



# “Hot Air” – Preparing for Greenhouse Gas Regulation

Environmental Focus 2007  
Louisiana Section A&WMA  
October 29, 2007

Greg L. Johnson  
**LISKOW&LEWIS**

# *Overview*

- GHG Litigation
- New Source Review for Carbon Emissions
- California Waiver
- Regional Initiatives
- International Issues
- U.S. Proposed Legislation



# Greenhouse Gas Litigation

- *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007)
  - Background:
    - Organizations petitioned EPA to regulate GHGs in motor vehicle emissions under CAA § 202.
    - EPA determined that it lacked authority to regulate GHGs because not “pollutants.”
    - Even if it had authority, EPA declined to regulate CO<sub>2</sub> in relation to global warming for policy reasons.

# Greenhouse Gas Litigation

- *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007)
  - S. Ct. decision (5-4) issued April 2, 2007:
    - CO<sub>2</sub> and other GHG are “pollutants” under CAA.
    - EPA’s policy justifications for inaction not reasonable.
    - Remand back to EPA. EPA must ground its reasons for action or inaction in the statute.

# Greenhouse Gas Litigation

- Implications of *Massachusetts v. EPA*
  - “Endangerment standard”:
    - EPA must now determine whether GHGs “may reasonably be anticipated to endanger public health or welfare.”
  - Definition of “pollutant” is applicable to entire CAA:
    - GHG regulation can apply to stationary sources.

# Greenhouse Gas Litigation

- Implications of *Massachusetts v. EPA*
  - Example:
    - Kansas DHE denied an air permit for a proposed coal fired plant on basis that CO<sub>2</sub> emissions present “a substantial endangerment.” (Oct. 2007).
    - Kansas statute provides authority for DHE to take necessary action upon receipt of information that air pollution presents “substantial endangerment.”
    - DHE relied on *Massachusetts v. EPA* to establish CO<sub>2</sub> as a pollutant.

# Greenhouse Gas Litigation

- EPA reaction to *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007)
  - EPA recently pledged to propose mobile source GHG regulations by the end of 2007.
  - Final rules to be completed in 2008.



# Greenhouse Gas Litigation

- *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Crombie*, D.Vt., No.05-cv-302, 9/12/07
  - Background:
    - Vermont adopted California's GHG regulations for new motor vehicles.
    - Auto industry claimed GHG regulations are actually fuel economy standards that conflict with federal law.
    - Auto industry claimed detrimental effect on industry.

# Greenhouse Gas Litigation

- *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Crombie*
  - Federal Court Decision
    - Vermont GHG regulations sufficiently unrelated to fuel economy standards – NOT preempted by Energy Policy and Conservation Act of 1975.
    - No catastrophic effect for auto industry.

# Greenhouse Gas Litigation

- Implications of *Green Mountain Chrysler-Plymouth-Dodge-Jeep*
  - Auto industry may appeal.
  - Similar case underway in California:
    - *Central Valley Chrysler Jeep v. Witherspoon* – E.D. Cal. (hearing scheduled in late October).
- VT, NY, NJ, MA, CT, ME, RI, PA, MD, WA, OR also adopting California standards.

# Greenhouse Gas Litigation

- Public Nuisance Claims
  - *New York v. TVA, et al.*, 05-5104, 2<sup>nd</sup> Cir.: Alleges companies creating public nuisance w/their GHG emissions. Dismissed by district court. Appealed to 2<sup>nd</sup> Circuit. Oral arguments held in June 2007.
  - *California v. GM*, 3:06-cv-5755, N.D. Cal.: State seeking financial payments from “Big Six” auto cos. Dismissed by district court. Appealed to 9<sup>th</sup> Circuit.
  - *Comer v. Murphy Oil*, 1:05-cv-436-LG-RHW, S.D. Miss.: Hurricane Katrina victims alleged GHG emissions strengthened storm. Dismissed by district court on Aug. 30, 2007.
  - *Korinsky v. EPA*, 1:05-cv-859-NRB, S.D. NY: Resident sued EPA, NY state and NYC for creating public nuisance with GHG emissions. Dismissed by district court for lack of standing. Appealed to 2<sup>nd</sup> Circuit.

# Greenhouse Gas Litigation

- Other
  - *FOE v. Mosbacher*, 02-4106, N.D. Cal.: Alleges NEPA violations by agencies due to failure to assess GHG emissions in energy-intensive projects. Pending. Govt's motion to dismiss denied Feb. 2007.
  - *New York v. EPA*, 06-1148, D.C. Cir.: Alleges EPA failed to regulate CO<sub>2</sub> from new coal-fired power plants and industrial boilers. Remand to EPA expected.
  - *Montana Env'tl. Info. Center v. EPA*, 06-1059, D.C. Cir.: Settled. EPA repealed letter stating that power plant builders need not consider construction of a coal gasification plant.
  - *CBD v. Brennan*, 4:06-cv-7062-SBA, N.D. Cal.: Ct. ordered Govt to publish a new draft climate research plan by March 1, 2008 and a new scientific assessment by May 31, 2008.

# New Source Review for GHG Emissions

- EPA proposed rule planned for end of 2007.
- Set threshold for GHG emissions that will trigger NSR.
- To be issued with proposed GHG rule for mobile sources.
- EPA not yet decided if NSR applies.
- Once EPA regulates mobile source GHGs as pollutants, *any* emission of GHG from a stationary source could trigger NSR unless threshold level is set.
- Even a 100 tpy or 250 tpy threshold would be burdensome on industry and agencies.
  - Typical threshold levels for increases: 25 tpy or 40 tpy.
  - Typical GHG emissions for a furnace or boiler in a commercial building: 250 tpy.

# California Waiver

- California law imposes more stringent GHG controls on motor vehicles.
  - Cut emissions from cars/light trucks by 25% and from SUVs by 18% starting with 2009 models.
- Under CAA, a state may enact its own motor vehicle emissions regulations so long as it receives permission from EPA. *See* CAA § 209.
- Other states can follow federal or waiver-approved California standards.
- EPA is obligated to provide the waiver unless:
  - State determination is arbitrary and capricious;
  - State does not need the standards to meet extraordinary circumstances; or
  - State standards are not consistent with federal standards.

# California Waiver

- California submitted waiver request in 2005.
- Public comment process completed June 2007.
- EPA received > 60,000 comments.
- Gov. Schwarzenegger threatened suit to compel delayed agency action.
- EPA committed to issuing decision by end of 2007.
- Other states adopting California standards: VT, NY, NJ, MA, CT, ME, RI, PA, MD, WA, OR.



# Regional Initiatives

- The Climate Registry
  - A common GHG reporting system.
  - Provides consistent, transparent, and verified set of emissions data for participating entities.
  - Majority of states are members.



# Regional Initiatives

- Western Climate Initiative (WCI)
  - Arizona, California, Oregon, New Mexico, Washington, Utah, and Canadian provinces of British Columbia and Manitoba.
  - Load-based, Cap and Trade program.
  - Goal: Reduce GHGs to 15% below 2005 levels by 2020.
  - Multi-sector action.
  - All participants are members of the Climate Registry.

# Regional Initiatives

- Northeast Regional Greenhouse Gas Initiative (RGGI)
  - Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, New York, and Vermont.
  - Initially, cap CO<sub>2</sub> emissions from power plants.
  - Second stage may include sources other than power plants.
  - Goal: an approximately 35 % reduction by 2020.
  - All participants are members of the Climate Registry.

# International Issues

- Kyoto Protocol in effect; 162 countries subject to the treaty.
- Australia, U.S. have not accepted the Protocol.
- Sets country-specific targets for reductions of 6 GHGs to 8% below 1990 levels.
  - CO<sub>2</sub>, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride
- Initial targets are for 2008-2012.
- Expires in 2012.

# International Issues

- On February 2, 2007, the United Nations Intergovernmental Panel on Climate Change issued *Climate Change 2007: The Physical Science Basis*.
- Report recognizes that an “unequivocal” warming of the climate system is taking place and suggests that it is “very likely” being caused by human activity.

# International Issues

- G-8 Meeting June 2007
- All nations agreed to “consider seriously” a target of cutting global carbon dioxide emissions in half by 2050.
- U.N. meeting scheduled for Dec. 2007 in Bali with goal of negotiating framework for successor to Kyoto Protocol.

# International Issues

- Major Economies Meeting on Energy Security and Climate Change
  - U.S. initiative to contribute to post-Kyoto framework.
  - First meeting held September 2007.
  - Each nation designs separate strategies for achieving long-term goal, which will reflect each country's different energy resources, stages of development, and economic needs.
  - Key Component: Advance clean energy technologies
    - US will promote nuclear power plants.
    - US “Twenty in Ten” plan: reduce gasoline consumption by 20% in 10 years.
    - US will address unsustainable deforestation



# U.S. Proposed Legislation

- Global Warming Reduction Act (S. 485):
  - Kerry/Snowe
  - Cut GHG emissions 65% from 2000 levels by 2050.
  - Freeze GHG emissions in 2010.
  - 1.5% annual cut through 2020.
  - 2.5% annual cut through 2030.
  - 3.5% annual cut through 2050.
- Climate Stewardship and Innovation Act (S. 280):
  - McCain/Lieberman
  - Reduce GHG emissions to 2004 levels by 2012.
  - Cap steadily declines until it is equal to one-third of the 2004 levels by 2050.

# U.S. Proposed Legislation

- Climate Stewardship Act (H.R.620):
  - Olver
  - Reduce GHG emissions to 2004 levels by 2012.
  - Cap steadily declines until it is equal to one-fourth of the 2004 levels by 2050.
- Global Warming Pollution Reduction Act (S.309):
  - Boxer/Sanders
  - Cap GHG emissions economy-wide in 2010.
  - In 2020, cap national emissions at 1990 levels.
  - Reduce GHG emissions to 20% of 1990 levels by 2050.
- Safe Climate Act (H.R.1580):
  - Waxman
  - Reduce GHG emissions to 80% below current levels by 2050.

# U.S. Proposed Legislation

- Bingaman-Specter: Low Carbon Economy Act (S. 1766):
  - Regulates: petroleum refineries, natural gas processing plants, LNG facilities, importers of liquid fossil fuels and non-CO<sub>2</sub> GHGs, and coal-consuming facilities.
  - Reduce GHG emissions to 2006 levels by 2020. Reduce GHG emissions to 1990 levels by 2030.
  - Technology Accelerator Payment (“Safety Valve”) - Cost cap on emissions allowances.
    - Initial carbon price of \$12/metric ton (2012).
    - Rises 5% on top of the rate of inflation each successive year.
  - Directs money to support various industries in efforts to transition to a low-carbon economy.

# U.S. Proposed Legislation

- Proposed Legislation Targeting Power Plants:
  - Electric Utility Cap-and-Trade Act (S. 317):
    - Feinstein/Carper
  - America's Climate Security Act (S. Draft):
    - Lieberman/Warner
  - Clean Air Planning Act (S. 1117):
    - Carper/Feinstein/Lieberman
  - Clean Air/Climate Change Act (S. 1168):
    - Alexander/Lieberman
  - Clean Power Act (S. 1201):
    - Sanders, Lieberman

# U.S. Proposed Legislation

- **Containing and Managing Climate Change Costs Efficiently Act:**
  - Warner/Landrieu/Graham/Lincoln
  - To be incorporated as a cost-control mechanism into other cap-and-trade bill(s).
  - Allows firms to bank/borrow emissions credits.
  - Establishes a Carbon Market Efficiency Board (similar to Federal Reserve Board).
- **Save Our Climate Act (H.R.2069):**
  - Stark/McDermott
  - Carbon Tax of \$10/ton of carbon content.
  - Goal is to reduce GHG emissions until 80% below 1990 levels.
  - Tax raised \$10 annually until goal attained.

# U.S. Proposed Legislation

- Dingell (D-Mich.) Carbon Tax Draft:
  - Tax on carbon emissions of \$50/ton for industry.
  - Add a 50-cent-per gallon tax on gasoline on top of the current 18.4-cents-per-gallon.
  - Phase out the mortgage interest deductions for large homes (4200 square feet and greater).
  - Revenue to be used to expand Earned Income Tax Credit to help low-income families pay higher fuel bills; 60/40 split for highway trust fund and mass transit programs; and other social welfare programs.
- Dingell (D-Mich.)/Boucher (D-Va.) Legislation Planned:
  - Cap-and-trade.
  - Cover a broad array of industry sectors.
  - Releasing a series of white papers to discuss issues (e.g. timetables, cost-containment, carbon sequestration, offsets and credits, ensuring emissions reductions by developing nations, distribution of allowances).

	Safe Climate Act of 2007	Climate Stewardship and Innovation Act	Global Warming Pollution Reduction Act	Global Warming Reduction Act	Low Carbon Economy Act	Climate Stewardship Act
Bill Number	HR 1580	S 280	S 309	S 485	S 1766	HR 620
Sponsors	Waxman (D) + 141 cosponsors	Lieberman, McCain, Obama, Clinton + 7 others	Sanders (I), Boxer (D) + 17 others	Kerry (D), Snowe (R), and Kennedy (D)	Bingaman (D), Specter (R) + 5 others	129 cosponsors
Cap-and-Trade	Y	Y	Allowed	Y	Y	Y
Reduction Goal	80% below current levels by 2050	67% below 2004 levels by 2050	80% below 1990 levels by 2050	Reach 1990 levels by 2020; -2.5%/yr through 2030; -3.5%/yr through 2050	20% below 2006 levels by 2030	70% below 1990 levels by 2050
Regulated Industries	Sectors with "largest emissions" and "most cost-effective opportunities to reduce emissions"	Power plants; Commercial and Manufacturing Facilities; Transp.fuels at refinery or import terminal	Economy-wide	EPA discretion	Most sectors of economy	Power plants; Commercial and Manufacturing Facilities; Transp.fuels at refinery or import terminal
Allowances	Auction	Auction/ Giveaways	Allowed	Auction/ Giveaways	Auction/ Giveaways	Auction/Giveaways
Offsets	N/A	Y	Silent	Possible	Y	Y

	America's Climate Security Act	Clean Air Planning Act	Clean Air/Climate Change Act	Clean Power Act	Electric Utility Cap-and-Trade Act	Save Our Climate Act
Bill Number	Draft	S 1177	S 1168	S 1201	S 317	HR 2069
Sponsors	Lieberman (I) and Warner (R)	Carper (D), Feinstein (D), and Lieberman (I)	Alexander (R) and Lieberman (I)	Sanders (I), Lieberman (I) + 2 others	Feinstein (D) and Carper (D)	Stark (D) and McDermott (D)
Cap-and-Trade	Y	Y	Y	Y	Y	N (Carbon Tax)
Reduction Goal	70% below 2005 levels by 2050	CO2 25% below 1990 levels by 2050. Other reductions for other GHGs.	CO2: Reach 2006 levels by 2011; - 1.5 bill metric tons by 2025. Other reductions for other GHGs.	CO2: 17% below 1990 levels by 2025. Other reductions for other GHGs.	Reach 2006 levels by 2011	80% below 1990 levels; \$10/ton carbon content, raised \$10 annually, until goal reached
Regulated Industries	Elec utilities; industrial manf; petroleum refiners and importers	Power plants only	Power plants only	Power plants only	Power Plants only	N/A
Allowances	Auction/ Giveaways	Auction/ Giveaways	Giveaway 75%	Auction/ Giveaway	15% auctioned; 85% allocated based on output	N/A
Offsets	Possible	Y	Y	Possible	Y	N/A



# LISKOW & LEWIS

---

**One Shell Square  
701 Poydras Street, Suite 5000  
NEW ORLEANS, LA 70139  
(504) 581-7979**

**822 Harding Street  
P.O. Box 52008  
LAFAYETTE, LA 70505  
(337) 232-7424**

**First City Tower  
1001 Fannin Street, Suite 1800  
HOUSTON, TX 77002  
(713) 651-2900**

[www.liskow.com](http://www.liskow.com)