



Environmental Law Update

WEB CONFERENCE SERIES

Climate Debates Finally Producing Regulatory Action

Thursday, June 19, 2008
11:30 a.m. – 12:30 p.m. CST



©2008 Foley & Lardner LLP • 321 N. Clark Street, Suite 2800, Chicago, IL 60610 • 312.832.4500 • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not actual clients but are representative of clients • 08-4454



Welcome & Introductions



©2008 Foley & Lardner LLP



Introductions



Bruce A. Keyes

Bruce A. Keyes is a partner with Foley & Lardner LLP. He is a member of the firm's Environmental Regulation and Real Estate Practices and Golf & Resort Industry Team. Mr. Keyes divides his time between Brownfield remediation/redevelopment, sustainable development initiatives, environmental compliance counseling, transactions and environmental litigation.



©2008 Foley & Lardner LLP



Housekeeping Issues

- Call **866.493.2825** for technology assistance
- Dial ***0** (star/zero) for audio assistance
- Ample time for live Q & A will be allotted at the end of the formal presentation
- We encourage you to Maximize the PowerPoint to Full Screen Usage:
 - Hit F5 on your keyboard; or
 - Select “View” from the toolbar menu and click “Full Screen”



©2008 Foley & Lardner LLP



Massachusetts v. EPA and EPA's Response



Richard G. Stoll

Richard G. Stoll is a partner in Foley & Lardner's Washington, D.C. office. He is a member of the firm's Environmental Practice, and concentrates on federal administrative and environmental law matters.



©2008 Foley & Lardner LLP



GHG – Regulatory Update: Will EPA's Regulatory "Wall" Against CO₂ Regulation Fall?



Mark A. Thimke

Mark A. Thimke is a partner with Foley & Lardner LLP. He is a member of the firm's Environmental Regulation and White Collar Defense & Corporate Compliance Practices and the Energy Industry Team.



©2008 Foley & Lardner LLP



EPA to Require Mandatory GHG Emissions Reporting



Julie S. Solmer Stine

Julie Solmer Stine is an associate at Foley & Lardner LLP. She is a member of the firm's Environmental Regulation Practice. Prior to joining Foley, Ms. Solmer Stine worked as an environmental compliance coordinator in the automotive industry, where she ensured facility compliance with EPA, OSHA, and DOT regulations; implemented environmental management systems; and obtained ISO 14001 certification.

©2008 Foley & Lardner LLP



California Greenhouse Gas Initiatives



Elizabeth A. Cason

Elizabeth A. Cason is an associate at Foley & Lardner LLP and a member of the firm's Environmental Regulation Practice. Ms. Cason's experience includes land use, real estate, and litigation matters and more specifically, matters arising under the California Environmental Quality Act and before the California Coastal Commission.

©2008 Foley & Lardner LLP





Greenhouse Gas 101: An Introduction

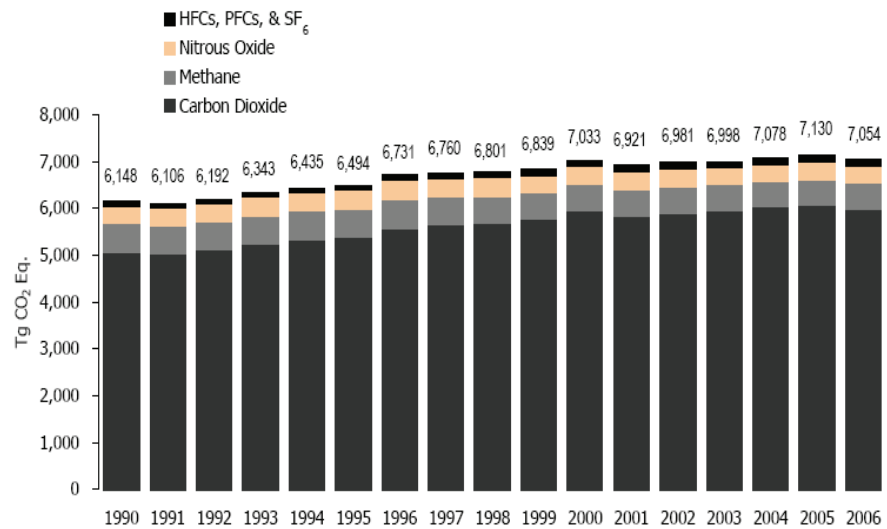
Bruce A. Keyes



©2008 Foley & Lardner LLP



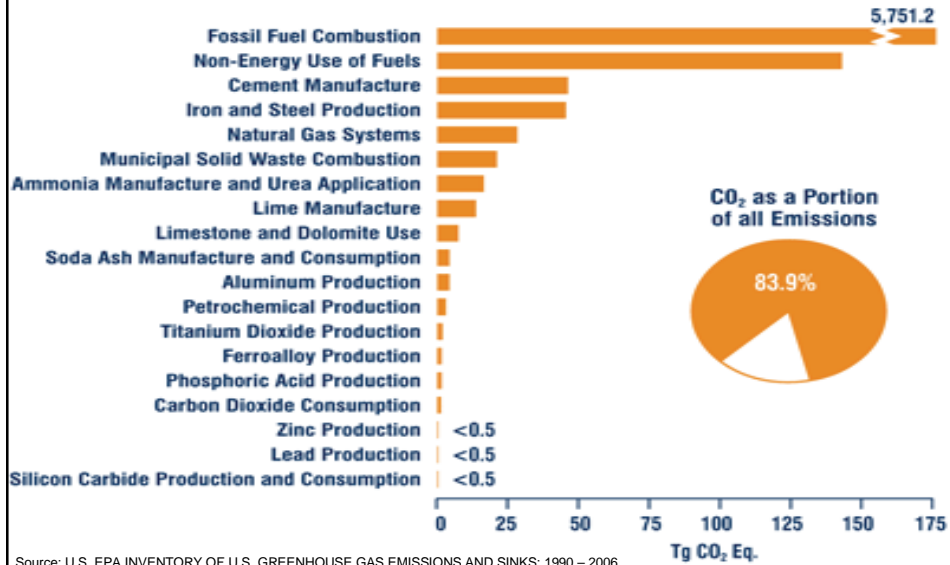
U.S. GHG Emissions by Gas



Source: U.S. EPA INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990 – 2006



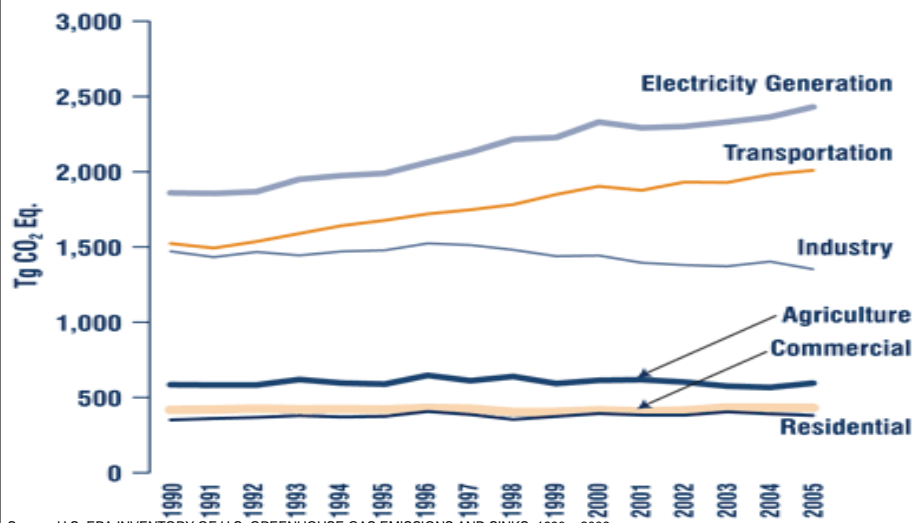
2005 Sources of CO₂



Source: U.S. EPA INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990 – 2006



Emissions Allocated to Economic Sectors

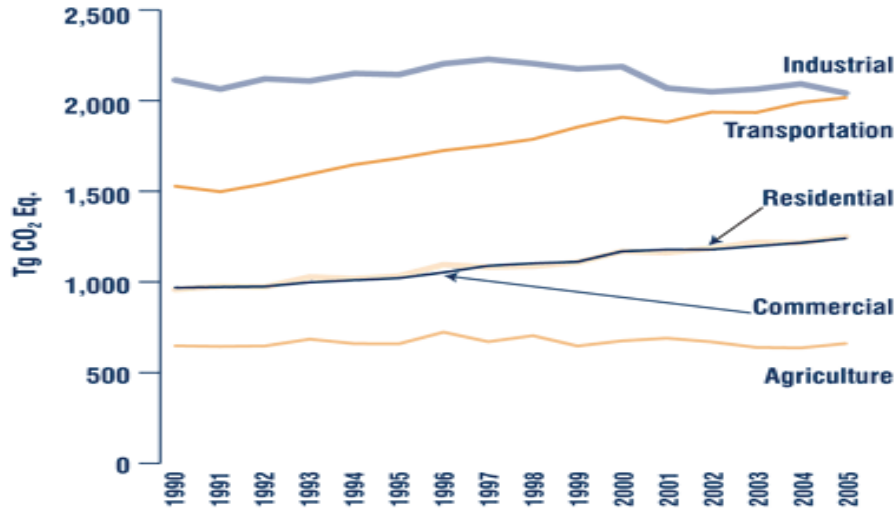


Source: U.S. EPA INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990 – 2006

Note: Does not include U.S. territories.



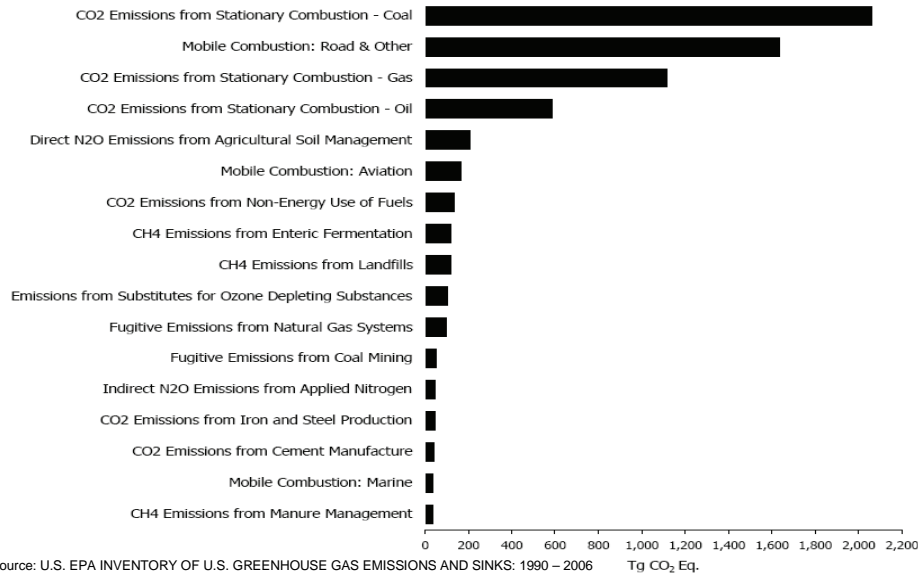
Emissions with Electricity Distributed to Economic Sectors



Note: Does not include U.S. territories.
Source: U.S. EPA INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990 – 2006



U.S Greenhouse Gas Emissions by Key Categories



Source: U.S. EPA INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990 – 2006



Climate Change

- Voluntary and Regional efforts in U.S. to date
 - Kyoto Protocol
 - Regional Greenhouse Gas Initiative (RGGI)
 - The Climate Registry
 - Western Regional Climate Action Initiative
 - Midwestern Greenhouse Gas Reduction Accord
 - California Climate Action Registry
- Proposed federal legislation
 - Cap and Trade Programs
 - Measurement/verification are critical

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Multiple types of “Carbon Credits”

- Certified Emission Reductions (CERs)
 - 1 metric ton of CO₂e (Kyoto – Compliance)
- Verified Emission Reductions (VERs)
 - 1 metric ton of CO₂e (Global – Voluntary)
- Renewable Energy Certificates (RECs, “green tags”)
 - 1 MWh renewable energy production
- Energy Efficiency Certificates (“white tags”)
 - 1 MWh energy production avoided

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Massachusetts v. EPA and EPA's Response

Richard A. Stoll



©2008 Foley & Lardner LLP



Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

- U.S. Supreme Court April 2, 2007
- 5-4 opinion
- Forcing EPA action on climate under Clean Air Act (CAA)
- Public confusion on Court's holdings



©2008 Foley & Lardner LLP



Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

Background:

- 1997 — Senate disapproves Kyoto Protocol (concerns over failure to cover India and China)
- 1997-2000 — Clinton EPA (under Carol Browner) under increasing pressure to use CAA for climate, and appears favorably inclined
- 1998 — EPA General Counsel issues opinion holding CAA authorizes EPA to regulate GHG for climate
- 1999 — Group of 19 files rulemaking petition with EPA to take CAA regulatory action (states, NGOs)

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

- Petitioners sought GHG rules under CAA §202 for new motor vehicles
- Last week of Clinton/Browner Administration (January 2001), EPA publishes notice seeking comment on petition

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

- Bush climate approach dramatically different than Clinton/Browner
- 2003 — EPA denies petition:
 - a. reversing opinion of Clinton/Browner EPA General Counsel, finds that CAA does not authorize EPA to regulate GHG for climate
 - b. rules that even if such authority existed, would be inappropriate to utilize at this time
- 2005 — D.C. Circuit upholds (2-1) EPA's petition denial



©2008 Foley & Lardner LLP



Supreme Court's 5-4 Opinion

- Reverses D.C. Circuit
- Two basic holdings:
 1. EPA erred in concluding CAA does not authorize GHG regulation for climate. Plain language of statute proves EPA wrong.
 2. Because CAA requires §202 rulemaking if EPA finds that GHGs "endanger" health/welfare (including contributing to global warming) EPA must explain on the record whether EPA finds "endangerment."



©2008 Foley & Lardner LLP



Supreme Court's 5-4 Opinion

Important to recognize what Supreme Court did NOT say:

- Court established no deadlines for EPA to act.
- Court did not require EPA to make an "endangerment" finding. EPA must simply find one way or the other, and explain basis on the record.



©2008 Foley & Lardner LLP



EPA's Response to Supreme Court

- Summer 2007, began work on proposed rule under CAA §202 based on assumed finding of endangerment.
- Political leadership in EPA/White House/OMB became increasingly concerned about implications of endangerment finding triggering other CAA obligations, impacts on economy.
- Also believed that new legislation is needed to deal with climate; CAA not an appropriate framework.
- March 2008, EPA announced intent to issue Advance Notice of Proposed Rulemaking (ANPR) by end of June 2008.



©2008 Foley & Lardner LLP



EPA's Response to Supreme Court

- ANPR to provide framework for EPA's decision on endangerment.
- ANPR to discuss and solicit comments on approaches to GHG regulation, and attempt to tie together other CAA provisions where "endangerment" finding could trigger new controls (ambient standards, NSPS, MACT, PSD/NSR, additional motor vehicle controls).
- Critics view ANPR as major stall. Virtually guarantees no CAA climate regulation for several years.
- EPA appears to be placing all GHG eggs in the ANPR basket. Recent example: deferral of GHG considerations to the ANPR process in newly-proposed Portland cement kiln NSPS. 73 FR 34072, 34082, June 16, 2008.



©2008 Foley & Lardner LLP



Mandamus Proceedings in D.C. Circuit

- April 2008, Massachusetts and co-petitioners filed mandamus petition in D.C. Circuit. (D.C. Cir. #03-1361.)
- Seek order compelling EPA to make endangerment finding within 60 days.
- EPA defending based on no deadline in Supreme Court opinion and favorable case law on "reasonable time" for agency action; enormous socio-economic implications need to be thoroughly vetted through ANPR process.
- All papers on petition have been filed; Court could issue decision any day.



©2008 Foley & Lardner LLP



GHG – Regulatory Update: Will EPA’s Regulatory “Wall” Against CO₂ Regulation Fall?

Mark A. Thimke



©2008 Foley & Lardner LLP



Background Post - *Massachusetts v. EPA* Developments

- 2007 – EPA Changing Positions
 - September 2007 Clean Air Task Force – CO₂ new source review rule forthcoming
 - Fall 2007 – Nakayama (OECA) confirms CO₂ new source review rule development
 - Administrator Johnson Congressional testimony, November 2007 – backs away from CO₂ new source review rule
 - Denial of California waiver, December 2007 – no CO₂ new source review rule
- 2008 – Notice of Preliminary Rulemaking for CO₂



©2008 Foley & Lardner LLP



Reaction to EPA “Inaction”

- ENGOs – pursuing air permit challenges based on CO₂ to force regulation
 - Christian County Generation, LLC
 - Deseret Power Electric Coop.
- States – Active – ranging from “Cap & Trade” to rejecting air permits based on CO₂
- Companies – “voluntary” response to offset CO₂ to address State/ENGOs



©2008 Foley & Lardner LLP



Deseret Power Electric Coop: ENGO Challenge

- Background – Coal fired power plant air permit appeal
- EPA Region 8 approved permit and denied ENGO objections
- ENGOs challenged lack of BACT for CO₂



©2008 Foley & Lardner LLP



Deseret Power: Legal Background CAA Title I – BACT Implications

- CAA Section 7475(a) – “[n]o construction of a major source unless”
- CAA Section 7475(a)(4) – “[t]he proposed facility is subject to best available control technology for each pollutant **subject to regulation** under this Act”
- Key aspect – is CO₂ “subject to regulation” after *Massachusetts v. U.S. EPA* decision?
- **Note** – if CO₂ subject to regulation, BACT de minimis is zero unless U.S. EPA rulemaking sets different level

©2008 Foley & Lardner LLP



Deseret Power Cooperative Key Issues for EAB (1)

- Key term “subject to regulation under the Act”
- Significant reliance on 1993 “Wegman Memo” – Definition of Regulated Air Pollutant for Purpose of Title V
 - Wegman Memo addresses Title V; U.S. EPA asserts it applies to Title I
 - Describes categories of regulated air pollutants
 - Does not set forth a rationale for categories

©2008 Foley & Lardner LLP





Key Issues for EAB (2)

- U.S. EPA – “subject to regulation” requires “actual control of emissions” based on Wegman Memo
- Position reiterated in EPA General Counsel memo (April 10, 1998)
- U.S. EPA – *Kawaihae Cogeneration Project*, 7EAD 107,13 (EAB 1997) (summary dismissal of CO₂ challenge)



©2008 Foley & Lardner LLP



Key Issues for EAB (3)

- ENGOs – *Massachusetts v. EPA* implies CO₂ is “subject to regulation”
- ENGOs – acid rain program monitoring reporting of CO₂ under Section 821 of 1990 CAA Amendments means CO₂ “subject to regulation”



©2008 Foley & Lardner LLP



State Activities on CO₂ (1)

- Kansas denial of Sunflower power plant permit
 - Kansas air program recommended approval of air permit
 - Agency director obtained AG opinion that health and adverse environmental effects could be considered in reviewing permit
 - October 18, 2007 – Denied permit based on lack of CO₂ limits
 - Spring 2008 – Legislative effort to override denial – not successful

©2008 Foley & Lardner LLP



State Activities on CO₂ (2)

- Minnesota – Big Stone II Power Plant
 - Proposed plant in North Dakota with transmission lines into Minnesota
 - Minnesota PUC involved over transmission line and service to Minnesota customers
 - PUC considering requiring CO₂ offsets for new power plant

©2008 Foley & Lardner LLP





State Cap and Trade

- Three major initiatives – WCI; RGGI and MGA
- All based on similar legal model
- Scope of program (utilities only or broader) may differ but all limit CO₂

©2008 Foley & Lardner LLP



Companies Activity

- Duke Power – Cliffside unit; air permit requires Carbon neutral by 2018
http://www.ncair.org/permits/psd/docs/cliffside/Final_Permit-Final_Determ_App_A.pdf
- Alliant Energy (Wisconsin Power and Light) – voluntary commitment to “offset” CO₂ emissions from proposal plant

©2008 Foley & Lardner LLP





EPA to Require Mandatory GHG Emissions Reporting

Julie S. Solmer Stine

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



EPA GHG Reporting Rule

- Congressional directive buried in 2008 Appropriations Act
- EPA to require mandatory reporting of GHG emissions in all sectors of the economy
- Could affect tens of thousands of sources
- Few were aware provision was even under consideration
- Sponsored by Senators Feinstein and Boxer (both D-California)

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Current Law

- Only steam-generating electric utilities are required to report at federal level
 - CAA Title IV
- Voluntary 1605(b) GHG reporting program administered by U.S. DOE
 - Only 417 facilities have reported

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Objective

- To collect comprehensive and accurate data relevant to future climate policy decisions
- First step necessary to establishing national cap and trade regime – will provide baseline data

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Appropriations Language

- Requires EPA to promulgate rule “to require *mandatory reporting* of greenhouse gas emissions above appropriate thresholds *in all sectors of the economy* of the United States.” H.R. 2764-285 (2007).
- Include reporting of emissions “resulting from upstream production and downstream sources” 153 Cong. Rec. H16131 (Dec. 17, 2007).

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Appropriations Language

- Proposed rule by September 2008
- Final rule by June 2009
- Provides \$3.5 million in funding

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Legal Authority

- EPA to use existing authority under Clean Air Act
 - Sections 114 and 208 allow for data collection and measurement and recordkeeping from stationary or mobile related sources
 - Section 113 provides for civil penalties of \$32,500 per day for failure to file reports, plus criminal penalties for knowing failure

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Scope of Coverage

- Greenhouse gases
 - CO₂, CH₄, N₂O, HFC, PFC, SF₆
- Upstream sources
 - Fossil fuel and chemical producers and importers
- Downstream sources
 - Direct emitters – industrial facilities

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Areas of Flexibility

- Appropriate reporting thresholds
- Frequency of reporting
- Methods of reporting
 - Discretion to use existing reporting requirements for electric generating units
 - Level of detail in reports
 - Emission measurement techniques
 - Types of recordkeeping
 - Whether CEMS must be utilized

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



June 2008 Status

- EPA work group, team of technical staff
- Public outreach – meetings with over 100 stakeholder groups
- States – overlap/consistency issues
- Other agencies – DOE, USDA
- Putting together option selection document
- Need consensus within agency
- September 2008 proposed rule deadline

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



California Greenhouse Gas Initiatives

Elizabeth A. Cason



©2008 Foley & Lardner LLP



AB32, California Global Warming Solutions Act of 2006

- AB32 requires the California Air Resources Board (CARB) to:
 - Establish a statewide greenhouse gas (GHG) emissions cap for 2020, based on 1990 emissions (adopted December 6, 2007)
 - Adopt mandatory reporting rules for significant sources of GHGs
 - Adopt a list of discrete, early action measures that can be implemented before January 1, 2010, and adopt such measures
 - Adopt a plan by January 1, 2009 indicating how emission reductions will be achieved from significant greenhouse gas sources via regulations, market mechanisms and other actions (Scoping Plan)
 - Adopt regulations by January 1, 2011 to achieve the maximum technologically feasible and cost-effective reductions in greenhouse gases, using both market mechanisms and alternative compliance mechanisms.
 - Convene an environmental justice advisory committee and an economic and technology advancement advisory committee
 - Ensure public notice and opportunity for comment



©2008 Foley & Lardner LLP



CARB Obligations

- Prior to imposing any mandates or authorizing market mechanisms, AB32 requires CARB to evaluate several factors, including but not limited to:
 - Impacts on California's economy, the environment, and public health
 - Equity between regulated entities
 - Electricity reliability
 - Conformance with other environmental laws
 - Ensure that the rules do not disproportionately impact low-income communities

©2008 Foley & Lardner LLP



First Step: Scoping Plan

- AB32 requires CARB to develop a Plan to:
- Achieve maximum technologically feasible and cost-effective reductions in greenhouse gases by 2020
 - CARB to approve the plan no later than January 1, 2009
 - Draft Plan anticipated June 26, 2008

©2008 Foley & Lardner LLP





Sources of potential greenhouse gas reductions

- Vehicles and fuels
- Forestry
- Smart land use/improved transportation
- Utility energy efficiency programs
- Renewable portfolio standards
- Waste management
- Building and appliance standards

©2008 Foley & Lardner LLP



Proposed Early Action Measures Include:

- Green ports
- Reduction of high global warming potential-greenhouse gases used in consumer products
- Low carbon fuel standard
- Improved landfill gas capture
- Tire inflation program
- Manure management
- Cool automobile paints
- Electrification of stationary agricultural engines
- Energy efficiency of cement facilities

©2008 Foley & Lardner LLP





Mandatory Reporting Requirements

- Facility-based reporting: Cement plants, power plants, cogeneration, refineries, hydrogen plants, large combustion
- Broader requirements for electric power sector, both retail providers and marketers
- Third party verification: annual or triennial as specified
- Must report specified stationary combustion practices, process, fugitive emissions
- Report to also include fuel use, indirect energy use

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Mandatory Reporting Approach

- Phase-in
- Sufficient third party verifiers
- De minimis emissions
- Mobile sources

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Phase-In

- Reporting begins in 2009
- Verification begins in 2010
- First reports can use best available emissions information
- 2010 and future reports must use methods specified in regulation

©2008 Foley & Lardner LLP



Sufficient Verifiers

- Welcome air districts and private consultants to act as verifiers
- Provides larger pool of qualified verifiers
- Provides choice to operators
- Third-party verifiers are consistent with existing greenhouse gas programs

©2008 Foley & Lardner LLP





De Minimis Sources

- Proposal allows designation of small discrete sources as de minimis
- Emissions are still reported but may be estimated through simpler methods

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Mobile Sources

- Reporting is optional at facility level
- Expected for optional entity reporting
- Will look at mobile source reporting needs in context of scoping plan

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Reporting Process

- Reporting: operator submits required data to CARB each year by reporting deadline
- Verification: verification team conducts verification when required and submits:
 - Detailed verification report to operator
 - Verification opinion to operator and CARB by verification deadline
- Reporting not required for backup or emergency generators, portable equipment

©2008 Foley & Lardner LLP



AB1493

- 2002 law to force automakers to redesign vehicles to get dramatically better mileage, starting with the 2009 model year
- On December 19, 2007, US EPA denied California's request for the necessary waiver to implement its law, saying local emissions had little effect on global warming, and that the conditions in California were not "compelling and extraordinary" as required by law

©2008 Foley & Lardner LLP





AB1493 (Continued)

- In January, 2008, California sued the federal government to force reconsideration, given the precedent of *Massachusetts v. EPA*. Suit is currently pending in the 9th Circuit Court of Appeals
- Fifteen states (all interested in adopting California's automobile emissions standards) and 5 environmental organizations joined the lawsuit
- If California loses its suit against EPA, officials would be required under AB 32 to find 14.5 million tons of transportation emissions cuts through other means – such as getting consumers to shift to smaller vehicles or simply drive less
- S. 2806/Greenhouse Gas Endangerment Finding Deadline and California Waiver Reconsideration Act: Senators Feinstein and Snowe introduced legislation to require the EPA Administrator to reconsider the waiver decision, and to complete further proceedings in accordance with the *Massachusetts v. EPA* decision



©2008 Foley & Lardner LLP



Questions & Answers



©2008 Foley & Lardner LLP



Upcoming Web Conferences

- Please mark your calendars for the remaining session of the 2008 Environmental Law Update Web Conference Series
– **September 18, 2008**



©2008 Foley & Lardner LLP



Contact Us

- **Bruce A. Keyes**
Milwaukee, WI
(414) 297-5815
bkeyes@foley.com
- **Julie S. Solmer Stine**
Milwaukee, WI
(414) 319-7311
jstine@foley.com
- **Richard G. Stoll**
Washington, DC
(202) 295-4021
rstoll@foley.com
- **Elizabeth A. Cason**
San Diego, CA
(619) 685-4634
ecason@foley.com
- **Mark A. Thimke**
Milwaukee, WI
(414) 297-5832
mthimke@foley.com



©2008 Foley & Lardner LLP



Thank You!

- A copy of the PowerPoint presentation and a multimedia recording will be available on our website within 24 to 48 hours:

http://www.foley.com/news/event_detail.aspx?eventid=2249

- We welcome your feedback. Please take a few moments before you leave the web conference today to provide us with your feedback:

<http://www.zoomerang.com/Survey/?p=WEB227XR63KNWC>



©2008 Foley & Lardner LLP