansas, Idaho, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas and Utah, and industry organizations such as the Alliance of Automobile Manufacturers (a trade association representing BMW of North America, LLC, DaimlerChrysler Corporation, Ford Motor Company, General Motors Corporation, Mazda North America Operations, Mitsubishi Motor Sales of America, Inc., Porsche Cars of North America, Inc., Toyota Motor North America, Inc. and Volkswagen of America, Inc.), CO_2 Litigation Group, National Automobile Dealers Association, Engine Manufacturers Association, Truck Manufacturers Association and the Utility Air Regulatory Group. The intervenors focused on the lack of authority to regulate GHG emissions

under the CAA and criticized petitioners' reference to "isolated words" in the CAA to argue that GHG regulation was required.

Petitioners filed their reply brief in mid-December 2004. Oral argument occurred before the D.C. Circuit on April 8, 2005. If the petitioner states and organizations are successful, EPA will be forced to draft regulations that limit CO_2 emissions from new motor vehicles, a step that will most certainly impact industry and consumers and could prompt Congress to enact federal legislation addressing CO_2 emissions.

Litigation Against California Regulation of CO_2 from New Motor Vehicles

On July 22, 2002, then-Gov. Gray Davis of California signed into law California Assembly Bill 1493. This landmark state legislation established new requirements for the regulation of GHGs, including CO_2, from motor vehicles. Specifically, AB 1493 requires the California Air Resources Board (CARB) to develop and adopt by Jan. 1, 2005 regulations that achieve the maximum feasible reduction of GHGs emitted by passenger vehicles and light-duty trucks. The regulations must become effective for the 2009 model year. Following the mandate of AB 1493, CARB developed proposed regulations that would require vehicle manufacturers to reduce GHG emissions from their passenger vehicle fleets by two to five percent in 2009. Each year thereafter, manufacturers must continue to decrease GHG emissions from their fleet in increments that reach approximately 30 percent below projected 2009 levels by 2014. Although all GHGs are targeted, the largest component of the proposed regulations involves CO_2. CARB approved the proposed regulations at a public hearing on Sept. 23, 2004, but has yet to file a final version of the regulations with California's Office of Administrative Law.

In response to the proposed regulations, a series of three separate actions were taken by automobile manufacturers and various car dealers in the state of California. The first action, *Central Valley Chrysler–Jeep, Inc. et al v. Witherspoon ex rel. California Air Resources Board*, No. 043v 6663 (E.D. Cal. Dec. 7, 2004) was filed by the Alliance of Automobile Manufacturers (Alliance), along with several California car dealerships in the U.S. District Court for the Eastern District of California.

In the complaint, the Alliance alleged that CARB's proposed GHG regulations were illegal on five grounds, each of which was separately sufficient to warrant declaratory and injunctive relief. First, the Alliance alleged that CARB's regulations were nothing more than de facto fuel economy regulations. Accordingly, California was expressly preempted from enacting such regulations under the EPCA. Second, the Alliance asserted that the state's proposed regulations were also preempted by section 209(a) of the CAA, 42 U.S.C. § 7543(a), expressly prohibiting states from enacting emissions standards related to new motor vehicles. Moreover, California could not seek a waiver from EPA under section 209(b) since EPA had determined that the CAA expressly prohibits the regulation of CO_2 and other GHGs. *See* Memorandum from R.E. Fabricant, General Counsel, EPA to M. Horinko, Acting Administrator, EPA, *EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act* (August 28, 2003). The Alliance argued that since CARB's regulations were not consistent with the provisions of the CAA, a waiver could not be granted. Third, the Alliance alleged that California's GHG regulations were an attempt to exercise state-level control of foreign policy matters, a matter solely within the authority of the federal government. Fourth, the Alliance argued that the proposed regulations would violate the dormant Commerce Clause of the Constitution, since the burdens of regulation would disproportionately outweigh the benefits of the rule and impose an undue burden on interstate commerce. Finally, the Alliance alleged that the requirements of the proposed regulations would require a degree of cooperation among competing manufacturers that would constitute a violation of federal antitrust laws.

In a separate action filed in state court, two of the Alliance's members, DaimlerChrysler Corporation and General Motors Corporation, along with another set of California car dealerships, sued CARB. *Fresno Dodge, Inc. et al. v. California Air Resources Board et al.*, No. 04CECG03498 (Cal. Super. Ct., Fresno

County, Central Div. Dec. 7, 2004). In this 24-count complaint, DaimlerChrysler and General Motors alleged that CARB had failed to follow appropriate California procedure in enacting the proposed GHG regulations. They asserted a lack of external peer review, failure to consider key emissions modeling, the safety impacts to vehicles required to comply with the proposed regulations, the adverse economic consequences of the proposed rules and other procedural defects in the rulemaking process under both the California Administrative Procedure Act and the California Health & Safety Code. Based on these counts, the plaintiffs seek not only to have the current proposed rulemaking declared invalid but also a writ of mandate from the court to compel CARB to conform to the requirements of the California Administrative Procedure Act and the California Health & Safety Code.

In the third of the California vehicle GHG actions, the Association of International Automobile Manufacturers (AIAM) filed a motion to intervene on Feb. 3, 2005 in the *Central Valley Chrysler–Jeep, Inc. et al v. Witherspoon ex rel. California Air Resources Board* case. The AIAM is a trade association representing foreign-based automobile manufacturers including American Honda Motor Company, Inc., America Suzuki Motor Corporation, Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, Inc., Nissan North America, Inc., Peugeot Motors of America, Inc., Renault, SA, Subaru of America, Inc. and Toyota North America, Inc. Filing under the theory of intervention as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure or, alternatively, permissively under Rule 24(b), AIAM seeks to join the *Central Valley* case as a plaintiff. In its complaint, AIAM cited similar preemption arguments as the Alliance. Specifically, AIAM argued that both the EPCA and the CAA preempt California from attempting to impose standards contrary to the fuel economy and emissions requirements of the foregoing federal laws.

Most recently, California has filed a motion to dismiss in the *Central Valley Chrysler – Jeep, Inc. et al v. Witherspoon ex rel. California Air Resources Board* case. Filed on March 7, 2005, California moved to have the complaint by the auto manufacturers dismissed on ripeness grounds since the proposed regulations are not yet final. In addition, California also moved for dismissal on primacy doctrine grounds, noting that any challenge to an EPA waiver decision on California standards would need to be brought in the appropriate court of appeals, not federal district court. Finally, California also noted that the Fresno District Court was an improper venue for the case and the action should be moved to the Sacramento Division.

If the plaintiffs in the foregoing cases prove successful, California will be required to withdraw or substantially modify the proposed regulations pertaining to GHGs emitted from motor vehicles. The victory could be short-lived, however, if CARB attempts to implement a different version of the regulations. Even if the proposed regulations are struck down, the underlying statute, AB 1483, remains. Lawmakers in California, including the current governor, the state legislature and CARB, remain supportive of some form of regulation of GHG emissions from motor vehicles.

Inuit Petition Alleging U.S. CO_2 Emissions Violate Human Rights

On Dec. 15, 2004, at the 10th Conference of the Parties to the UN Framework Convention on Climate Change in Argentina, the Inuit Circumpolar Conference (ICC), an international non-governmental organization representing the Inuit people, announced its intention to petition the Inter-American Commission on Human Rights (IACHR) for a declaration that U.S. emissions of GHGs are destroying the Inuit way of life and are a violation of human rights. *See* ICC Web site, *What's New?* at www.inuitcircumpolar.com. Representatives for the Inuit assert that global climate poses an immediate danger for the 155,000 Inuit in the Arctic regions of Canada, Russia, Greenland and the United States and their already struggling culture. The ICC is currently working with Earthjustice and the Center for International Environmental Law to prepare the petition. *See* CIEL Press Release, *Inuit Leader Watt-Cloutier Announces Intention to File a Human Right Claim Against the U.S. for Its Dangerous Greenhouse Gas Emissions* (Dec. 15, 2004) (www.ciel.org/Climate/Lawsuit_Inuit_15Dec04.htm).

The IACHR is an agency of the Organization for American States, of which the United States and the Inuit are members. The IACHR can issue findings, recommendations and rulings, but it is not a court, and the United States has indicated that it is not bound by any rulings of the IACHR. An IACHR ruling on the Inuit petition, however, could provide the basis for future class action lawsuits against the U.S. government and/or private energy utility companies, either in international court or in the United States.

Moreover, a recent report linking GHG emissions to environmental changes in the Arctic could support the Inuit petition and provide the basis for a finding of human rights violation by the IACHR. In November 2004, the Arctic Council released the Arctic Climate Impact Assessment (ACIA), an overview report that concluded that the Arctic is warming much more rapidly than previously known, at nearly twice the rate as the rest of the globe. The Arctic Council is an intergovernmental body involving the eight Arctic nations – Canada, Denmark, Finland, Sweden, Iceland, Norway, Russia and the United States. The ACIA also concluded that increasing GHG emissions from human activities are projected to continue warming the Arctic by an average of 6 degrees Celsius by the end of the century and predicted the depletion of summer sea ice would lead to a number of adverse effects, including the decline and possible extinction of marine mammals like polar bears, walrus and some seal species upon which Artic hunting cultures like the Inuit rely and an increase in disease rates. The full Assessment is expected to be released this spring and is the culmination of a four-year scientific study conducted by an international team of 300 scientists. The United States' involvement in the ACIA could lend weight to the Inuit's petition before the IACHR. Although the ICC has not yet filed its petition, the chair of the ICC recently announced that the petition is expected to be filed in the first half of 2005. *See* G. Brownwell, Newsweek, *"We Won't Sink With Our Ice"* (Feb. 3, 2005) (www.msnbc.msn.com/id/6908719/site/newsweek/).

Conclusion

With an increase in climate change related litigation, the United States may very well find itself at a turning point in the debate on U.S. regulation of GHGs. Although the federal government has recently resisted efforts to regulate GHG emissions, these requirements may be inevitable. As demonstrated by the cases above, state, local and regional governments as well as non-governmental organizations are continuing to become more and more proactive on the issue, on both sides. With several lawsuits scheduled for major decision points over the next year, the issue of federal regulation of GHGs will likely come to a boil in 2005 as states continue to raise the heat.

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LIKE TO WRITE?

The Sustainable Development, Ecosystems and Climate Change Committee welcomes the participation of members who are interested in preparing this Newsletter. If you would like to lend a hand by writing, editing or identifying issues, please contact the editor Amy Royden-Bloom at aroyden-bloom@4cleanair.org.

KYOTO'S CDM AND WORLD BANK'S PCF: ESSENTIAL FOR SUSTAINABLE DEVELOPMENT

Gordon L. Mathews

Cooperation between North and South is ultimately necessary to make an international effort to reduce greenhouse gas (GHG) emissions and limit global warming viable in the long term, and it is this necessity that is addressed in Articles 6 and 12 of the Kyoto Protocol.

This article looks at the key points of the Kyoto Protocol's Clean Development Mechanism (CDM) (Article 12 of the Protocol) and joint implementation (JI) provisions (Article 6 of the Protocol) and their importance in promoting sustainable development. It will then look at several project initiatives and the challenges and potential limitations under Kyoto's procedural mechanism for approval and monitoring of CDM projects. Finally, the importance and contributions of the World Bank's Prototype Carbon Fund (PCF) as an intermediary between developed countries investing in sustainable development projects and developing countries hosting such projects will be addressed.

Articles 6 and 12 of the Kyoto Protocol: JI and CDM

Articles 6 and 12 of the Kyoto Protocol are very similar in their propositions, in that both encourage developed, or Annex I, countries to initiate cooperative efforts with other countries through the sharing of resources and technological expertise for projects that will reduce GHG emissions. In exchange, the developed countries can count emission reductions generated by these projects towards their emission targets. Article 6 on JI states that, subject to oversight approval and agreement by the parties involved, "For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of [GHGs] in any sector of the economy…" The text of the Protocol is available at http://unfccc.int/resource/docs/convkp/kpeng.pdf.

Article 12 on CDM similarly encourages collaboration between countries, or private entities in different countries, and offers the same incentive of allowing GHG emissions reductions in the host country to count towards Article 3 targets of the sponsoring country. Article 12, however, holds two important distinctions from Article 6. The first is that while Article 6 seeks simply to expand countries' options for meeting emissions targets by allowing international collaboration, Article 12 specifically encourages Annex I countries to undertake CDM projects in non-Annex I, or less-developed, countries. In conjunction with this goal, the second distinction is that CDM initiatives, by definition, are to be undertaken with the overall goals of promoting sustainable development in non-Annex I countries and the long-term mitigation of global warming.

These distinctions are outlined in Article 12, as it reads that the purpose of the CDM "shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3." Also significant in the Article 12 text is that "Emission reductions resulting from each project activity shall be certified by operational entities to be designated by the Conference of the Parties serving as the meeting of the Parties to this Protocol, on the basis of: … (b) Real, measurable and long-term benefits related to the mitigation of climate change; and (c) Reductions in emissions that are additional to any that would occur in the absence of the certified project activity."

These provisions concerning real long-term benefits and verified emissions reductions resulting in below normal, or baseline, pollution levels are critical elements of a credible trading system. They also can be points of contention and potential exploitation in the project approval process. As developed countries and private entities look for ways to meet impending

emission targets, contributing to projects in less-developed countries where their financial investment would be maximized can be an attractive option. An essential procedural component of an emissions trading system is to ensure that the sustainable development benefits to the host countries are of central concern throughout the process and that the investment goals of Annex I countries do not take precedence in implementing the CDM.

It is clear that both Article 6 and Article 12 promote environmental responsibility and undertake to do so in similar fashion; however, Article 12's CDM approach is the more ambitious and forward-thinking of the two in that it specifically promotes the inclusion of non-Annex I countries in the process. While Article 6 is an important element of the Protocol in encouraging and assisting countries to meet their emissions targets by allowing flexibility and creativity in the process, Article 12 is an essential concept and element of the agreement in achieving Kyoto's long-term goals. In particular, Article 12 takes an important first step in involving non-Annex I countries in the GHG emissions reduction process, thus allowing for a proactive approach to addressing one of the primary concerns of Kyoto detractors – that a large group of GHG emitters, most notably China and India, is not covered by the Protocol.

Examples of Projects

The Río Blanco Small Hydroelectric Project is the second and most recent CDM project to have completed the review process and been registered by the CDM Executive Board. Registered on Jan. 11, 2005, the project involves Annex I country Finland and host country Honduras. As one of only two projects currently registered by the Executive Board, the Río Blanco project necessarily incorporates all the elements of an ideal CDM initiative. The project involves a run-of-river renewable hydroelectric generating plant and aims to reduce carbon dioxide (CO_2) emissions that would otherwise be generated in producing power from a petroleum source. It also contributes to sustainable development in the host country by reducing Honduran dependence on imported energy sources. Classified as a small-scale project, the Río Blanco Project Design Document (PDD) predicts it will generate 22,000 kilowatt-hours per year (kWh/year) of electricity and will reduce CO_2 emissions by 17,800 tons/year. (Text of PDD available at http://cdm.unfccc.int/UserManagement/FileStorage/FS_792172973.)

While the amount of energy to be generated by the project is relatively small in itself, the ripple effects of introducing a credibly-backed renewable energy source to Honduras have the potential to be very significant. Currently "lacking a clear National Energy Policy that would foster expansion of the generation system through renewable energy sources, the country has compromised its sustainable development [by] paying a heavy burden in badly needed hard currency to pay for its fossil fuels. This situation hampers the well being of the vast poor majority that lives in rural areas and marginal urban areas, especially the most vulnerable groups such as women, children, and elders." (*Id*. at p.3.) The Río Blanco CDM project will provide an exemplary alternative, introducing the technology and training (some of it to locals) that is needed to independently produce renewable sustainable energy on a small scale. The PDD further predicts the project will contribute to preserving and conserving the Río Blanco river basin through a partnership with the San Francisco de Yojoa Municipality, which will benefit from having a management plan for that purpose. As with the Kyoto Protocol itself, the introduction to Honduras of a framework for partnership, an exchange of resources and an inducement to shift towards responsible methods of energy production is arguably as important as the actual reduction of GHGs.

While bringing a small-scale run-of-river hydroelectric project into operation is a relatively straightforward endeavor in the United States, coordinating such projects in developing countries and getting CDM approval has proven to be a very costly and time-consuming undertaking. Currently just one other project in addition to the Río Blanco has successfully navigated the complexities of funding, technology transfer and approval to have been registered, or fully approved, by the CDM Executive Board. Many projects have been working through the validation and approval process for several years since their initiation.

The Hidroeléctrica Candelaria CDM project proposed to be undertaken in Guatemala illustrates the difficulty of getting a proposal registered by the CDM Executive Board. Proposed by Electric Power Development Co., Ltd., of Argentina, the project would introduce a hydroelectric facility to a region of Guatemala in need of electricity. Were this need to be met without such a CDM project, the electricity very likely would be generated by the unregulated (environmentally and otherwise) burning of fossil fuels. Having been validated by a designated operational entity (an independent authority approved by the CDM's Executive Board to evaluate proposed projects), the Candelaria project purports to benefit Guatemala by providing "(a) a higher standard of living for its population; (b) sufficient clean energy supply to balance out the negative environmental impact caused by fossil fuels; (c) reduction in the current dependency on imported fossil fuels (and its corresponding dependency on foreign currency required to purchase it); and (d) appropriate technology transfer and associated benefits such as job creation and training." (MGM International, Inc., Project Design Document, Hidroeléctrica Candelaria, 2003, at p.4, available at http://www2.dnv.com/certification/ClimateChange/Upload/PDD_Candelaria_2003-03-17.pdf).

Also significant, the project aims to contribute to the host country's sustainable development by importing "environmentally sound technologies to rural Guatemala…Because of its size (4.3 [megawatts (MW)]) and location (rural highlands) this project has a high probability of being copied in other parts of the country, thus multiplying the social and environmental benefits…" (*Id.* at 6.) It is estimated in the Candelaria PDD that Guatemala has the necessary natural resources to support a 4,000 MW hydroelectric capacity, illustrating the vast potential for renewable energy production from replicating the project.

Thus, the project introduces the potential for significant environmentally responsible energy development and sustainable growth within the region and the country. The Candelaria initiative incorporates all the essential goals for a CDM project and has many similarities to the CDM-registered Río Blanco project. The Candelaria project, however, is not being actively reviewed by the Executive Board, in part due to complications in how the baseline emissions levels, and the resulting emissions reductions of the project, were initially calculated.

While stringency in the approval of projects is critical in ensuring credibility in the CDM process, of equally critical concern is the efficiency and expeditiousness of the CDM approval and registration process. The CDM is currently only applicable for Kyoto's first commitment period of 2008-2012, after which the value of Certified Emissions Reductions (CERs) (emission reductions generated by a CDM project and certified by the CDM Executive Board) is much more speculative. Roger Raufer, of the U.N.'s Division of Sustainable Development in the Department of Economic and Social Affairs, estimates that there currently exists at least 160 CDM activities in 48 countries, with another 450-500 "project ideas" that have yet to begin the approval process. With the Kyoto Protocol having taken effect Feb. 16, 2005, Raufer foresees an impending "approval crunch" for the CDM Executive Board as countries rush to get hundreds, possibly in excess of a thousand, projects registered and operational for the 2008-2012 commitment period. The CDM Executive Board is entering a critical period during which it has the opportunity to facilitate hundreds of projects that could jumpstart a market for environmentally responsible and sustainable energy development projects in countries around the world. It also has the challenge of maintaining the credibility of the CDM system in the process and eliminating project proposals that do not meet CDM criteria. Project proposals that do not sufficiently benefit the host country and are skewed towards being a convenient investment in emission reduction credits for an Annex I country are not uncommon. One of the frequent points of contention in the proposal and approval processes of CDM projects, as in the Candelaria project, is the methodology used for determining baseline emissions levels and the determination of whether the proposed project would result in GHG emissions below the baseline that would otherwise not be realized.

The Peñas Blancas Hydroelectric Project proposed for Costa Rica is an example of such a project that is

focused more on obtaining emissions reductions credits than on benefiting the host country. The project appears similar to the Río Blanco project, as it plans to fund a renewable energy (hydroelectric) project in a non-Annex I country. The PDD outlines the contributions of the proposed project to Costa Rica, proposing that it will "contribute to meet the growing demand for electricity to Costa Rica's development needs, based on locally available alternative resources instead of relying on imported oil to fuel thermal power plants without any aggregate value to the local economy;" and "[r]educe [GHG] emissions from the national interconnected electric system (NIS) that otherwise would have occurred in the absence of the proposed project activity and hence contribute to the long-term mitigation of climate change." (Draft PDD, Peñas Blancas Hydroelectric Project, 2001, at p.2, available at http://cdm.unfccc.int/methodologies/UserManagement/FileStorage/FS_180030172.)

A critical difference in the projects, however, is the extent to which the true needs and conditions of the host region were considered. The Río Blanco project would contribute to sustainable development in Honduras by introducing a new technology to a region in need of power, whereas the Peñas Blancas project would do little more than fund a project utilizing technology common to the area. A public comment submission outlines the glaring problem with the proposal. "This methodology is incompatible with the main purpose of the CDM. The CDM is supposed to be a means of achieving emissions reductions – yet under this methodology it would become mainly a means of subsidizing purportedly clean technologies where these are already being implemented … the majority of planned plants in the Costa Rican extension plan are hydro and wind." (Haya, International Rivers Network, UNFCCC Public Comment Form, May 7, 2003, at p.2, available at http://cdm.unfccc.int/EB/Panels/meth/CallForInputs/inputsarchive/NM0008.)

Public comments on the Peñas Blancas proposal also addressed the larger impact such projects could have on the CDM, expressing that in order to effectively internationalize the effort to mitigate global warming and maximize its efficiency, the credibility of CDM projects and the resulting value of emission reduction credits must be maintained. "While the CDM allows for an Annex 1 country to increase its domestic emissions, the use of the CDM must also facilitate the reduction of emissions in a non-Annex 1 country. Therefore, a project is clearly only additional if the project would not have happened without the CDM. Otherwise the use of the CDM would result in an increase in global emissions and the CERs would not represent real emissions reductions." (*Id*. at 4.) Projects such as the Peñas Blancas could potentially provide some environmental and economic benefit to a host country, as it would receive outside support for a renewable energy project; however these projects are not in the spirit of the CDM and, if approved, serve to devalue the emissions reduction credits, limit the potential environmental and overall sustainable development benefits of the CDM to developing nations and ultimately undermine the system.

The World Bank's Prototype Carbon Fund

The World Bank's Prototype Carbon Fund (PCF) is uniquely positioned to both help reduce the number of proposed projects not in compliance with the guidelines of the Kyoto Protocol and its CDM initiative and also to expedite the approval process for projects that do meet CDM criteria. The PCF was created in 1999 with the goal of promoting cost-effective reduction of GHG emissions and combating climate change through a responsible market-based system, while adhering to the Bank's central tenets of sustainable development, demonstrating the possibilities of public/private partnerships and offering learning-by-doing opportunities to participants.

The PCF allows Annex I countries or private entities, currently including six government and 17 company participants, to contribute financially to the PCF in exchange for cost-efficient emissions reduction credits, as the PCF will use the contributions to fund projects in compliance with CDM and/or JI guidelines. "The PCF will pilot production of Emission Reductions within the framework of [JI] and the [CDM]. The PCF [invests] contributions made by companies and governments in projects designed to produce Emission Reductions fully consistent with the Kyoto Protocol and the emerging framework for JI and the CDM.

Contributors, or 'Participants' in the PCF, will receive a pro rata share of the Emission Reductions, verified and certified in accordance with agreements reached with the respective countries 'hosting' the projects." (See http://carbonfinance.org/pcf/router.cfm?Page=About.)

The value of such a program, from a procedural standpoint, is that it provides a standardized system for funding CDM and JI projects. It essentially eliminates the potential for Annex I entities to take advantage of the CDM and JI programs, and, congruently, eliminates any race-to-the-bottom tendency of developing countries to compete for CDM funding by accepting increasingly lower contributions from Annex I countries. By serving as an intermediary in potential negotiations between relatively wealthy countries looking for the most economical way to meet emissions reduction targets and relatively poor countries desperate for technological advancement and economic assistance, the PCF has the potential to help all parties more fully realize the goals of the CDM.

The value of the PCF from an environmental standpoint is that host countries will be able to realize the full value of the emissions reductions of the projects they host and will also benefit from the World Bank's focus on renewable energy and sustainable development. "To date the primary focus of the majority of projects has been on renewable energy technologies – such as wind, small hydro, and biomass energy technology – that would not be viable without financial support from the PCF." (Protoype Carbon Fund 2003 Annual Report, at p.52, available at http://prototypecarbonfund.org/util/DocItemDisp.cfm?CatalogID=1115.)

By acting as an intermediary in the transaction, the PCF can ensure sustainable development considerations are addressed, host countries are not competing to undercut each other, project proposals are stringently reviewed and the value of potential CDM projects is maximized. The PCF also has the additional benefit of acting as both the funding body and insurer of CDM compliance for the projects it oversees. Operating as a credible and proactive oversight body, the PCF serves to facilitate projects, such as the Brazilian NovaGerar Landfill Gas to Energy Project, in countries that have the potential for environmentally responsible progress and that will increase their energy capacity in one way or another to meet population demands.

The NovaGerar project is to date the only other CDM project, in addition to the Río Blanco project, to be certified by the Executive Board, and it was facilitated in large part by the PCF. The project aims to collect and utilize gas currently being emitted from landfills in Sao Paulo, Brazil, and use the gas to generate electricity. This will involve "investing in a gas collection system, leachate drainage system, and a modular electricity generation plant at each landfill site (with expected final total capacity of 12 MW), as well as a generator compound at each site. The generators will combust the methane in the landfill gas to produce electricity for export to the grid. Excess landfill gas, and all gas collected during periods when electricity is not produced, will be flared. Combustion and flaring combined reduce emissions of 14.072 million tons of CO_2 over the next 21 years. In addition, the project will lead to emission reductions attributable to the displacement of grid electricity." (PDD available at http://cdm.unfccc.int/UserManagement/FileStorage/FS_609234123.)

The project will contribute to sustainable development primarily by introducing an environmentally responsible technology and operating system that has the potential to be widely replicated in the region. The project is being funded by the Netherlands Clean Development Facility, an initiative established by the World Bank's PCF and the Netherlands to purchase GHG emission reduction credits. The Facility supports projects in developing countries undertaken in accordance with CDM guidelines in exchange for such credits under the CDM.

This project illustrates the value that the CDM and PCF can provide for one another: Kyoto's CDM provided an opportunity for Brazil to acquire the necessary technological and financial resources for sustainable development, and the PCF was central to advancing the actual projects. Without the PCF involvement, the framework and opportunity for a

country like Brazil to gain resource assistance and develop in a manner non-detrimental to the world's climate would remain, but the efficiency of implementing projects and the value and credibility of the resulting emissions credits would likely be compromised. Value and credibility are key elements for advancing emissions trading initiatives and for allowing the CDM to continue to grow and facilitate sustainable development:

> The greater the guarantee the seller can provide regarding the robustness of the [emission reductions] purchased, the higher the price is likely to be… [O]ther key determinants of price, identified via information from market players and the World Bank Carbon Finance business experience, [include] creditworthiness of the project sponsor and viability of the project; confidence in the quality of the ongoing carbon asset management; cost of validation and potential certification; [and] additional environmental and social benefits. (Lecocq and Capoor, State and Trends of the Carbon Market, 2003, at p.17, available at http://carbonfinance.org/docs/StateandTrendsofCarbonMarket2003.pdf.)

The PCF adds credibility and stability to the emissions trading process and has the potential to enhance the value of emissions reductions credits to host countries through its focus on renewable energy projects and sustainable development. This is essential in an emerging market, as it helps to encourage investor confidence, thereby further benefiting developing countries hoping to attract investor resources for their CDM projects. Given the length of time for approving and carrying out a project, the window for countries to utilize CERs in the 2008-2012 commitment period is beginning to close; therefore, perhaps the most critical role for the PCF is as an established body experienced in scrutinizing potential projects to comply with the CDM. This will greatly help in maximizing the opportunities for a system of sustainable development and responsible progress in the very near future.

Though the PCF in its current state is a pilot program and not intended to be a permanent institution (it is scheduled to terminate in 2012), it will likely be necessary that either a similar permanent institution is created in place of the PCF, or that the PCF remain intact in order to maintain the stability of the market between developing and developed countries and the progression of sustainable development-enhancing energy projects. The World Bank's *State of the Carbon Market 2004* report indicates that many European companies prefer to enter the international carbon market through intermediaries or public-private partnerships like the PCF. The report also shows the PCF as among the top three purchasers of emissions reduction credits, along with Japanese companies and the Netherlands. In 2003-2004, the PCF purchased approximately 25 percent of the global total of emission reduction credits, illustrating its instrumentality to the marketplace and the increasing prominence of the renewable energy sector that it supports. (Full text of report available at carbonfinance.org/docs/CarbonMarketStudy2004.pdf .)

Conclusion

The actions and methods being facilitated by the CDM and PCF promote the dissemination of renewable energy technologies to developing countries and simultaneously reduce pollution and promote development. To most effectively and efficiently meet the long-term goals of the Kyoto Protocol and the overall goal of climate change mitigation, the CDM must play an integral role in involving non-Annex I countries in the process. And to most effectively and efficiently implement the CDM, an intermediary such as the PCF is necessary to ensure that not only do Annex I countries meet their emissions goals, but that developing countries become models for clean, efficient and sustainable progress, rather than the next great threat to the global climate.

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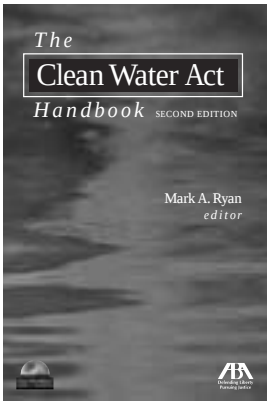
From ABA Publishing and The Section of Environment, Energy, and Resources

The Clean Water Act Handbook, Second Edition
Mark A. Ryan, editor



This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc*., *Talent Irrigation*, and *Forsgren*, among others.

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UPDATE ON THE EU EMISSIONS TRADING SYSTEM

Kyle Danish

Transactions have begun in the world's largest-ever emissions trading program, the European Union Emissions Trading System (EU ETS). Today, it is possible to go to any number of commercial Web sites and see prices and volumes traded of European Union Allowances (EUAs), each one providing authorization to emit one ton of carbon dioxide (CO_2) equivalent. On a single day in early March, for example, approximately 1.5 million vintage year 2005 EUAs exchanged hands at an average price of nearly 11 Euros each (or $14.72). Yet, the launch of this new marketplace has been far from smooth and some of the biggest challenges to implementing the EU ETS may still lie ahead. This article briefly highlights some of the current issues with the EU ETS.

Background

The EU ETS is a "cap-and-trade" program modeled on the successful U.S. experience with trading of sulfur dioxide emission allowances under the Clean Air Act's Acid Rain program. (*See* Directive 2003/87/EC of the European Parliament and of the Council of Oct. 13, 2003 establishing a scheme for greenhouse gas (GHG) emission allowance trading within the Community and amending Council Directive 96/61/EC, available at http://europa.eu.int/comm/environment/climat/emission/implementation_en.htm.) The 25 EU member states distribute a finite quantity of EUAs to companies that own regulated "installations." The companies then are required to surrender EUAs to cover their CO_2 emissions from those installations. Companies with surplus EUAs can sell them to companies that have a shortfall.

Like other trading programs, the EU ETS offers the advantages of flexibility. It encourages implementation of the lowest-cost reduction activities, thereby promoting the most cost-effective achievement of its environmental objectives.

The EU member states have adopted the EU ETS as a primary strategy for meeting their obligations under the Kyoto Protocol. The ETS is a two-phase program. Phase I started in January 2005 and will run through 2007. Phase II corresponds to the Kyoto Protocol's 2008-2012 commitment period.

The EU ETS applies to "installations," a category that can comprise multiple boilers or other emitting equipment. Only installations of a certain size are included in the program. For Phase I, each member state must regulate through the EU ETS its installations in the following sectors: (1) energy (electricity and refineries with direct emissions); (2) production and processing of iron and steel; (3) minerals (cement, glass, and ceramic production); and (4) pulp and paper. Phase I covers only CO_2 emissions. Collectively, Phase I of the EU ETS is expected to cover 12,000 installations, accounting for approximately 46 percent of the EU's total CO_2 emissions. For Phase II, EU policy-makers are considering extending the EU ETS to additional sectors (including potentially transportation and aviation) and additional types of GHGs.

Fundamental to the implementation of the EU ETS are the national allocation plans (NAPs). Each participating government is responsible for developing a NAP and submitting it to the European Commission (Commission) for approval. The Commission has identified eleven criteria for NAP approval.

The NAP is a complicated policy instrument, involving more than simply an allocation of EUAs. Indeed, it involves at least three levels of decisions. First, the government must determine what portion of its country's Kyoto Protocol emissions target will be met by the sectors subject to the EU ETS program and what portion will met through: (1) policies imposed on sectors not subject to the EU ETS (*i.e.*, transportation, buildings and agriculture) and (2) purchases by the government through the Kyoto Protocol's "flexible mechanisms" (*i.e.*, the Clean Development Mechanism, Joint Implementation and Article 17 emissions trading).

Having determined this "cap within a cap," the government must then determine allocations of EUAs to the sectors subject to the EU ETS. Finally, the government must allocate EUAs to each of the

regulated installations within each sector, while setting aside some amount for new entrants.

Development and Review of National Allocation Plans

Though the member states have significant discretion in developing their NAPs, each NAP must meet certain criteria in order to be approved by the Commission. In its decisions on NAP submissions to date, the Commission has focused substantially on four issues: (1) the extent to which the amount of EUAs allocated by the country's NAP is consistent with the country's emissions target; (2) the requirement that the amount allocated not exceed the country's projected emissions for 2005-2007; (3) the prohibition against NAPs that authorize the government to make an ex post adjustment to the allocations; and (4) the extent to which the NAP sets aside EUAs for new entrants. (*See* EPRI, The EU Emissions Trading Scheme: Key Issues and Future Outlook (2004)).

EU members states have had difficulties developing and gaining approval of their NAPs. As of January 2005, six member states had won only a conditional approval for their NAPs and four states, including Italy, had no legally effective NAP of any kind.

The Commission also rejected Germany's plan in 2004 because it would authorize the German government to make ex post adjustments in allocations. The German government is challenging the Commission's determination in the European Court of Justice.

The United Kingdom (UK) already had a version of its NAP approved by the Commission in July 2004, but it subsequently sought approval to increase the amount of EUAs it will allocate in light of new data suggesting that the country's GHG emissions level will be higher than was projected at the time that it developed its original NAP. In January 2005, the Commission rejected the UK request. Now, the UK is bringing a challenge to the European Court of Justice.

In addition, in another decision in 2004, the Commission rejected France's original submission. The Commission determined that France had over-allocated EUAs and had failed to cover a sufficient number of installations. In December 2004, France won approval for a revised NAP that allocates fewer total allowances to nearly double the number of installations.

Development of the NAPs also had led to vigorous policy debates and contention within the member states. Certain German companies believe themselves to have been unfairly shortchanged by the German NAP's methodology for determining allocation levels and have threatened to sue the government.

An overall theme in the NAPs is leniency. Governments appear to be looking at Phase I of the EU ETS as only a warm-up. They have been generous in their allocations to installations subject to the program. Indeed, the Commission recently rejected Poland's NAP for allocating unneeded allowances. This pattern of leniency has at least two implications. First, it means that the trading market is "thinner" than it might be if EUAs were scarcer relative to emissions. Second, it suggests that the EU member states will need to ramp up their efforts considerably in the coming years if they are going to comply with their Kyoto Protocol obligations.

Linking to Programs Outside the European Union

An outstanding issue with the EU ETS is the extent to which it can and will connect with programs outside the boundaries of the European Union. This concept of "linkage" refers to at least four different concepts: (1) linkage between the EU ETS and the other Kyoto Protocol "flexible mechanisms" (*i.e.*, the Clean Development Mechanism and Joint Implementation), (2) linkage between the EU ETS trading systems and industrialized countries that have ratified the Kyoto Protocol (*i.e.*, "Annex B" countries), (3) linkage between the EU ETS and trading systems in industrialized countries that have not ratified the Kyoto Protocol but may develop trading systems (*i.e.*, potentially the United States), (4) linkage between the EU ETS and sub-national trading systems in industrialized countries that have not ratified the Kyoto Protocol (*i.e.*, the Regional Greenhouse Gas Initiative in the Northeast states of the United States). (*See* EPRI, *supra*.)

The EU ETS expressly provides for the first type of linkage as the result of the EU "Linking Directive." (*See* Directive 2004/101/EC of the European Parliament and of the Council of Oct. 27, 2004 amending Directive 2003/87/EC establishing a scheme for GHG emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms, available at http://europa.eu.int/scadplus/leg/en/lvb/l28012.htm.) The Linking Directive specifies conditions under which firms subject to the EU ETS may use Certified Emission Reductions (CERs) from Clean Development Mechanism (CDM) projects or Emission Reduction Units (ERUs) from Joint Implementation (JI) projects for compliance purposes. For the first phase of the EU ETS, firms are not permitted to use ERUs for compliance. They may use CERs, except from the following types of projects: nuclear power projects; Land Use, Land Use Change, and Forestry projects; and hydroelectric projects with a generating capacity greater than 20 megawatts (MW) that do not meet criteria set by the World Commission on Dams, the World Bank and the Organization for Economic Cooperation and Development. The EU plans to review and potentially modify or remove these restrictions for Phase II of the ETS.

A question, however, is whether these project-based credits will be available to meet much of the EU demand after 2008. The World Bank has repeatedly cautioned that there may be little more than two years remaining to make needed investments in CDM and JI projects. The lead-time necessary to develop projects has proven to be quite long. More importantly, the current pace of CDM Executive Board review and evaluation of projects borders on glacial. [Editor's note: see related article on CDM and JI in this newsletter.] These factors have led to concerns that there may not be enough projects certified in time to lower the costs of compliance for EU member states.

The second linkage concept entails linkage between the EU ETS and trading systems in other Annex B countries. To this end, active discussions reportedly are underway between the EU and Japan and the EU and Canada. Neither linkage opportunity is straightforward. Significant uncertainties remain about Japan's domestic program for Kyoto compliance. More information is available about Canada's evolving program. The centerpiece is a domestic trading program for its most significant sources of emissions, referred to as "large final emitters." However, the Canadian government has pledged to establish a "safety-valve" price for that program at $15/ton CO_2 equivalent. To the extent that the safety-valve approach of the Canadian program makes that program less stringent than the EU ETS Phase II program, linkage could be complicated.

Significantly more complicated would be linkage with the United States. Of course, there is not a U.S. emissions trading program at present, so linkage is not an issue at that level. On the other hand, there reportedly have been discussions between EU officials and officials from states that are participating in the Regional Greenhouse Gas Initiative (RGGI). Strictly from the perspective of compliance with the Kyoto Protocol, linkage with the RGGI has nothing to offer the EU because emission reductions from a country that is not a party to the Kyoto Protocol cannot be used for Kyoto compliance. However, the EU member states ultimately might determine that purchases of "RGGI allowances" (or whatever they may come to be called) are worthwhile for the purposes of building a bridge to interests in the United States that are supportive of mandatory approaches to climate change policy – even if they somewhat deepen the EU's Kyoto compliance burdens.

Conclusion

The European Union's experiment with multi-national GHG emissions trading is now underway. And with the entry into force of the Kyoto Protocol, the issues with the EU ETS are far from academic. Lawyers for companies with facilities within the EU will need to pay close attention to policy developments within the program.

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SUMMARY OF STATE AND LOCAL ACTIONS TO REDUCE GREENHOUSE GAS EMISSIONS (JULY 2004- JANUARY 2005)

Amy Royden-Bloom

On a regional basis or on their own, states and localities continue apace with initiatives to reduce greenhouse gas (GHG) emissions. The Northeast states continue to work on developing a regional cap-and-trade system for GHG emissions along with a regional GHG registry, and the West Coast states may be moving in the same direction. Several states embarked upon regulatory initiatives – most notably California, which will be regulating GHG emissions from motor vehicles and requiring electric utilities to include a "GHG adder" when conducting procurements. Many states and localities released climate action plans, and several states announced renewable portfolio standards. These and other state and local climate action in the time period July 2004 through January 2005 are summarized in this article.

Regional Activities

The Regional GHG Initiative (RGGI) is a cooperative effort by nine Northeast and Mid-Atlantic states to develop a multi-state GHG cap-and-trade program. RGGI is initially aimed at developing a program to reduce carbon dioxide (CO_2) emissions from fossil fuel-fired electric generating units 25 megawatts (MW) and larger in participating states. The effort began in April 2003 with New York Governor George Pataki inviting about a dozen states to participate in discussions. Participants hope to develop a model rule by May 2005, which would then need to be adopted by each state. RGGI held a number of workshops and stakeholder meetings during the fall of 2004 and winter of 2005. See www.rggi.org.

The Northeast States for Coordinated Air Use Management (NESCAUM) continued to develop the Regional GHG Registry (RGGR) in collaboration with the World Resources Institute and California Climate Action Registry. RGGR will consist of three components: (1) a RGGI support component – which could track allowances, credits and trades under RGGI, (2) a voluntary GHG reporting component modeled on the California Climate Action Registry and (3) a mandatory component to support mandatory reporting requirements that are emerging in the Northeast states. The registry should be designed and ready to begin operation by October 2005 for electric generating reporters. See www.rggr.us.

On the other side of the country, in November 2004 governors of three West Coast states – California, Oregon and Washington – approved 36 recommendations for action by their states to combat global warming. These recommendations are part of the West Coast Governors' Global Warming Initiative, which was launched in September 2003. Among the recommendations are directives to: (1) set new targets for improvement in performance in average annual state fleet GHG emissions; (2) establish a plan for the deployment of electrification technologies at truck stops in each state on the I-5 corridor, on the outskirts of major urban areas and on other major interstate routes; (3) set goals and implement strategies and incentives to increase retail energy sales from renewable resources by one percent or more annually in each state through 2015; (4) adopt energy efficiency standards for eight to 14 products not regulated by the federal government for all products sold on the West Coast; and (5) incorporate aggressive energy efficiency measures into updates of state building energy codes, with a goal of achieving at least 15 percent cumulative savings by 2015 in each state. In addition, the governors agreed to explore more comprehensive regional measures, such as adopting state and regional goals for GHG emission reductions and developing a market-based carbon allowance program. See www.ef.org/westcoastclimate/WCGGWI_Nov_04%20Report.pdf.

Several states and localities have also taken legal action to address global warming [see related article in this issue for further details]. In July 2004, eight states and the city of New York filed a nuisance suit against five of the largest electric utilities in the United States to force them to reduce their GHG emissions. The lawsuit alleges that global warming has begun to change the climate in the United States, and continued GHG emissions from these utilities will lead to global

warming that will harm public health, inundate coastlines, harm water supplies, harm the Great Lakes, hurt agriculture and harm ecosystems, forests, fisheries and wildlife. The plaintiffs seek an order from the court requiring each utility to cap its CO_2 emissions and then reduce them by a specified percentage each year for at least a decade. In November 2004, ten states filed an intervenors' brief to support EPA's determination that it lacks authority to regulate GHGs under the Clean Air Act. These states are intervening in a lawsuit initiated earlier in 2004 by eleven states and 14 environmental and citizen groups, which sued EPA to challenge its rejection of a petition urging EPA to regulate GHG emissions from motor vehicles under the act; EPA rejected the petition because it says it lacks authority under the act to regulate GHGs, but petitioners argue that the act gives EPA this authority.

States and Localities

Regulatory Developments

In September 2004, California's Air Resources Board (CARB) approved regulations that set GHG emission standards for passenger vehicles beginning with model year 2009 vehicles. According to CARB, the average reduction of GHGs from new California cars and light trucks will be about 22 percent in 2012 and about 30 percent in 2016, compared to today's vehicles. The regulations do not go into effect until Jan. 1, 2006, and will apply to cars (including SUVs) and light-duty trucks. The regulations implement Assembly Bill 1493, which directed CARB to "develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of [GHG] emissions from motor vehicles." Once these regulations go into effect in California, they may be adopted by other states. See www.arb.ca.gov/regact/grnhsgas/isor.pdf.

In September 2004, New Jersey proposed to revise its air pollution regulations to define CO_2 as an air pollutant. As part of the rule proposal, New Jersey published a formal determination that CO_2 emissions are responsible for significant adverse impacts on human health and the environment by contributing to global warming. See www.state.nj.us/cgi-bin/governor/njnewsline/view_article.pl?id=2144.

In December 2004, the California Public Utilities Commission (CPUC) issued an order that requires California utilities – Pacific Gas & Electric, Southern California Edison and San Diego Gas & Electric – to include a value to account for the financial risk associated with GHG emissions when the utilities conduct procurements. The CPUC adopt a range of values for a "GHG adder" of $8 to $25 per ton, to be used in the utilities' evaluation of fossil generation bids. According to the order, the GHG value is to be added to the fossil prices bid in future procurements of electricity in order to develop a more accurate price comparison between fossil, renewable and demand-side bids. See www.cpuc.ca.gov/PUBLISHED/COMMENT_DECISION/41385.htm.

Climate Action Plans

The states of Maine and Washington released climate action plans, while stakeholder groups in Connecticut and Oregon released recommendations for reducing GHG emissions. In early December 2004, Maine released a plan with 54 recommended actions for the state to reach its GHG reduction goals – reducing GHG emissions to1990 levels by 2010, to 10 percent below those levels in 2020 and by a sufficient amount to avert the threat of global warming over the longer term. See maineghg.raabassociates.org/finalplan.asp. In late December 2004, Washington's governor announced a suite of measures to reduce GHG emissions in the state, including adoption of California's tailpipe GHG emission standards, adoption of renewable and energy-efficiency portfolio requirements for utilities, adoption of GHG emission reduction goals for the state, establishment of a GHG emission registry and establishment of state energy efficiency standards for 13 products. For the governor's executive order implementing these measures for state government, see www.governor.wa.gov/orders/eoarchive/eo05-01.htm. Late December 2004 also saw an advisory group convened by Oregon's governor announce 55 policy recommendations for reducing GHG emissions in Oregon. Included in the advisory group's report are the following reduction targets: by 2010, "arrest" the growth of Oregon's GHG emissions and begin to reduce them; by 2020, reduce emissions to 10 percent below 1990 levels; and reduce GHG emissions

75 percent below 1990 levels in 2050. To help reach the reduction targets, the group said Oregon should adopt California's plan to reduce GHG emissions from passenger vehicles. See www.energy.state.or.us/climate/Warming/Report/GWPlan.pdf. In January 2005, a steering committee convened by Connecticut's governor submitted a draft of the Connecticut Climate Change Action Plan 2005 to four committees of the Connecticut General Assembly for their review and comment. The plan contains 55 recommended actions to put Connecticut on target to reduce GHG emissions to 1990 levels by 2010 and to 10 percent below 1990 levels by 2020 and, over the long-term, achieve a 75 percent reduction. See www.ctclimatechange.com/StateActionPlan.html.

Two localities released climate action plans: Puget Sound, Washington and San Francisco, California. San Francisco's plan, released in October 2004, outlines specific steps that local government agencies, residents and businesses should take to reduce San Francisco's annual CO_2 emissions by more than 2.5 million tons by 2012 (which translates into 20 percent below San Francisco's 1990 levels by the year 2012. See temp.sfgov.org/sfenvironment/aboutus/energy/cap.pdf. Puget Sound's Climate Protection Advisory Committee presented its final report and recommendations for reducing GHG emissions in the region. It identifies eight key priority actions for the region to pursue to reduce emissions to 1990 levels in the next 15 years. See www.pscleanair.org/specprog/globclim/cpsp/pdf/rptfin.pdf.

Renewable Portfolio Standards

Three states adopted renewable portfolio standards (RPS): Colorado, New York and Pennsylvania. In September 2004, New York's Public Service Commission approved a RPS that requires that 25 percent of electricity sold in New York be generated by renewable resources by 2013. See www.dps.state.ny.us/03e0188.htm. On Nov. 2, 2004, Colorado residents approved Amendment 37, which requires utilities with over 40,000 customers to provide an increasing percentage of electricity from renewables, reaching 10 percent by 2015. Finally, on Dec. 7, 2004, Pennsylvania's governor signed into law Pennsylvania's Clean Energy Portfolio Standard, which requires that qualified power sources provide 18 percent of Pennsylvania's electricity by 2020. Qualified power sources include not only wind, solar, coalmine methane, small hydropower, geothermal and biomass, but also waste coal, demand side management, large hydropower, municipal solid waste and coal integrated gasification combined cycle. See www.state.pa.us/papower/cwp/view.asp?A=11&Q=439442. This brings the total number of states with RPS's to 18.

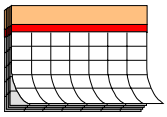
Miscellaneous Developments

In September 2004, North Carolina's Division of Air Quality (NCDAQ) released a report examining CO_2 emission reduction options for coal-fired electrical utility boilers and other stationary sources. The CO_2 report lays out a wide range of options for North Carolina, including: (1) taking no action (and simply reacting to federal mandates) on CO_2 emissions; (2) a combination of voluntary and mandatory requirements to maximize emissions reductions while minimizing cost impacts; and (3) setting a cap on all GHG emissions from stationary and transportation sources in North Carolina (the latter could also be part of a multi-state energy and carbon emission reduction plan). See daq.state.nc.us/news/leg/co2_csa_int_09012004.pdf. North Carolina's legislation, the Clean Smokestacks Act, requires that NCDAQ make final findings and recommendations by September 2005.

Amy Royden-Bloom is a senior staff associate at the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO). She also serves as newsletter editor for the Sustainable Development, Ecosystems and Climate Change Committee Newsletter. She can be contacted at aroyden-bloom@4cleanair.org.

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events



Key Environmental Issues in Region 6
May 26, 2005
Dallas

State-Level Environmental Impact Assessment
May 30, 2005
Cambridge, Massachusetts
(Cosponsored with the International Association for Impact Assessment, for information see www.iaia.org)

Wetlands Law and Regulation
June 8-10, 2005
Washington, D.C.
(Cosponsored with ALI-ABA and ELI, for information see www.ali-aba.org.)

ABA Annual Meeting
Aug. 4-9, 2005
Chicago

13th Section Fall Meeting
Sept. 21-25, 2005
Nashville, Tennessee

For more information, see the Section Web site at http://www.abanet.org/environ or contact the Section at (312) 988-5724.

ECOSYSTEMS UPDATE

The Millennium Ecosystem Assessment, a study that involved more than 1,300 scientists from 95 countries, was released in late March 2005. The effort brought together governments, civil society groups, industry and indigenous people over a four-year period to examine the social, economic and environmental aspects of ecosystems

The overall message of the report is that over the last 50 years, human actions have depleted the Earth's natural resources at an unprecedented scale and rate to satisfy growing demands for food, fresh water, timber, fiber and fuel. Although food production is up, the report said, many other benefits that humans obtain from ecosystems are threatened, and some environmental changes can produce sudden, unexpected deteriorations in water quality, climate and health.

"Human actions are depleting Earth's natural capital, putting such strain on the environment that the ability of the planet's ecosystems to sustain future generations can no longer be taken for granted," the authors said. The study warns that the depletion of natural ecosystem services will continue as the world's population continues to grow and economic activity expands as much as six-fold.

The report cites widespread and growing problems such as the collapse of fisheries in some parts of the world because of over-exploitation, the creation of "dead zones" around the mouths of some rivers because of nitrogen runoff from farms and environmental degradation in some dry-land ecosystems.

"Only by understanding the environment and how it works, can we make the necessary decisions to protect it," said U.N. Secretary General Kofi Annan in a statement marking the report's release. "Only by valuing all our precious natural and human resources, can we hope to build a sustainable future."

The 45-member Millennium Assessment board of directors also distributed a statement entitled "Living Beyond Our Means: Natural Assets and Human Well-

Being." The Millennium Assessment Secretariat is coordinated by the United Nations Environment Programme (UNEP); its board is chaired by Robert Watson, chief scientist of The World Bank, and A. H. Zakri, director of the United Nations University's Institute of Advanced Studies.

The text of the Millennium Ecosystem Assessment is available online at www.millenniumassessment.org.

SUSTAINABILITY SQUIBS

G3 – A new phase of the GRI sustainability reporting initiative.

Since its inception, the Global Reporting Initiative (GRI) has been committed to a process of continuous improvement driven by the insights and experiences of stakeholders familiar with the sustainability reporting Guidelines and other GRI reporting framework components. Following a "structured feedback process," the third generation of GRI Guidelines (built on prior versions issued in 2000 and 2002) is due for release in mid-2006.

GRI has named the process "G3" not only as a reference to the third generation of Guidelines, but also to reflect its three key components:

Guidelines Innovations: focusing on updating and improving indicators, the application of the Guidelines and linkages with other CSR tools and financial markets.

Digital Solutions: The development of a technology platform for use of the GRI Guidelines and resulting sustainability reports.

Education and Accreditation: the development of educational support, such as tutorials and seminars, around the context and application of principles and indicators.

The G3 initiative will seek to increase the sophistication of the existing GRI reporting framework, and will attempt to reframe the GRI business model to become a self-sustaining organization through technology-supported Guidelines and related services.

For more information on GRI's G3, including the establishment of a new performance metrics advisory group, see: www.globalreporting.org/G3/.

UPCOMING SUSTAINABILITY EVENTS

June 10, 2005
Baltimore, Maryland
ABA Standing Committee on Environmental Law
33rd National Spring Conference on the Environment
"Financial Institutions, Corporate Stewardship, and Sustainable Development: Drivers for the Evolution of U.S. Environmental Laws and Practice"
www.abanet,org/publicserv/environmental/

June 13-15, 2005
New York, New York
The Conference Board
"Business and Sustainability: The Promise and Challenge of Sustainable Development"
www.conference-board.org/sustainability.htm