



# The Boardroom Climate on Climate Change

## *An Environmental Law Update*

Thursday, April 19, 2007

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## Welcome & Introductions

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## Introductions



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## REMINDER: Upcoming Sessions

- Mark your calendar and plan to join us for the remaining sessions of the 2007 Environmental Law Update Series.

- July 19, 2007
- October 18, 2007

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## Company Initiatives



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## A Canvass of State, Regional and Local Initiatives



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## Federal Developments on Climate Change



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# Filling the Gap - Litigation and Other Challenges Absent Greenhouse Gas Regulation



Leah M. Krider

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# Company Initiatives

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## Business is Getting Green

- Companies are moving forward to reduce greenhouse gas emissions.
- Facility improvements
- Transportation improvements
- Energy efficiency and renewable energy use

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## Why?

- Risk: physical, regulatory, competitive, reputational
- Customer demand
- Investor demand
- California/European regulations
- Chance to Be Ahead of the Pack
- Cost Saving

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## How?

- Goals and Incentives for emission reductions.
- Annual Sustainability Reports
- Choosing or creating renewable energy sources
- Choosing more efficient buildings, appliances, vehicles

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## Poster Child: Wal-Mart

- Emphasis on reducing energy consumption
- More efficient buildings (some with solar power)
- More efficient vehicles (hydrogen fuel cell forklifts)
- More sustainable products (light bulb effort, toy packaging effort)
- More to come: Wal-Mart can leverage it's size to create change. Website reports that if each Wal-Mart customer purchased 1 compact fluorescent bulb, it would save 22 billions lbs of coal from being burned in power plants.

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## Disclosures

- Public companies are subject to Securities and Exchange Commission Disclosure Requirements
- Requires disclosure of “known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect of financial condition or performance.”
- Currently little guidance from SEC on how to disclose risk from climate change.

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## Disclosures

- SEC also requires disclosure of material effects from compliance with environmental laws.
- Current impact for companies doing business in state jurisdictions with climate change legislation (California).

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## Disclosures

- Investor Pressure is resulting in greater disclosure through other forums.
- CERES – Coalition for Environmentally Responsible Economies is organizing groups of investors to ask companies to disclose climate change risk and greenhouse gas emissions.
- Shareholder resolutions also asking for greater disclosure.
- Carbon Disclosure Project: [www.cdproject.net](http://www.cdproject.net)

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## A Canvass of State, Regional and Local Initiatives

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## State GHG Initiatives

- State Legislation
  - Not much enforceable
  - Mostly broad general policy statements, targets, goals via executive order or “state action plan”
  - Exceptions:
    - Some limited emission caps/offset programs
    - Implementation of RGGI (See below)
    - California
  - Clear momentum towards more regulation, pending federal outcomes

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## Specific State Initiatives GHG Emissions Targets

- States “imposing” GHG Emission Limit Targets
- Most to 1990 levels by 2020
- Most state goals set by executive order or unenforceable state “action plan”:
  - Arizona, Oregon, New Mexico, Connecticut, Maine, New Jersey, New York, Rhode Island, Vermont, Illinois
- Exceptions:
  - California
    - Established state wide target limits for all GHGs and separate carbon limits for “major industries” by legislation
  - Massachusetts
    - Established by rulemaking separate goals for CO<sub>2</sub> for utilities
  - New Hampshire
    - Established by legislation separate goals for CO<sub>2</sub> for utilities

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## State Initiatives

- States with Carbon Offset Programs:
  - Oregon – Any new plant faces emissions caps that can be offset
  - Washington – New or expanding power plants must offset CO<sub>2</sub> emissions by set percentages
  - Massachusetts – Offsets permitted to counter exceedances of set CO<sub>2</sub> caps for older plants

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## Other State GHG Initiatives

- Climate Change “Commissions”:
  - AK, NC, IL
- Climate Action Plans:
  - CT, ME
- Greenhouse Gas Reporting:
  - CA, WI, WV
- GHG Performance Standards for Vehicles
  - CA, NJ, WA (nine other states pending)

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## California Initiatives

- Governor's EO (June 2005)
  - Emissions cap at 2000 levels by 2010
  - Emissions cap at 1990 levels by 2020
  - Emissions reductions to 80% below 1990 levels by 2050

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## California Legislation

- AB 32 – Approved 9/27/2006
  - State wide Cap on GHG emissions at 1990 levels by 2020
  - CARB (CA Air Resources Board) to create implement and enforce cap
  - Requires CARB to establish statewide greenhouse gas emissions reporting and monitoring program and enforce compliance -- Including penalties
  - Authorizes CARB to adopt market-based mechanisms (cap & trade/offsets)
- SB 1368 – Approved 9/29/2006
  - Directs the California Energy Commission to set a greenhouse gas performance standard
  - Applies to electricity procured by local publicly owned utilities, *whether generated within state borders or imported from plants in other states*, and will apply to all new long-term electricity contracts
- SB 107 – Approved 9/26/2006
  - Requires California's three major utilities – Pacific Gas & Electric, Southern Edison, and San Diego Gas & Electric – to produce at least 20 percent of their electricity using renewable sources by 2010

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## Regional Initiatives

- Several regional efforts to address GHG emissions
- Regional Greenhouse Gas Initiative (RGGI) – Northeast/Mid-Atlantic States; appears to have “teeth.”
- Others do not, so far:
  - Western Regional Climate Action Initiative (CA/OR/WA/NM/AZ) (Regional emissions target with cap & trade program)
  - Western Governors Association Initiative (research programs)
  - West Coast Governors’ Global Warming Initiative (CA/OR/WA) (compact to cooperate regionally)
  - Southwest Climate Change Initiative (NM/AZ) (collaboration and research)
  - Powering the Plains (ND, SD, MN, IA, WI) (research)

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## Focus on Regional Greenhouse Gas Initiative (RGGI)

- RGGI is the first regional GHG cap & trade program in the U.S.
- First initiative to spur regulatory action
- RGGI Memorandum of Understanding signed on Dec 20, 2005 by 7 of 9 states active in forming RGGI framework. (CT, DE, ME, NH, NJ, NY, VT); MA & RI added in 2007.
- RGGI States to begin state-specific legislative or rulemaking processes based on “Model Rule.”

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## RGGI – Cap & Trade Program

- A cap and-trade program for CO<sub>2</sub>
  - Program commences Jan 1, 2009
  - Emissions from fossil fuel-fired electricity generating units (EGUs) with capacity of 25 MW or greater capped at 121 million tpy (through 2015)
  - Sources may cover up to 3.3% of reported annual emissions with offsets from programs outside electric generation (see next slide)
  - Unlimited banking of allowances and offsets allowed

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## RGGI – Offsets Program

- Offsets subject to approval under specific criteria
- Regional organization will manage emissions and allowance tracking system and evaluate offsets
- Initial offset categories (others may be added in future):
  - Landfill methane capture and destruction
  - Sulfur hexafluoride fugitive emissions capture and recycling at electricity transmission equipment
  - Carbon sequestration through afforestation
  - Increasing fossil fuel end-use efficiency (natural gas/oil/propane)
  - Methane capture from agricultural operations

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## RGGI – Economic Considerations

- RGGI modeled retail electricity impacts
- Predicted increase 0.3%-0.6% by 2015 across all rate classes as best scenario; more modest modeling suggests an additional 1-2% increase by 2015.
- Mitigated by requirement that states allocate 25% of allowances sold for “consumer benefit”

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## Local/Municipal Efforts

- Authorities?
  - Building permits and codes (green construction)
  - Land use decisions
  - Public transit
  - Utility franchise agreements
  - Traffic laws and regulations
  - Landfill management
  - Energy efficiency
  - Vegetation

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## Local/Municipal Efforts

- U.S. Mayors Climate Protection Agreement
  - 393 Municipalities in US
  - Pledge to achieve 7% reduction by 2012 through various measures
- Clinton Climate Initiative (Aug. 2006)
  - Encouraging cities to pool purchasing power to acquire energy savings/cost savings
- Int'l Council for Local Environmental Initiatives (ICLEI)
  - International consortium of cities committed to quantifiable reductions in GHGs
  - US participants include Chicago, Atlanta, NYC, Boston, Seattle, LA
  - Cities commit to adopt a policy to reduce GHGs
    - Establish baseline inventory and forecast of GHG emissions
    - Adopt an emissions reduction target
    - Develop a Local Action Plan to address
    - Implement policies
    - Monitor/verify results

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## Summary

- Not a lot enforceable now
- Exceptions: coastal states, utilities
- Clear momentum towards future regulation at state/local level

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## Federal Developments on Climate Change

- A. Massachusetts v. EPA, the Supreme Court and CO<sub>2</sub> under the Clean Air Act
- B. Legislation introduced in the 110th Congress – its content and prospects
- C. Kyoto and beyond – U. S. international activity and positions

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## Massachusetts v. EPA, 549 U.S. \_\_\_\_ (No. 05-1120, April 2, 2007) (cont.)

- The Supreme Court rules, in a 5-4 decision: carbon dioxide can be regulated as a pollutant under the Clean Air Act; and EPA's policy-based reasons not to regulate CO<sub>2</sub> emissions were inconsistent with its Clean Air Act and administrative law obligations to consider rulemaking.
- Context – States petitioned EPA to set new vehicle tailpipe CO<sub>2</sub> emissions standards. EPA refused, based on the two grounds the 5-4 decision rejects: no authority to regulate CO<sub>2</sub>, as it is not a pollutant; and these standards would accomplish little and conflict with other Administration climate programs.
- Getting to the merits – new law on States' standing to sue the Federal Government. The dissents were on both standing (Chief Justice Roberts) and on the merits (Justice Scalia).

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## **Massachusetts v. EPA, 549 U.S. \_\_\_\_ (No. 05-1120, April 2, 2007)**

- Scope and impact – the ruling is not limited to tailpipe standards. EPA must consider rules for CO<sub>2</sub> limits under all Clean Air Act programs, most notably New Source Review (NSR) for major facilities, and for major modifications of existing facilities. Pending petitions at EPA for NSR CO<sub>2</sub> rules, relying on the same statutory and administrative law arguments, assure EPA must deal with more than vehicle CO<sub>2</sub>.
- Relation to pending legislation – absent federal legislation superseding current law, EPA must consider new CO<sub>2</sub> emissions regulations using the existing Clean Air Act programs. Most legislative proposals set up new GHGE programs, layered on top of current Clean Air Act authority, much like the SO<sub>2</sub> (acid rain) control program of 1992.

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## **The Federal Legislative “Climate” S.309 – Sanders-Boxer “The Gold Standard” for Climate Change Legislation**

- Goals and outcomes of the legislation
  - In 2050 U.S. GHG emissions 80% below 1990
  - U. S. will reduce its GHG emissions proportional to world emission reductions needed for:
    - maximum 3.6° F global temperature increase; and
    - maximum 450 PPM concentration of CO<sub>2</sub> equivalents
- What is regulated?
  - Listed GHG emissions: CO<sub>2</sub>, NO<sub>x</sub>, methane, three fluorocarbons (hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride), and anything else found by rule to be climate-forcing. Also regulates biological carbon storage (for national inventory)

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## The Federal Legislative “Climate” S.309 – Sanders-Boxer (cont.)

### ■ Who is regulated?

- Industries and sectors of the economy covered by “any rules that are necessary” so that 2020 U. S. GHG emissions = 1990 emissions.
- Focuses on “major stationary sources,” types of industrial plants that emit > 250 tons of any pollutant listed in CAA § 169A (42 U.S.C. 7491).
- Electric utilities and vehicle manufacturers.

### ■ Regulatory Mechanisms

- Rulemaking sets emissions limits by industry sector, to meet reduction standards for each decade until 2050;
- EPA can design “1 or more” allowance trading markets, can use declining emissions caps and a “technology-indexed stop price,” suggesting preference for allowance allocation and pricing by industrial sector or emissions source type (not economy wide);

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## The Federal Legislative “Climate” S.309 – Sanders-Boxer (cont.)

### ■ Regulatory Mechanisms (continued)

- Vehicle emission limits (e.g. 205-405 grams/mile CO<sub>2</sub>E based on car weight)
- Electric utilities:
  - Post-2011 new source low-carbon standard;
  - Retrofit of pre-2012 units; and
  - “retail electric suppliers” must ensure peak demand and total electricity use reductions (§ 712)

### ■ Renewable Portfolio Standard (RPS)?

- Yes, new CAA § 713 for utilities – minimum 5% renewables for 2008, phasing up to 20% in 2020 and after (comparable to California’s)

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## The Federal Legislative “Climate” S.309 – Sanders-Boxer (cont.)

- Timelines and Milestones
  - 2020, 2030 and 2040 total reduction numbers, steps toward 2050 goal (80% reduction below 1990 U.S. emissions)
  - Vehicles, restrictions in effect for model year 2017
  - New electric plants – going into service in 2011; low-carbon generation requirements that phase in over 2015-2020; and by 2030, pre-2011 plants must meet low-carbon generation requirements
- Incentives, Subsidies, Bells and Whistles?
  - Grants for carbon sequestration projects.
  - National security emergency allows suspension of requirements.
  - Study whether patent system obstructs technology licensing and deployment.

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## The Federal Legislative “Climate” S.309 – Sanders-Boxer (cont.)

- Relation to New Source Review (NSR) Under Clean Air Act?
  - Sets post-2011, new source “low-carbon” emission standard, apart from allowance program (new CAA § 708)
- Recognize reductions made prior to effective date of new law?
  - Local or State program is mandatory, is as “stringent” as this program, and the reductions are verifiable; or
  - Voluntary reductions since 1992 (under DOE program) meet verification standards in this program.
- Effect on State or Other Federal Laws
  - Would be a new CAA Title VII
  - Allows States to take further action except as to vehicle emissions standards.

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## The Federal Legislative “Climate” S.309 – Sanders-Boxer (cont.)

- Direct link to SEC Reporting?
  - Section 9 requires reporting on the company’s risks and potential liability: due to its own GHG emissions; and to its interests (plants, income) from the consequences of climate change
- Relation to Kyoto, Or Its Successor: International Cooperation?
  - New CAA § 716 – “International Clean, Low Carbon Energy Cooperation” program; directs U.S. participation in 1992 U.N. Framework Convention (which yielded Kyoto, and which is now discussing post-Kyoto, i.e., post-2012)
- Corresponding House Bill?
  - H.R. 5642 (109<sup>th</sup> Congress, 2005-2006) – Waxman-Markey. Not reintroduced in the 110<sup>th</sup> Congress yet.

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## The Federal Legislative “Climate” S.280 – Lieberman-McCain, the 2004-2006 Contender in Congress

- Goals; Outcomes
  - Reduce GHG emissions enough between 2007 and 2050 to “forestall[] catastrophic, manmade global climate change”
  - Based on allowance pool size (see next slide), to cut regulated GHG emissions to about one-third their 2012 level.
- What is Regulated?
  - Listed GHG emissions; CO<sub>2</sub>, NO<sub>x</sub>, methane, and the three fluorocarbons
  - Also, EPA approval of suitability of geological sequestration sites and their operators

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## The Federal Legislative “Climate” S.280 – Lieberman-McCain (cont.)

- Who is Regulated?
  - Entities who own or control a source emitting > 10,000 metric tons/year of GHG, and producers of petroleum products and fluorocarbons that will emit about that threshold when used;
  - Entities “in electric power, industrial, or commercial sectors” in the U. S. inventory of emissions per the 1992 U.N. Framework Convention
- Regulatory Mechanisms
  - National registry of emissions and reductions (each reduction ton serial numbered for verification and trading).
  - Discretionary allowance allocation by EPA among industry sectors, and within each industry, with only “factors” for EPA to consider.
  - Tradeable, bankable allowances, one market.

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## The Federal Legislative “Climate” S.280 – Lieberman-McCain (cont.)

- Regulatory Mechanisms (cont.)
  - Sequestration verification system.
  - Climate Change Credit Corporation: gets unspecified share of allowances; trades in allowances; uses trading profits to mitigate impacts, and for a technology funding program
- Renewable Portfolio Standard (RPS)? None.
- Relation To New Source Review (NSR) under Clean Air Act?
  - No direct relationship
- Direct Link to SEC Reporting? None.
- Recognize Reductions Made Prior to Effective Date of new law?
  - Reductions from 1990-2012 may be registered and credited (new § 103).

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## The Federal Legislative “Climate” S.280 – Lieberman-McCain (cont.)

### ■ Timelines and Milestones

- Implement in 5 years – must have an allowance for each metric ton (MT) CO<sub>2</sub>E emitted in 2012;
- Annual allowance limits (each number is less the MT of emissions from unregulated entities); and
- 2012-2018, 6,130 million MT per year of CO<sub>2</sub>E allowances; 2019-2028, 5,239 million; 2029-2048, 4,100 million; 2049 on, 2,096 million.

### ■ Incentives, Subsidies, Bells and Whistles?

- Climate Change Credit Corp. must fund minimum number of clean coal technology, biofuels, and advanced nuclear reactor design power plants, with a “low-or zero- emissions electricity generation” program.

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## The Federal Legislative “Climate” S.280 – Lieberman-McCain (cont.)

### ■ Relation To Kyoto, Or Its Successor; International Cooperation?

- Up to 30% of an entity’s allowances can be from another nation’s EPA-approved GHG emissions market.
- Section 145 has an international credits program for projects in developing countries.

### ■ Effect On State Or Other Federal Laws

- Does not treat relation to state laws.
- Does not amend the Clean Air Act directly.

### ■ Corresponding House Bill?

- H.R. 620 – Olver (101 co-sponsors), “The Climate Stewardship Act of 2007”

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## The Federal Legislative “Climate” S.317 – Feinstein-Carper “Electric Utility Cap and Trade Act of 2007”

### ■ Goals; Outcomes

- Get U. S. GHG emissions to the “safe climate level,” described as the level “that would prevent dangerous anthropogenic interference with the climate system,” to be set by EPA on recommendation from a new “Climate Science Advisory Panel.”

### ■ What is Regulated?

- Listed GHG emissions: CO<sub>2</sub>, NO<sub>x</sub>, methane and the three fluorocarbons.

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## The Federal Legislative “Climate” S.317 – Feinstein-Carper (cont.)

### ■ Who is regulated?

- Generators of electricity for sale, with any unit > 25 MW capacity.
- Broad “offset credit” program, mainly for agricultural practices.
- Not applicable to vehicles or other industrial GHG emissions.

### ■ Regulatory Mechanisms

- Auction and allocation of GHG emission allowances: begins in 2011 with 15% auction/85% allocation; swings so by 2036 it is 100% auction
- No allowances to new coal-fired unit unless it uses “qualifying advanced clean coal technology” (to be defined)

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## The Federal Legislative “Climate” S.317 – Feinstein-Carper (cont.)

- Regulatory Mechanisms (cont.)
  - Phase-down of GHG emissions: in 2011-2014 at 2006 levels; in 2015 at 2001 levels; in 2016-2019, 1% reduction from prior year; in 2020 and on, 1.5% less than each prior year – subject to adjustment by EPA after 2015 based on the Advisory Panel’s views.
- Timelines and milestones
  - In 2011, emit at 2006 levels; in 2015, at 2001 levels; in 2016-2019 – reducing 1% per year; in 2020 and on – reducing 1 1/2% per year.
- Renewable Portfolio Standard (RPS)? None.
- Direct Link To SEC Reporting? None.

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## The Federal Legislative “Climate” S.317 – Feinstein-Carper (cont.)

- Relation To New Source Review (NSR) Under Clean Air Act?
  - None. Last year Senator Carper’s bill would have created a cap and trade program for electric utility NO<sub>x</sub>, CO<sub>2</sub>E, and mercury. No mercury provisions now.
- Relation To Kyoto, or Its Successor; International Cooperation?
  - Can use foreign reductions as credits if under national mandatory program, or certified per Kyoto standards (new CAA § 719)
- Effect On State Or Other Federal Laws
  - Does not treat relation to state laws.
  - Adds Title VII to the CAA; balance of air permitting left intact.

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## The Federal Legislative “Climate” S.317 – Feinstein-Carper (cont.)

- Recognize Reductions Made Prior To Effective Date Of New Law?
  - New CAA § 718 – accounts for emissions reductions (or sequestration) between 2001 and 2010, including under DOE’s voluntary program.
- Incentives, Subsidies, Bells and Whistles?
  - Climate Action Trust Fund spends allowance auction income on mitigation (wildlife and natural systems, and worker adjustment assistance), as well as on technology development.

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## The Big Picture – The Kyoto Protocol and Beyond

- The Kyoto Protocol, and beyond
  - The 1997 Byrd-Hagel Resolution (S. Res. 98)
    - 95-0 – U. S. should not sign any treaty that: mandates GHGE limits for developed countries but not for “developing” countries; and “would result in serious harm to the [U.S.] economy
    - The “95” who endorsed that position include 26 Democrats and 29 Republicans still in the Senate
  - Neither President Clinton nor Bush sought Senate ratification of Kyoto
  - The “Asia-Pacific Partnership” – Administration initiative regarding a post-Kyoto GHGE regime for China and India.

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## The Big Picture – The Kyoto Protocol and Beyond (cont.)

- “The Good, the Bad, and the Ugly” of Kyoto
  - European regulatory platform and business experience with:
    - emissions monitoring and reduction programs, and verification mechanisms for sinks, sequestration and other mitigation and offset projects;
    - a robust allowance trading, pricing and compliance regime (\$9.44 bb market in 2005, involving 362 mm tons of carbon emissions and offsets)
  - Electricity rate shock, and threatened relocation of energy-intensive industry
  - EU bureaucracy evaluating country allowance allocations and emission reduction programs; inter-country competition and EU enforcement issues

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## The Big Picture The Kyoto Protocol and Beyond (cont.)

- After 2012, what?
  - Post-Kyoto was on the agenda at the most recent (2006) Conference of Parties (COP)
  - Everyone recognizes that China and India must be a part of any effective, longer-term program – China will pass U.S. as largest GHG emitter in 2009 or before
  - The United States is not a party, so is not directly involved in the COP's, but the Asian-Pacific Partnership has the U. S. in the global negotiations for the post-Kyoto regime
  - Will U. S. domestic law and the consensus for post-Kyoto international agreements converge at all?

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# Filling the Gap - Litigation and Other Challenges Absent Greenhouse Gas Regulation

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## Filling the Gap

- Several “Groups” Targeting Climate Change
  - Citizen Groups (Sierra Club, NRDC) –
    - Primary target is coal-fired generation
  - States
    - EPA rulemakings, Midwest Utilities
- Primarily Through Litigation
  - Clean Air Act
  - Clean Water Act
  - Endangered Species Act
  - Public Nuisance Claims
  - Energy Policy and Conservation Act
- Other Initiatives

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## Clean Air Act Litigation

- Does the Clean Air Act grant U.S. EPA the authority to regulate CO<sub>2</sub> as a “pollutant”?
  - *Massachusetts v. EPA*, No. 05-1120, 549 U.S. \_\_\_\_ (April 2, 2007)
    - In a 5-4 decision, U.S. Supreme Court held EPA has the authority to regulate CO<sub>2</sub> emissions as a “pollutant” under the Clean Air Act
    - Suit brought by several states, cities and environmental groups
    - Challenge to U.S. EPA’s position that the agency did not have authority to regulate CO<sub>2</sub> from vehicle tailpipes and, even if it did, its duty to regulate was discretionary

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## Clean Air Act Litigation

- *Massachusetts v. EPA*, No. 05-1120, 549 U.S. \_\_\_\_ (April 2, 2007) (cont.)
  - Court – “Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”
  - Issue of standing – legitimizes the science and causal connection to global warming

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## Clean Air Act Litigation

- *New York v. EPA*, No. 06-1148 (D.C. Cir. Filed April 27, 2006); *Coke Oven Environmental Task Force v. EPA*, 06-1322 (D.C. Cir. Filed April 27, 2006)
  - Ten states, two cities and multiple environmental and industry groups filed suit challenging U.S. EPA's failure to include limits on CO<sub>2</sub> emissions from new electric generating and industrial facilities in NSPS regulations
  - CO<sub>2</sub> issue on hold pending outcome of *Massachusetts v. EPA*

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## Other Claims

- “GHG” Litigation is also proceeding under the Energy Policy and Conservation Act, the National Environmental Policy Act (“NEPA”), theories of preemption and the Endangered Species Act

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## Other Claims

- Energy Policy and Conservation Act
  - Focus of statute – energy efficiency of motor vehicles, appliances and consumer products, fuel economy
- Preemption of State Law
  - Generally, federal Clean Air Act preempts state law on vehicle emission regulation
  - One Exception – California can regulate if the state obtains a waiver 42 U.S.C. § 7543(a), (b)

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## Other Claims

- *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Crombie*, No. 05-cv-302 (D.Vt.)
  - Automakers challenging Vermont GHG emission standards for cars, SUVs
  - Challengers argue EPCA is controlling law, Vermont law preempted by federal fuel economy standards
  - Currently in trial

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## Other Claims

- *Central Valley Chrysler-Jeep v. Witherspoon*, CV-F-04-6663 (E.D. Cal.)
  - Automobile dealerships challenge to California law limiting GHG emissions from new vehicles sold in California
  - Plaintiffs argued state law preempted by Clean Air Act, EPCA and foreign policy
  - Postponed pending *Massachusetts v. EPA*
  - Outcome relevant outside California

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## Other Claims

- *California v. General Motors*, Case No. 3:06-CV-05775 (N.D. Cal. 2006)
  - California brought suit against automobile manufacturers for GHG emissions under federal and California common law of public nuisance theory
  - Manufacturer's moved to dismiss on basis that Clean Air Act, EPCA and foreign policy preempted federal common law

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## Other Claims

- National Environmental Policy Act
  - *Border Power Plant Working Group v. Dept. of Energy*, 260 F.Supp.2d 997 (S.D. Cal. 2003)
    - Environmental groups challenged Department of Energy’s approval of transmission lines connecting new Mexican power plants to California power grid
    - Argued DOE should have consider plant’s emissions in Environmental Assessment and finding of “No Significant Impact”
    - Court agreed with the environmental groups

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## Other Claims

- *Center for Biological Diversity v. NHTSA*, No. 06-71891 (9th Cir.)
  - Various environmental groups, states and cities are suing U.S. EPA for failing to prepare an Environmental Impact Statement on revised Corporate Average Fuel Economy (“CAFE”) standards, failure to comply with EPCA

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## Other Claims

- Endangered Species Act
  - The Center for Biological Diversity petitioned US Fish and Wildlife Service to list the polar bear in February 2005
  - US Fish and Wildlife Service failed to respond, petitioners bring suit
  - On January 9, 2007, US Fish and Wildlife Service proposed to list the polar bear as a threatened species, due in part on the observed reduction in sea ice

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## Non-Litigation Efforts

- Permit Challenges
  - Citizen groups challenging new coal-fired generation nationally, including:
    - Wisconsin
    - Illinois
    - Missouri
  - Kansas City Power & Light and Springfield City Utilities both settled to avoid permit challenge
- Shareholder Initiatives

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## Non-Litigation Efforts

### ■ TXU Buyout

- Buyers worked with NRDC and Environmental Defense
- TXU abandoned plans to build 11 coal-fired plants in Texas as contingency to \$45 B buyout deal
- Agreed to reduce emissions to 1990 levels by 2020
- Agreed to terminate plans to build new coal capacity in Pennsylvania, Virginia
- Endorse mandatory caps on CO<sub>2</sub> emissions
- Reduce SO<sub>2</sub>, NO<sub>x</sub> emission at all Texas plants by 20%

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## Questions & Answers

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