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# Climate Change 2008 Year in Review: Complex Legal and Political Issues Are Waiting for the New Administration

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## Introduction[1]

The year 2008 was the end of the Bush Administration's approach to federal policy on climate change; hence, it was the end of an era that largely resisted developing mandatory federal programs to address climate change. In its last year, the Bush Administration took several actions precluding the use of existing federal law to comprehensively regulate greenhouse gas (GHG) emissions. Moreover, the waning days of President Bush's term left several litigation and regulatory issues unresolved and teed up for resolution by President Obama's team. The new administration also will need to consider the impact of decisions made, or deferred, in 2008 on the state and regional level, as well as how to respond to increasing pressure on the international front for the United States to take a leadership role in reducing GHG emissions. Legislative, regulatory, and litigation activities occurring in 2008 set the stage for a wide range of legal and political issues which the new President and Congress will face with respect to climate change. A review of events throughout 2008 demonstrates that even for a new presidential administration willing to enact comprehensive global warming regulation, the path to achieving such regulation is complex and uncharted.

## A. 2008: The Bush Administration Rejects Comprehensive Regulation; Leaves Unresolved Legal Issues

**1. Resistance to Use of CAA to Reduce GHG Emissions.** A consistent theme of the Bush Administration's final year was opposition to the regulation of GHG emissions, particularly any attempt to use existing federal law to do so. The best examples of this theme were the Bush Administration's actions limiting the use of the Clean Air Act (CAA) to reduce GHG emissions. In May 2007, in *Massachusetts v. EPA*,[2] the United States Supreme Court had directed the United States Environmental Protection Agency (EPA) to consider how to regulate carbon dioxide ($CO_2$) given the Court's finding that $CO_2$ is a "pollutant" under the CAA. EPA's regulatory silence throughout the remainder of 2007 resulted in a lawsuit filed on April 2, 2008, by 17 states, local governments, and

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2. 127 S. Ct. 1438 (2007).

environmental groups seeking to have the United States Court of Appeals for the D.C. Circuit compel EPA to issue a finding under the CAA that GHGs pose a danger to public health or welfare. [3] This "endangerment finding," if made by EPA, would trigger further regulation under the CAA. On June 26, 2008, the appellate court declined to force EPA to issue, or decline to issue, an endangerment finding within any specific timeframe.[4]

Although given a reprieve by the appellate court, on July 30, 2008, EPA issued an Advanced Notice of Proposed Rulemaking (ANPR), regarding an endangerment finding and related issues raised by the Supreme Court's decision.[5] The ANPR revealed the breadth of federal agency positions opposing regulation of GHG emissions under the CAA. The ANPR had several unprecedented components. It began with a statement from the President's Office of Management and Budget that, due to many agencies' disagreement with EPA's proposed draft ANPR circulated internally to the agencies on June 17, 2008, EPA agreed to publish the draft under a statement that it did not represent administration policy. In addition to publishing an ANPR without an approved statement of proposed EPA policy, the ANPR included the letters of other federal agencies — including the Departments of Agriculture, Commerce, Energy, and Transportation; the Council of Economic Advisers; the Office of Science and Technology Policy; the Council on Environmental Quality; and the Small Business Administration — criticizing EPA's draft ANPR. These federal agencies stated as a basic premise the difficulty, if not impossibility, of using the CAA to regulate GHG emissions or to address global warming issues. EPA requested public comment on several policy and technical issues pertaining to the regulation of GHG emissions, but at the close of 2008, EPA had not published a new ANPR or issued a proposed rule.

The Bush Administration's opposition to using the CAA to address GHG emissions was further demonstrated in its approach to CAA permits for power plants. On November 13, 2008, the federal Environmental Appeals Board (EAB) ruled that EPA had not adequately justified its failure to impose $CO_2$ emissions limits in a Prevention of Significant Deterioration (PSD) permit for a proposed coal-fired power plant in Utah, and remanded the permit to EPA for further consideration.[6] In this permit proceeding, titled *In Re De-*

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3. *Massachusetts v. EPA*, No. 03-1361 (D.C. Cir., filed April 2, 2008).

4. *Massachusetts v. EPA*, No. 03-1361 (D.C. Cir., June 26, 2008).

5. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (Advanced Notice of Proposed Rulemaking July 30, 2008).

*seret*, EPA had granted a PSD permit to Deseret Power in August 2007 without imposing best available control technology (BACT) emissions limits for $CO_2$. The Sierra Club petitioned the EAB to overturn EPA's decision, arguing that $CO_2$ is unambiguously a pollutant subject to regulation under the CAA; thus, EPA could not issue a PSD permit without BACT emissions limits for $CO_2$. The EAB disagreed with the Sierra Club, holding that the term "subject to regulation under the Act" is ambiguous.[7] However, it also rejected EPA's claim that the agency's historical interpretation of the CAA's phrase "subject to regulation under the Act" constrained EPA's authority to impose BACT limits for $CO_2$, holding that EPA's position "is not supported by the administrative record."[8]

In response to the EAB remand, on December 18, 2008, EPA Administrator Stephen Johnson issued a memorandum declaring that EPA interpreted "regulated [New Source Review] pollutant," as defined in CAA implementing regulations at 40 C.F.R. § 52.21(b)(50), to "exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant."[9] The effect of the Administrator's announced interpretation would be to exclude $CO_2$ from EPA's definition of "regulated NSR pollutant" and, consequently, from PSD permitting requirements, unless and until additional CAA provisions or regulations requiring control of $CO_2$ emissions are adopted. Environmental groups and members of Congress immediately voiced opposition to Johnson's memorandum and vowed to take legal and political action. Thus, EPA's approach to PSD requirements under the CAA are bound to be an issue for the next Administration.[10]

Also left for the next Administration is the role of the CAA in limiting GHG emissions from automobiles. In March 2008, EPA Administrator Johnson published in the Federal

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6. *In Re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (E.A.B. Nov. 13, 2008) Slip Opinion, http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Filings%20By%20Appeal%20Number/C8C5985967D8096E8525750000681 1A7/$File/Remand...39.pdf.

7. *Id*. at 15.

8. *Id.* at 33.

9. *See* http://www.epa.gov/nsr/documents/psd_interpretive_memo_12.18.08.pdf.

10. Some Democratic members of the Congress sought to pass legislation requiring EPA to use the PSD requirements under the CAA to require coal-fired power plants to reduce $CO_2$ emissions. On March 11, 2008, Representatives Henry Waxman (D-CA) and Edward Markey (D-MA) introduced the Moratorium on Uncontrolled Power Plants Act of 2008, H.R. 5575, to prohibit new coal-fired power plants from receiving CAA permits unless the plants were required to install $CO_2$ sequestration technology. This bill was not passed by Congress, but may be renewed given Congressman Waxman's new role as head of the House Energy and Commerce Committee. (See discussion at Section B, below.)

Register his decision, first announced in December 2007, to deny California a waiver under the CAA.[11] The waiver would have allowed California, and many other states, to use the CAA to impose GHG emission regulations for automobiles. Johnson asserted that California's right to a CAA waiver — which allows that state to impose more stringent vehicle emission regulations than federal regulations — was meant only to allow California to address local air pollution problems. Johnson found that it was inappropriate to use the CAA waiver provision to address global air pollution issues raised by GHG emissions.[12] At year-end, litigation on whether EPA properly denied California's waiver request was still pending before the U.S. Court of Appeals for the D.C. Circuit.[13]

In the Obama Administration, EPA will be faced with several other pending or threatened lawsuits pertaining to the scope of CAA regulation to address GHG emissions. On August 25, 2008, New York and 11 other states brought an action in the D.C. Circuit Court of Appeals challenging EPA's recently-updated New Source Performance Standard (NSPS) for oil refineries, claiming that EPA unlawfully failed to include GHG emission limits in the NSPS.[14] New York asserts that, after the Supreme Court's decision in *Massachusetts v. EPA*, the CAA requires EPA to impose such limits. Similarly, on October 7, 2008, environmentalists filed a notice of intent to sue the EPA for allegedly violating its duty under the CAA to review the NSPS for nitric acid plants, which EPA has not reviewed since 1984.[15] The environmentalists demand that EPA review and revise the NSPS to include technologies for limiting emissions of the GHG nitrous oxide. In a similar notice of intent to sue filed on October 23, 2008, the Environmental Defense Fund alleges that EPA has violated the CAA by failing to review the NSPS for landfills with respect to technologies for the capture of methane, another GHG.[16]

**2. Bush Administration's Affirmative Efforts Regarding Climate Change.** Although comprehensive GHG regulation was not proposed in 2008, the Bush Administration announced a national goal to reduce GHG emissions. On April 16, 2008, President Bush

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11. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Case Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156 (Mar. 6, 2008).

12. 73 Fed. Reg. at 12157.

13. *California v. EPA*, No. 08-1178 (D.C. Cir.).

14. *New York v. EPA*, No. 08-1279 (D.C. Cir.).

15. *See* http://www.environmentalintegrity.org/pubs/10-07-08%20--%20Notice%20of%20Intent%20re%20Nitric%20Acid%20Plants.pdf.

16. *See* http://www.edf.org/documents/8713_NOILandfillNSPSOct2008.pdf.

announced a national goal to halt the growth of GHG emissions by 2025 ("the 2025 Goal").[17] For the power sector, President Bush announced a secondary goal of peaking GHG emissions within 10-15 years but reducing GHG emissions thereafter. President Bush cited the December 2007 enactment of the Energy Independence and Security Act (EISA),[18] which set more stringent fuel economy standards, as progress that has already been made towards the 2025 Goal. President Bush advocated clean technology investment as the principal method of meeting the 2025 Goal, rather than emissions cuts, raising taxes, increasing gasoline prices, abandoning coal, or carbon tariffs. With respect to clean technology, President Bush advocated an incentive program that was carbon-weighted (*i.e.*, making lower emissions sources less expensive than higher sources), technology-neutral (*e.g.*, as between nuclear and clean coal), and long-lasting.

The 2025 Goal drew criticism from key Congressional figures on climate change, including Senator Barbara Boxer (D-CA), Chairman of the Senate Environment and Public Works Committee, and Representative Edward Markey (D-MA), Chairman of the House Select Committee on Energy Independence and Global Warming. At the international Major Economies Meeting on Energy Security and Climate Change held in Paris, representatives from Germany and South Africa expressed disapproval of the 2025 Goal. Moreover, the President's budget plan for fiscal 2009 did not provide funding for EPA's development of a GHG emissions registry, despite the fact that, on December 26, 2007, President Bush had signed a spending bill requiring EPA to create such a registry.

Consistent with the 2025 Goal, EPA's principal climate change regulatory initiative in 2008 related to clean technology in the power industry. Specifically, on July 15, 2008, EPA announced proposed regulations under the Safe Drinking Water Act that would create a new class of injection wells for $CO_2$.[19] The purpose of the proposed rule is to avoid the endangerment of underground sources of drinking water through exposure to concentrated $CO_2$ that would be injected underground in carbon sequestration projects. The proposed regulations offer instruction on geologic site characterization, well construction materials, and monitoring. The regulations also include financial assurance requirements for corrective action, injection well plugging, post-injection site care and site closure, and emergency response. The proposed regulation also recognized, but did not resolve, po-

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17. *See* http://www.whitehouse.gov/news/releases/2008/04/20080416-6.html.

18. Pub. L. No. 110-140, 121 Stat. 1492 (2007).

19. Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide ($CO_2$) Geologic Sequestration (GS) Wells, 73 Fed. Reg. 43491 (proposed July 25, 2008).

tential liability issues under other environmental laws which may be triggered by carbon sequestration. Because the proposed regulations were not finalized before the end of President Bush's term, the new administration will need to decide whether to continue with this rule or address carbon sequestration issues through a different approach.

The proposed rule regarding drinking water protection from carbon sequestration was one of several actions taken in 2008 with respect to this technology. First, on January 4, 2008, the Department of Energy (DoE) announced that it would collaborate to construct a $CO_2$ sequestration project that will inject 1,000 tons/day of $CO_2$ produced by an ethanol production facility in Decatur, Illinois, one mile under the Mount Simon Sandstone Formation in the Illinois Basin, a large geologic depression beneath most of Illinois and portions of southwest Indiana and northwest Kentucky. DoE's collaborators include the Midwest Geological Sequestration Consortium, the Illinois State Geological Survey, and Archer Daniels Midland Company, which owns the Decatur facility. This project is the fourth $CO_2$ sequestration project funded by DoE. $CO_2$ storage is expected to begin in October 2009 and continue for three years. After 2012, the injected $CO_2$ will be monitored to determine the viability of the storage system.

In contrast to other projects encouraging sequestration technology development, on January 30, 2008, the DoE announced that it was withdrawing its support for the FutureGen plant. On December 18, 2007, the FutureGen Industrial Alliance chose Mattoon, Illinois, as the site for the first power plant in the United States that includes $CO_2$ sequestration. One month later, DoE withdrew support and announced that it would support projects that include $CO_2$ sequestration technology at existing power plants, which, according to DoE, would double the capacity for $CO_2$ sequestration compared to the FutureGen plant. DoE cited a doubling of cost estimates for the FutureGen plant as one reason why it withdrew its support. The future of FutureGen, a project strongly supported by President Obama's home state, will likely be addressed again in 2009.

**3. Climate Change Regulatory Actions Under ESA.** The Bush Administration ended the year with decisions that limited the use of another environmental law — the Endangered Species Act (ESA) — to address climate change issues. On December 11, 2008, the Department of Interior (DoI) finalized a new rule which limits consideration of the impact of climate change on species protected under the ESA, and allows individual federal agencies to bypass consultation with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) to determine whether federal actions will threaten protected spe-

cies.[20] Under the new rule, which took effect on January 15, 2009, federal agencies need not consult with FWS or NMFS regarding a project that they approve, fund or review if "[t]he effects of such action are manifested through global processes" and "[c]annot be reliably predicted or measured at the scale of a listed species' current range," would result in "an extremely small, insignificant impact" on a protected species or its critical habitat, or pose only a remote risk of harm to protected species or their critical habitat.[21] Agencies also may omit consultation with FWS or NMFS if the effects of an action they approve, fund or review "are not capable of being measured or detected in a manner that permits meaningful evaluation."[22] Interior Secretary Dirk Kempthorne stated that the rule is intended to give FWS and NMFS scientists the ability to focus their resources on evaluating projects that pose more serious risks of harm to protected species. Critics of the rule charge that it will "gut" the ESA and is a clear attempt to circumvent protections for species that are threatened by global warming.

By the end of the year, two lawsuits already had been filed to challenge the new rule. On December 11, 2008, Defenders of Wildlife, the Center for Biological Diversity, and Greenpeace brought suit against DoI and the Department of Commerce, claiming that the rule violates the ESA and that those agencies did not provide adequate time for public review of the rule before it was finalized.[23] The second lawsuit, filed by the State of California on December 29, 2008, alleges that the rule violates the ESA, that the agencies violated the National Environmental Policy Act (NEPA) by failing to complete an Environmental Impact Statement for the new rule, and that DoI and the Department of Commerce violated the Administrative Procedure Act by failing to provide adequate public notice or an adequate response to public comments.[24] The Obama Administration will need to address the new rule either in this litigation or as a matter of administrative action.

In addition to this new rule regarding ESA decision-making, the Bush Administration made several other ESA determinations by year-end, largely in response to pending or threatened lawsuits. On December 18, 2008, FWS proposed to list as threatened sev-

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20. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76272 (Dec. 16, 2008) (to be codified at 50 C.F.R. § 402).

21. 73 Fed. Reg. at 76287.

22. 73 Fed. Reg. at 76287.

23. *Center for Biological Diversity v. Kempthorne*, No. 3:08-cv-5546-MHP (N.D. Cal.).

24. *California v. Kempthorne*, No. 3:08-cv-5775-MHP (N.D. Cal.).

eral species of penguin.[25] On the same day, FWS denied the petition of the Center for Biological Diversity (CBD) to list three other penguin species as threatened. FWS's December 18 actions followed a September settlement with CBD, which required FWS to determine by December 19 whether certain penguin species should be listed as threatened or endangered under the ESA.[26]

On December 23, 2008, the National Oceanic and Atmospheric Administration (NOAA) determined that ribbon seals are not threatened or endangered and, thus, should not be listed under the ESA. NOAA made the determination in a response to a December 2007 CBD petition claiming that the seals are threatened by global warming because the sea ice the seals require for reproduction and resting is melting. Announcing the decision, NOAA acting assistant administrator for fisheries said that "annual ice … will continue to form each winter in the Bering Sea and the Sea of Okhotsk where the majority of ribbon seals are located."[27]

In addition to these year-end ESA decisions, the Obama Administration will be facing litigation filed, or noticed to be filed, in 2008 with respect to the asserted impact of global warming. For example, on December 3, 2008, the CBD brought suit against FWS in the District Court for the District of Alaska, alleging that FWS violated the ESA by failing to issue a preliminary finding on CBD's petition to list the Pacific walrus within 90 days of receipt of that petition.[28] Other CBD litigation activity late in 2008 included a Notice of Intent to sue NMFS for protection of elkhorn and staghorn coral from increased ocean acidification and rising temperatures, which CBD claims are caused by global warming.[29] On December 9, 2008, the Natural Resources Defense Counsel (NRDC) peti-

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25. 12-Month Finding on a Petition to List Five Penguin Species Under the Endangered Species Act, and Proposed Rule To List the Five Penguin Species, 73 Fed. Reg. 77303 (proposed Dec. 18, 2008); 12-Month Finding on a Petition To List Four Penguin Species as Threatened or Endangered Under the Endangered Species Act and Proposed Rule To List the Southern Rockhopper Penguin in the Campbell Plateau Portion of Its Range, 73 Fed. Reg. 77263 (proposed Dec. 18, 2008); 12-Month Finding on a Petition To List the African Penguin (Spheniscus demersus) Under the Endangered Species Act, and Proposed Rule To List the African Penguin as Endangered Throughout Its Range, 73 Fed. Reg. 77332 (proposed Dec. 18, 2008).

26. *Center for Biodiversity v. Hall*, No. 08-CV-335 (D.D.C. Sept. 8, 2008).

27. *See* http://www.fakr.noaa.gov/newsreleases/2008/ribbonseals122308.htm; 73 Fed. Reg. 79822 (Dec. 30, 2008).

28. *Center for Biological Diversity v. United States Fish and Wildlife Service*, No. 3:08-cv-265-JWS (D. Alaska filed Dec. 3, 2008).

29. *See* http://www.biologicaldiversity.org/news/press_releases/2008/corals-11-25-2008.html. CBD also filed an intent to sue EPA over its failure to revise Clean Water Act water criteria for pH. http://www.biologicaldiversity.org/news/press_releases/2008/ocean-acidification-11-13-2008.html.pdf. CBD claimed that the Clean Water Act requires EPA to update that standard, set in 1976, in light of new scientific evidence that increased $CO_2$ absorption has led to significant acidification of ocean waters. This increased acidity, the group argued, threatens the survival of numerous species, in particular those with calcium-based exterior

tioned DoI to list as endangered the whitebark pine, a tree which grows in elevated areas of the Western U.S. and Canada.[30] NRDC claimed that the pine has been dying off due to the increased presence of a beetle that previously could not thrive at the altitudes where the pines grow, to extended exposure to blister rust, and to a diminishing range, all of which, NRDC asserts, stem from global warming. If listed, the tree would be the first wide-ranging tree to be designated as endangered.

In 2009, DoI also must address a lawsuit, filed in September 2008, regarding the ESA status of the wolverine. Nine environmental groups sued DoI and FWS, claiming that FWS wrongly denied a petition to list wolverines as threatened or endangered.[31] The FWS denied the petition in March 2008, on the grounds that there remain 15,000 to 19,000 wolverines in Canada, and others in Alaska, so wolverines will not face extinction even if their population in the lower 48 states were to disappear.[32] The activists contend that wolverines in the lower 48 states are genetically different from those living further north, and thus constitute a different species.

Legal actions also continued throughout 2008 with respect to one of FWS's most controversial global warming decisions under the ESA — protection of the polar bear. On December 16, 2008, FWS published a final rule defining protections for polar bears.[33] This clarification came in partial settlement to a lawsuit brought by CBD in California federal court.[34] Other claims in the same lawsuit, including the claim that the bear should not have been exempted from other ESA protections, as well as the claim that the bear should have been listed as endangered, rather than threatened, have not been resolved.

The polar bear listing sparked other litigation in 2008, which is still pending in 2009. On August 4, 2008, Alaska filed suit in the D.C. Circuit seeking to vacate and set aside

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shells like shellfish and coral. CBD argued that EPA must adopt a water quality criterion prohibiting measurable change in the acidity of ocean waters, which, if adopted, could force regulators to apply strict $CO_2$ emission controls.

30. *See* http://docs.nrdc.org/legislation/files/leg_08120801a.pdf.

31. *Defenders of Wildlife v. Kempthorne*, No. 9:08-cv-139-DWM (D. Mont. filed Sept. 30, 2008).

32. 12-Month Finding on a Petition to List the American Wolverine as Endangered or Threatened, 73 Fed. Reg. 12929 (Mar. 22, 2008).

33. Special Rule for the Polar Bear, 73 Fed. Reg. 76249 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 17); *see also* Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. 28212 (May 15, 2008) (final rule to be codified at 50 C.F.R. pt. 17).

34. *Center for Biological Diversity v. Kempthorne*, No. 4:08-cv-1339-cw (N.D. Cal.).

DoI's rule listing polar bears as threatened under the ESA.[35] In the same month, industry groups, led by the American Petroleum Institute, filed their own suit opposing the polar bear listing.[36] On August 27, 2008, the industry groups claimed the FWS rule's requirement that Alaskan businesses undergo evaluations for their impact on the bears is unlawful. Although such evaluations are normally required for all species listed as endangered or threatened, DoI exempted projects in all states except Alaska from the requirement. The industry groups claim that failing to exclude Alaskan businesses from the evaluation requirement is unfair and contrary to the administration's position that climate change cannot be traced to individual emitters of GHGs.[37]

**4. Other Federal Climate Change Actions in Response to Congress and the Courts.** In 2008, the judicial branch and Congress required the Bush Administration to take actions addressing climate change. For example, on May 29, 2008, in response to a court order, the National Science and Technology Council and the United States Climate Change Science Program, part of the White House's Office of Science and Technology, released a report entitled "Scientific Assessment of the Effects of Global Change on the United States" ("the Assessment").[38] On August 21, 2007, the U.S. District Court for the Northern District of California had ruled that the White House did not fulfill its obligations under the Global Change Research Act of 1990, one of which was to prepare the Assessment.[39] The Assessment states that global warming is the "direct result of human activities," but makes no policy recommendations. The Assessment further states that there is no evidence to link extreme weather events to global warming.

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35. *Alaska v. Kempthorne*, No. 08-CV-1352 (D.C. Cir.). Alaska's complaint alleges that DoI's determination was made without considering "the best scientific and commercial data available." The state argues that climate change models relied upon in listing polar bears as threatened are "unreliable beyond a decade." Moreover, the state avers, polar bears have survived Arctic warming periods before, and there has been no recent decline in the state's overall population of polar bears. The complaint further alleges that DoI did not take into consideration polar bears' "adaptability" and their "ability to survive in extensive ice-free conditions." Finally, Alaska claims, the listing of polar bears as threatened is unnecessary in light of the state's "comprehensive conservation strategy."

36. *American Petroleum Institute v. Kempthorne*, No. 08-1496 (D.C. Cir.).

37. On September 4, 2008, the same industry groups moved to intervene in the polar bear lawsuit brought by environmental groups. *See* footnote 34 above.

38. *See* http://www.climatescience.gov/Library/scientific-assessment/Scientific-AssessmentFINAL.pdf (Assessment); http://www.climatescience.gov/Library/scientific-assessment/6-SA-FAQ-LO-RES.pdf (Summary of Assessment).

39. *Center for Biological Diversity v. Brennan*, No. 4:06-cv-7062-SBA (N.D. Cal. Aug. 21, 2007).

As another example of court-prompted, and Congress-required, action on climate change, the Bush Administration was required to address the corporate average fuel economy (CAFE) standards for cars and light trucks. In November 2007, the U.S. Court of Appeals for the Ninth Circuit vacated the 2008-2011 CAFE standards for light trucks promulgated by the National Highway Traffic Safety Administration (NHTSA), holding that NHTSA violated the Energy Policy and Conservation Act of 1975 (EPCA) by failing to accurately calculate the benefits of $CO_2$ emissions reductions in the cost-benefit analysis it used to determine the proposed standards.[40] The court also held that NHTSA's Environmental Assessment (EA), required by NEPA, was inadequate because it failed to evaluate the incremental impacts vehicles' GHG emissions would have on climate change. The court remanded the case to NHTSA with instructions to include a non-zero value for the benefit of reducing $CO_2$ emissions in calculating CAFE standards and to prepare an Environmental Impact Statement (EIS) taking into account the incremental impacts of GHG emissions on climate change.[41]

On August 18, 2008, the Court of Appeals for the Ninth Circuit denied NHTSA's petition for a rehearing en banc of its November 2007 ruling, vacated and withdrew that ruling, and issued a new order in the case.[42] The court made no changes to its November 2007 holding on NHTSA's violation of EPCA, but it withdrew its order that NHTSA complete an EIS taking $CO_2$ emissions into account and instead instructed the agency to prepare a revised EA.[43]

EISA, which became law on December 19, 2007, also required NHTSA to take climate change into account when setting CAFE standards. Specifically, EISA mandated that CAFE standards increase to 35 mpg by 2020.[44] On April 22, 2008, NHTSA announced its intent to issue proposed rules to increase the model year 2011 through 2015 CAFE standards.[45] Specifically, CAFE standards would rise from approximately 25 mpg to 27.8 mpg in 2011, 29.2 mpg in 2012, 30.5 mpg in 2013, 31.0 mpg in 2014, and 31.6 mpg in 2015. If

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40. *Center for Biological Diversity v. National Highway Transp. Safety Admin.,* 508 F.3d 508 (9th Cir. 2007).

41. *Id.*

42. *Center for Biological Diversity v. National Highway Transp. Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008).

43. *Id.*

44. *See* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ140.110.

45. *See* http://www.dot.gov/affairs/dot5608.htm.

the increases continue at the same pace after 2015, 34.5 mpg could be achieved by 2020. In contrast to the NHTSA-proposed standards, California's GHG regulations for vehicles, if a waiver were granted, would result in 33 mpg in 2016 and 13 percent less GHG emissions in 2015. As of the end of 2008, the NHTSA's proposed rules had not been finalized, with the most recent significant action occurring in October, when it published its Final Environmental Impact Statement for the Proposed Rules.[46]

### B. 2008: Major Congressional Initiatives Regarding Climate Change Fail to Pass

By mid-2008, it was clear that Congress would not pass a comprehensive bill to address GHG emission reductions. The Lieberman-Warner Climate Security Act of 2008, S. 3036, proceeded further in the legislative process than any other previous GHG emission reduction proposal, having been voted onto the Senate floor for consideration. However, on June 6, 2008, when it came to a vote for cloture, *i.e.*, end of debate, the measure failed by 12 votes. Lieberman-Warner would have created a cap-and-trade program for GHG emissions, requiring emission reductions to 70 percent below 2005 levels by 2050. Senate opposition to Lieberman-Warner was fueled by a report released in March by EPA which found that implementation of the bill's requirements would cause electricity and gasoline costs to increase and gross domestic product to decrease by up to 6.9 percent.[47] Some groups opposed Lieberman-Warner because it authorized free distribution of GHG emission allowances to power and other industries. Many Democratic Congressmen and Senators, including Senator Boxer, have vowed to renew a cap-and-trade emission reduction bill in the next Congress.

The most significant climate change-related laws approved by Congress in 2008 were provisions in the financial rescue package signed into law on October 3. The Energy Improvement and Extension Act of 2008 is Division B of the Emergency Economic Stabilization Act and contains several tax credits and other incentives for renewable energy projects.[48] One portion of the bill extends and modifies several existing tax credits, including tax credits for wind energy projects and biodiesel production for one year, for purchases of plug-in vehicles for six years, and for commercial and residential solar energy projects

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46. *See* http://www.nhtsa.dot.gov/portal/site/nhtsa/menuitem.43ac99aefa80569eea57529cdba.

47. "EPA Analysis of the Lieberman-Warner Climate Security Act of 2008, S.2191 in 110th Congress" (Mar. 14, 2008), available at http://www.epa.gov/climatechange/downloads/s2191_EPA_Analysis.pdf. S.2191 was an earlier version of the bill debated on the Senate floor.

48. *See* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ343.110.pdf.

for eight years. Other tax incentives are included for the production of geothermal, biomass and other renewable energy projects. Several of the tax incentives also address energy efficiency in commercial and residential properties. In addition, the Act allocates $1.5 billion in investment credits for coal projects utilizing carbon control technologies, and grants up to a $20 tax credit per ton of carbon sequestered. The total amount of the tax credits and incentives is estimated at $18 billion over 10 years, to be paid by several tax-related methods, including increasing or extending energy-related and other taxes and by freezing a tax deduction on profits from oil and natural gas sales.

Perhaps the most important Congressional action in 2008 which will drive climate change legislation in the 111th Congress was not a piece of legislation, but a choice of leadership. On November 20, 2008, Rep. Henry Waxman (D-CA) ousted Rep. John Dingell (D-MI) as Chairman of the House Energy and Commerce Committee by a 137-122 secret ballot vote of the full House Democratic Caucus. By choosing Rep. Waxman for chair of the House committee responsible for bringing a potential GHG emission reduction bill to the House floor, House Democrats signaled their intent to tackle more aggressively GHG emission reductions, including from transportation sources. Rep. Waxman has advocated for cutting GHG emissions nationwide to 20 percent below 1990 levels by 2020, and 80 percent below 1990 levels by 2050. He also supports granting California a CAA waiver to regulate GHG emissions from vehicles, and, as discussed above, has called for a ban on new coal-fired power plants unless they are equipped with carbon capture and storage technology.

### C. States Continue to Lead on Climate Change Decisions

**1. RGGI Begins Cap-and-Trade Implementation.** As in prior years, in 2008, the states have taken more tangible steps towards broad-ranging GHG emission regulation than has the federal government. The groups of states which had pledged to develop GHG emission reduction programs on a regional level reached significant milestones in 2008. The 10 Northeastern and Mid-Atlantic States in the Regional Greenhouse Gas Initiative (RGGI) took final steps to prepare for implementation of their cap-and-trade program, aiming to reduce $CO_2$ emissions from fossil fuel-fired electricity generators.[49] RGGI members have agreed to cap total $CO_2$ emissions from fossil fueled-power plants at 188 million tons per year from 2009 through 2014, and to reduce the cap by 2.5 percent per year for four years starting in 2015. RGGI

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49. *See* www.rggi.org.

caps went into effect on January 1, 2009, and beginning on that date, fossil-fueled electricity generators of 25 megawatts or greater will be required to purchase one allowance for each ton of $CO_2$ they emit.

By year-end, each RGGI state had enacted laws and/or regulations implementing the provisions of the RGGI Model Rule for the cap-and-trade program. On September 25, 2008, RGGI held the country's first auction of carbon emissions allowances. Allowances for the emission of 12.56 million tons of carbon dioxide were offered at the auction, with one allowance equaling one ton of emissions. All of the allowances were sold at a price of $3.07 per allowance, and the 59 participants in the auction submitted bids for over 51 million allowances. States auctioning allowances included Connecticut, Vermont, Maine, Maryland, Massachusetts and Rhode Island, six of the 10 RGGI states. The four remaining states — New York, New Jersey, Delaware, and New Hampshire — did not take part in the auction because they were unable to pass the necessary regulations in time.

On December 17, 2008, RGGI held its second auction of $CO_2$ emission allowances, with all 10 RGGI states participating. A total of 31.5 million allowances were sold to 69 bidders at a price of $3.38 per allowance, earning RGGI states a total of $106.5 million in proceeds. The money will be distributed to the member states according to the percentage of total allowances each state made available for sale at the auction. Proceeds from the auctions typically go to renewable energy and energy conservation programs, as well as to provide customer rebates to ease increased electricity costs. The next auction is scheduled for March 18, 2009.

**2. WCI States Move Forward.** While the RGGI states finished preparing to implement a regional cap-and-trade emission reduction program applicable to a single industry source, on the other side of the continent, the Western Climate Initiative (WCI) developed a design for a comprehensive cap-and-trade program, addressing a much broader scope of industries and six GHGs.[50] WCI aims to reduce GHG emissions to 15 percent below 2005 levels by 2020. On September 23, 2008, WCI released a plan detailing the design of a multi-sector cap-and-trade program that would be the first to cap GHG emissions from all major sources.[51] GHGs covered under WCI's plan include $CO_2$,

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50. WCI members are California, Oregon, Washington, Utah, New Mexico, Arizona, and the Canadian provinces of British Columbia, Manitoba, Quebec and Ontario.

methane, nitrous oxide, hydroflourocarbons, perflourocarbons and sulfur hexaflouride. Industries whose emissions would fall under the initial 2012 cap include electricity generators, industrial and commercial manufacturers, and oil and gas processors that emit over 25,000 metric tons of GHG per year. Emissions from petroleum-based fuel combustion from industrial, commercial, and residential sources, and from transportation sources, would fall under the cap starting in 2015.

The WCI plan would require GHG emitters in the member states and provinces to report their emissions in 2011, and would set the expected emissions from that year as the cap in 2012. Starting in 2012, the cap would decline steadily through 2020. Each member state and province would be allocated a certain number of emissions allowances per year, and would be required to auction at least 10 percent of those allowances when they distribute them to individual sources. Uniform caps across specific industries may, however, be set if WCI determines such industries would benefit from them.

By the end of the year, several states in WCI also began taking steps to implement the WCI design. For example, in December 2008, Washington introduced legislation to help the state reduce GHG emissions to 1990 levels by 2020, to 25 percent below 1990 levels by 2035, and to 50 below 1990 levels by 2050. The plan rests, in part, on Washington's participation in WCI. The state's plan also includes programs to increase public transit, green building requirements, and energy efficiency; encourage compact development; and protect the state's agricultural and forest lands.

On December 11, 2008, the California Air Review Board (CARB) unanimously approved a "scoping plan" aimed at reducing GHG emissions in the state to 1990 levels by 2020.[52] The plan describes how California will achieve the emission reduction goals called for in California's 2006 Global Warming Solutions Act. The plan includes 32 measures for reducing emissions, including programs for increasing energy efficiency in residences, businesses and vehicles; incentives for renewable energy production; and a cap-and-trade program covering large industrial plants, electricity generators, residential and commercial natural gas use, and transportation fuels. The plan also incorporates

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51. "Design Recommendations for Western Climate Initiative Cap-and-Trade Program" (Sept. 23, 2008); available at http://www.westernclimateinitiative.org/ewebeditpro/items/O104F20432.PDF.

52. For documents related to the CARB-approved Scoping Plan, see http://www.arb.ca.gov/cc/scopingplan/document/scopingplandocument.htm.

the state's 2004 vehicle GHG emission standards, which, as discussed above, are not currently enforceable.[53]

California further demonstrated its role as a leader in climate change policy when, on November 18-19, 2008, it hosted the Governors' Global Climate Summit ("the Summit"), an international meeting on climate change, in Los Angeles. Along with governors from all 50 U.S. states, officials from Mexico, Canada, China, India, Brazil, the European Union, and other countries attended.

At the Summit, governors of California, Illinois and Wisconsin, and the governors of four Brazilian states and two Indonesian provinces signed a Memorandum of Understanding that calls for the governors to develop rules "to ensure that forest-sector emissions reductions and sequestrations … will be real, measurable, verifiable and permanent, and capable of being recognized in compliance mechanisms of each party's state, provincial, regional, national or international programs … ." The governors also will collaborate to reduce GHG emissions from deforestation, improve forest management, and sequester carbon through reforestation and restoration projects. Finally, the governors will develop a "Joint Action Plan" detailing how future cooperative projects and studies will be financed and carried out.

At the close of the Summit, the governors of 13 U.S. states and officials from Mexico, India, Indonesia, Canada and Brazil signed a non-binding agreement aimed at "advanc[ing] the ongoing international efforts under the United Nations Framework Convention on Climate Change." The agreement sets forth five principles to guide signatories, including (a) stabilizing atmospheric concentrations of GHGs; (b) achieving "quantifiable greenhouse gas emission reductions collectively while recognizing that there are common but differentiated responsibilities and capabilities among developed, developing, and transitional governments"; (c) giving technical assistance with regard to the development and implementation of "climate-friendly technologies" and clean energy re-

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53. Earlier in the year, California expanded its climate change law by enacting "smart growth" legislation incentivizing land use decisions that the legislature expects will decrease climate change. *See* http://gov.ca.gov/press-release/10697. The law adopts a "sustainability communities" strategy that aims to minimize climate impact by reducing driving, mixing commercial and residential uses, increasing affordable housing, and encouraging development close to public transportation. Under the new law, the state will offer cities and counties incentives to develop compact neighborhoods with increased public transportation options and increased opportunities for residents to walk or bike. Communities that develop such projects will be moved to the front of the line for state transportation funding. In addition, the law grants relief from certain reviews required by the California Environmental Quality Act to developers and builders working on qualified projects.

search; (d) accelerating capacity building efforts; and (e) enhancing the ability of all regions to adapt to climate change while helping those that are most affected by it.[54]

In a surprise video presentation to attendees of the Summit, President-elect Obama emphasized his intent to make climate change a priority in his administration and promised that his presidency will "mark a new chapter in America's leadership on climate change that will strengthen our security and create millions of new jobs in the process." Observing that climate change must be dealt with urgently, Obama vowed to push ahead with a federal cap-and-trade scheme with "strong annual targets" aimed at reducing the nation's GHG emissions to 1990 levels by 2020, and 80 percent below 1990 levels by 2050. Obama also promised to provide $15 billion every year toward the further development of solar, wind, biofuel, safe nuclear, and clean coal technologies. Finally, Obama pledged that, under his leadership, the United States "will once again engage vigorously in [international] negotiations."[55]

**3. MRA Develops Preliminary Design.** The third regional group addressing climate change, the Midwest Greenhouse Gas Reduction Accord (MRA), also made progress towards designing a cap-and-trade program.[56] In December 2008, an advisory group for the MRA released draft preliminary design recommendations for a regional cap-and-trade program.[57] The advisory group's draft recommended that emissions be reduced by 15 to 25 percent below 2005 levels by 2020 and 60 to 80 percent below 2005 levels by 2050, with periodic revision of those targets. With regard to the sources to be covered by the emissions cap, the group recommended that, at a minimum, power plants and industrial combustion sources be covered, and that additional GHG sources, such as industrial process emissions and transportation fuels, be considered for inclusion under the cap. The group further advised that allowances issued by MRA should be linked to other regional systems, such as RGGI and WCI. Still under discussion at year-end were the use of offsets to comply with GHG emissions caps, the trajectory for emission reductions, and how emissions allowances should be distributed. The advisory group's

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54. The U.S. state signatories to the agreement are California, Colorado, Florida, Illinois, Kansas, Maryland, Massachusetts, Michigan, New York, Oregon, Utah, Washington, and Wisconsin.

55. *See* http://change.gov/newsroom/entry/president_elect_obama_promises_new_chapter_on_climate_change/.

56. MRA members are Iowa, Illinois, Kansas, Michigan, Minnesota, Wisconsin, and the Canadian province Manitoba.

57. Midwestern Greenhouse Gas Reduction Accord Preliminary Recommendations of the Advisory Board, December 2008, http://www.midwesternaccord.org/Meeting%20material%20pages/GHG-meeting-8/Accord_Draft_Recs_Dec08.pdf.

recommendations for program design are scheduled to be provided to the MRA members by Spring 2009.

**4. Individual States Address Climate Change.** In addition to actions taken by states in regional groups, several other states enacted policies and laws in 2008 which address climate change. For example, Kentucky published a comprehensive energy plan emphasizing carbon capture and sequestration,[58] Ohio passed a law requiring the use of renewable energy,[59] and Virginia released an action plan setting energy efficiency as a top state priority.[60]

Moreover, the issues surrounding permits for coal-fired power plants were not only a legal matter for EPA; states throughout the country had to deal with challenges to these permits as well. For example, on January 16, 2008, the South Dakota Supreme Court unanimously upheld the South Dakota Public Utilities Commission's (SDPUC) permit for the construction of the Big Stone II coal-fired power plant.[61] In late 2004, a consortium of utility companies petitioned for and was granted a permit to build a 600 megawatt coal-fired power plant that would emit 4.7 million tons of $CO_2$ yearly. Several environmental groups appealed, but the state supreme court found that: (1) neither Congress nor South Dakota had yet chosen to regulate $CO_2$ emissions; and (2) SDPUC had appropriately compared the projected emissions to the level of national emissions and concluded that no serious injury would result from them.

Kansas was the location of a heated dispute between the legislature and the governor regarding permitting for coal-fired plants. In February 2008, Kansas's Senate and House of Representatives passed separate bills to overturn the Kansas Department of Health and Environment's (KDHE) denial of Sunflower Electric Power Corporation's ("Sunflower") air quality permit application. Previously, in 2007, KDHE denied Sunflower's permit application for two coal-fired generators under a statute allowing KDHE to deny a permit to protect the health of persons or the environment. Having found that the generators would produce 11 million tons of $CO_2$ yearly, KDHE asserted that it had

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58. *See* http://www.eec.ky.gov/NR/rdonlyres/3BB23D1C-F42C-4E3D-808D-CF7588926BD3/0/FinalEnergyStrategy.pdf.

59. *See* http://www.legislature.state.oh.us/bills.cfm?ID=127_SB_221.

60. *See* http://www.deq.virginia.gov/export/sites/default/info/documents/climate/CCC_Final_Report-Final_12152008.pdf.

61. *In Re Otter Tail Power Co.*, 744 N.W.2d 594 (S.D. 2008).

the authority to protect the public and environment from what the agency concluded would be negative climate change consequences resulting from the generator's $CO_2$.

On March 21, 2008, Kansas Governor Kathleen Sebelius (D) vetoed the House bill to overturn KDHE's denial of the permit application. Then, on July 16, 2008, a Kansas state court dismissed two suits brought by Sunflower against KDHE.[62] On November 16, 2007, Sunflower had sued KDHE for denying Sunflower's air quality permit applications, alleging that KDHE violated Sunflower's due process rights by misapplying its statutorily-granted emergency powers to pollutants that had not yet been emitted, failing to support its order with factual findings, and failing to give Sunflower an opportunity to respond.

At least one other state denied a permit because of the plant's failure to address $CO_2$ emissions. On June 30, 2008, a Georgia state court overturned an earlier ruling by an administrative judge that upheld a permit for a coal-fired power plant that did not contain $CO_2$ emission limits.[63] The proposed power plant would be built on the Chattahoochee River by Dynergy and LS Power Company, generate 1,200 megawatts of electricity, and be the first new coal-fired power plant in Georgia in more than 20 years. Environmental groups opposed the permit for failing to control $CO_2$. Georgia's Environmental Protection Division (EPD) approved permits for the facility on May 14, 2007, and, when the permit was challenged, argued to the Georgia court that the CAA requires only monitoring of $CO_2$, not control of emissions. The court ruled that the U.S. Supreme Court's decision in *Massachusetts v. EPA* required EPD to set $CO_2$ emission limits.

Other states approved new permits, but with conditions requiring them to address $CO_2$ emissions. For example, on January 29, 2008, the North Carolina Division of Air Quality approved the building of a new 900 megawatt coal-fired boiler by Duke Energy, with the condition that the boiler's $CO_2$ emissions be offset by the end of 2018 by closing four older units and several other Duke plants throughout the state. The new boiler must also be built in such a way that it can accommodate future carbon control technologies. Similarly, on April 30, 2008, the Iowa Utilities Board ("the Board") approved a certificate of operation for Interstate Power and Light Company (IPL) to build a 630-megawatt

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62. *Sunflower v. KDHE*, No. 07 CV 245 (Kan. Dist. Ct. Finney Cty, July 16, 2008); *Tri-state Generation and Transmission Assoc. v. KDHE*, No. 07 CV 246 (Kan. Dist. Ct. Finney Cty, July 16, 2008). (Tri-state Generation and Transmission Association is Sunflower's partner in this venture).

63. *Friends of the Chattahoochee Inc. v. Couch*, No. 2008-CV-146398 (Ga. Super. Ct. Fulton Cty, June 30, 2008).

power plant. The Board required that five percent of the plant's electric generation come from biomass within two years and 10 percent within five years. The Board also required that 10 percent of the plant's electric generation come from renewable sources by 2013, and 25 percent by 2028. Finally, the Board required IPL to review the use of carbon capture and sequestration technology at the plant; if feasible, the Board could require installation of that technology.

### D. 2008: Foreign Countries Meet; EU Refines Climate Change Law

**1. International Meetings Occur Throughout the Year.** The year 2008 included several meetings of foreign governments, which are attempting to reach agreements in light of the Kyoto Protocol's expiration in 2012. Meetings of "major economies," the Group of 20 countries, and G-8 countries occurred throughout the year, climaxing with the UN-sponsored meeting of climate negotiators in Poznan, Poland. From December 1 through December 13, 2008, climate negotiators met in Poznan to facilitate the adoption of a new international climate treaty to replace the Kyoto Protocol. By the end of the meetings, the parties succeeded in reaching several agreements, including adopting a set of recommendations for methods to measure forest protection in developing countries;[64] endorsing a proposal concerning the transfer of green technologies to developing countries — the Poznan Strategic Program on Technology Transfer;[65] making operational an adaptation fund which would assist developing nations to adapt to climate change;[66] and approving a mandate for preparation of a draft document to replace the Kyoto Protocol. Discussions will continue at several meetings in 2009, including a final meeting in December in Copenhagen, Denmark, where climate negotiators hope to finalize a new treaty.

**2. EU Revises Climate Change Laws.** The European Union (EU), which operates the only multinational cap-and-trade program for GHG emissions, adopted significant changes to its climate change law at year-end. On December 17, 2008, the European

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64. These recommendations, part of a still-in-development forestry incentive package called the Reducing Emissions from Deforestation in Developing Countries (REDD) program, recognize the rights of indigenous peoples living in forested areas, but request additional input by February 2009, from both developing and developed countries, on matters concerning indigenous and local communities in forested areas. They also highlight the need for strong monitoring systems to verify forest protection.

65. The agreement calls for increasing investment in development of climate-fighting technologies in developing countries; however, developed countries made no commitments regarding the amount of financing they would offer.

66. The fund, which began operations on January 1, 2009, is now financed by a two-percent tax on a UN program which awards emissions credits to developed countries for investing in emissions-reduction projects in developing countries. Experts believe that funding from that program, the Clean Development Mechanism, will be insufficient.

Parliament approved a climate change package of six directives which, together, will decrease EU's GHG emissions to 20 percent below 1990 levels by 2020.[67] The directives concern renewable energy, $CO_2$ emissions, emissions standards for cars, emissions reductions from the production and use of vehicle fuels, carbon sequestration, revisions of the European Trading System (ETS), and GHG emissions reductions in sectors not covered by the ETS. The renewable energy directive sets binding national renewable energy targets for 2020, which vary by country, from a high of 49 percent of national energy consumption in Sweden to a low of 10 percent of energy consumption in Malta. The reductions will lead to a total EU renewable energy portfolio of 20 percent of consumption by 2020. The directive concerning $CO_2$ emissions from vehicles requires that carmakers cut average $CO_2$ emissions from new cars by approximately 19 percent of current $CO_2$ emissions levels by 2015, down to an average of 130 grams per kilometer (7.4 ounces per mile). Under another directive, fuel suppliers will have to reduce GHG emissions from fuel production by 10 percent by 2020. In addition, a fund of 300 million carbon allowances will be established to underwrite carbon sequestration demonstration projects.

The directive addressing revisions to the ETS has several components. First, the percentage of carbon allowances that EU countries can freely distribute, instead of auction, will be 80 percent in 2013, decreasing to 30 percent in 2020. If a sector can prove vulnerability by showing that its production costs have risen past certain amounts as a result of climate legislation, then that sector would receive additional free carbon allowances. Second, electricity generation companies in less economically developed EU countries will receive up to 70 percent of carbon allowances free in 2013 as long as those countries create national plans for diversifying energy production to decrease negative environmental impacts. Third, the emissions cap for all energy producers and large-scale industrial plants will gradually reduce after 2013, leading to an ETS-wide emissions reduction of 21 percent below 2005 levels by 2020. The directive addressing sectors not covered by ETS calls for national GHG emissions caps which vary by country, ranging from a cap of 20 percent below 2005 levels by 2020 for Denmark, Ireland and Luxembourg, to permitted emissions growth of up to 20 percent above 2005 levels for Bulgaria. This directive also permits countries to purchase approved offsets equaling up to 4 percent of their 2005 emissions levels to meet their emissions cap. If an international climate treaty is signed imposing GHG emission reductions to at least 20 percent

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67. The directives are available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20081217+TOC+DOC+XML+V0//EN&language=EN.

below 1990 levels, EU lawmakers must reevaluate the package to achieve emissions reductions of 30 percent below 1990 levels by 2020.

### E. 2008: Corporate Voices Demanding Federal Action More Subdued

In 2008, corporate voices demanding uniform, nation-wide climate change regulation were more subdued than in prior years, as the business community became more concerned about the effects of the recession and the collapse of the credit markets. In the beginning of the year, financial institutions advocated for business principles incorporating consideration of climate change. On February 4, 2008, Citigroup, JPMorgan-Chase, and Morgan Stanley established the Carbon Principles ("the Principles"), which encourage companies seeking funding for power plant-related projects to reduce their climate change impact (through lower $CO_2$ emissions and renewable energy investment) in order to reduce the banks' financial risk. To accomplish this aim, the banks stated that they will ask companies questions about their commitment to clean technology and renewable energy when negotiating financing for future projects. In a related development, on February 12, 2008, at a conference hosted by the Institute for Emerging Issues at North Carolina State University, Ken Lewis, Chairman and Chief Executive Officer of Bank of America, announced that Bank of America will consider $CO_2$ emissions as a liability when funding utilities, estimating a cost of $20-$40 per ton of $CO_2$.

On February 14, 2008, at an investor summit on climate risk held at the United Nations, 49 pension fund leaders, foundation heads, and financial asset managers (totaling $1.75 trillion in assets) signed a nine-point action plan describing their intentions with respect to their investment strategy. The nine points encompass: (1) taking climate risks and opportunities into consideration in investment decisions; (2) making investments in clean technology; (3) seeking improvements of energy performance in real estate portfolios and investments; (4) requiring more disclosure and action on the climate impact of corporations in critical sectors, *e.g.*, automobiles, energy, insurance, real estate, construction, finance, and forestry; (5) giving investors information and guidance to evaluate corporate climate risks; (6) expanding climate risk scrutiny and collaboration by participants in the finance sector; (7) urging the Securities and Exchange Commission to develop guidance for climate risk disclosure; (8) encouraging companies and investors to support government action on climate policy; and (9) supporting government policies to maximize energy efficiency.[68]

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68. Fund leaders from the following states signed the action plan: California, Connecticut, Florida, Illinois, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, and Vermont. *See* Investor Network on Climate Risk Action Plan, http://www.ceres.org/Document.Doc?id=279.

*Jenner & Block on*
## Climate Change 2008 Year in Review: Complex Legal and Political Issues Are Waiting for the New Administration

On April 8, 2008, before the auto industry's financial crisis was a matter for emergency congressional action, Ford Motor Company announced that it will reduce GHG emissions from its North American and European vehicle fleets 30 percent by 2020. To meet this goal, Ford will build lighter cars, more fuel-efficient engines, and additional hybrid vehicle models. Ford also stated that it would be investing $6-$7 billion in clean technology. Ford's shareholders had asked Ford in 2007 to make GHG emission reductions.

Some in the power industry announced their long-range plans to address the effects of climate change. For example, on July 15, 2008, Exelon Corporation announced the release of "Exelon 2020: A Low-Carbon Roadmap," which sets forth Exelon's plan to reduce GHG emissions from its operations 25 percent by 2020.[69] Exelon provides 20 percent of national nuclear power and stated that it will reduce GHG emissions by 15 million tons/year by 2020. Specifically, Exelon will build a 600-megawatt natural gas plant in Pennsylvania, reduce energy use in its buildings by 25 percent, expand its renewable energy portfolio, and spend $250 million in energy efficiency improvements in buildings.

Other energy companies faced more adversarial proceedings regarding climate change-related business disclosures. On October 23, 2008, Dynegy, Inc. signed an Assurance of Discontinuance (AOD) settlement agreement with New York Attorney General Andrew Cuomo requiring Dynegy to disclose to investors the financial risks that climate change poses to the company. The settlement calls for Dynegy to report climate change-related financial risks to investors in Securities and Exchange Commission Form 10-K filings. Dynegy's climate change-related risk disclosures will include analyses of financial risk from regulation, including both present and "probable future law," as well as from litigation and risk arising from "physical impacts of climate change."[70] In addition, Dynegy will provide a "strategic analysis of climate change risk and emissions management" and a description of the "corporate governance of climate change" issues.[71] The AOD will be in effect for four years.

Dynegy's settlement agreement follows a similar AOD signed in August 2008 between Attorney General Cuomo and Xcel Energy ("Xcel"), a national power company which is

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69. *See* http://www.exeloncorp.com/NR/rdonlyres/6BF790FC-6ADB-422D-A7A5-36F3776748CC/0/080716Exelon2020_A_Low_Carbon_Roadmap.pdf.

70. *See* http://www.oag.state.ny.us/media_center/2008/oct/dynegy_aod.pdf, at 1(a)-(c).

71. *Id.* at 1(d)-(e).

among the 10 top U.S. power industry emitters of GHGs in 2008.[72] Like Dynegy, Xcel will disclose the financial risks posed to the company by climate change in its Form 10-K filings.[73] Both settlement agreements stem from September 2007 subpoenas the Attorney General issued for information on corporate disclosures on climate change-based financial risks the companies faced.

### F. On the Agenda for the Next Administration

Through actions by EPA and other federal agencies, the Bush Administration demonstrated its consistent resistance to the development of a comprehensive approach to reduction of GHG emissions. The Obama Administration, with an announced policy of comprehensive programs to regulate and decrease GHG emissions, must both grapple with the legal and administrative decisions of the previous administration and make complicated design decisions for future policy.

As soon as the Obama team starts, they are going to have a full plate of complicated, pending issues waiting for them. Those items include:

- Clean Air Act — (1) deciding how to approach the endangerment finding issue in response to *Massachusetts v. EPA*; (2) strategy decisions regarding PSD and other permit requirements for coal-fired power plants, such as the plant at issue in *In re Deseret*; (3) NSPS decisions with respect to nitrous oxide, landfill methane, and other GHGs; and (4) determining whether and how to use the CAA to implement broader GHG regulation.

- Mobile Sources — (1) decisions on California's CAA waiver for GHG emissions; (2) finalizing CAFE standards in light of judicial decisions and the EISA; and (3) determining how a national GHG emission strategy should address mobile sources.

- Endangered Species Act — (1) policy and strategy decisions on litigation, pending and noticed, regarding the polar bear, coral, seals, penguins, wolverine, pine tree, and other species; (2) determining how to address

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72. *See* http://www.oag.state.ny.us/media_center/2008/aug/xcel_aod.pdf, at para. C. Xcel's disclosures also will include the company's present carbon emissions and projected carbon emissions from future coal-fired power plants.

73. *Id.* at (1)(a)-(d).

the new rule regarding FWS and NMFS consultations on global warming issues; and (3) determining how ESA goals and regulations intersect with any new GHG reduction initiatives.

- Technology — (1) decision regarding the funding for FutureGen; (2) finalization of the SDWA rule regarding carbon sequestration; and (3) strategic decisions regarding whether and how to use federal support for GHG emission reduction technologies.

In addition, if the new administration decides to pursue a comprehensive plan to reduce GHG emissions, the new policy-makers must make multiple program design judgments, not least among them how to address programs states already have begun to implement or plan.

Decisions on all of these pending and future programs will have broad repercussions for the regulated community, consumers, and the nation's infrastructure. Moreover, the new administration will not have the luxury of delaying decisions on its strategy given that the international community expects the United States to be a leader in the new climate change treaty to be negotiated in Copenhagen at year-end. With pending issues and new policies all demanding immediate attention, 2009 is bound to begin a new era in this country's course of action regarding climate change.

**For more information about global climate change**, *see* Environmental Law Practice Guide Ch. 17C; Treatise on Environmental Law Ch. 1A.

**For complete coverage of environmental trading programs**, *see* Environmental Law Practice Guide Ch. 18B.

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Ms. Sigel's national practice focuses primarily on environmental, safety and health litigation and counseling, toxic tort defense, and insurance coverage litigation and counseling. She recently concluded several toxic tort lawsuits concerning a contaminated site located in a residential area. A significant portion of

Ms. Sigel's litigation practice involves representing employers in matters concerning work-related injuries, including OSHA proceedings, personal injury lawsuits, criminal investigations, workers' compensation hearings and insurance coverage claims.

In addition to her litigation practice, Ms. Sigel advises clients on a variety of counseling, regulatory, and transactional issues. For example, she currently is advising a multinational corporation on how to address climate change issues, including working to develop definitions, inventory, and programs for greenhouse gas emission reduction. Her transactional experience has included due diligence investigations of environmental, safety and health issues nationwide, in Europe, and in Canada, in preparation for both sales and acquisitions of manufacturing concerns.

Ms. Sigel has been an adjunct professor, teaching environmental law at Northwestern University School of Law. She is active in the American Bar Association, Sections of Litigation and Environment, Energy and Resources. The Illinois State Bar Association appointed her to its Environmental Law Section Council. Ms. Sigel began developing her diverse legal practice when she joined Jenner & Block in 1983, immediately after graduating cum laude from Boston University School of Law. Ms. Sigel is AV Peer Review Rated, Martindale-Hubbell's highest peer recognition for ethical standards and legal ability.

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Prior to joining Jenner & Block, Ms. Cassel completed a PILI Fellowship at the Chicago Legal Clinic. During her Fellowship, Ms. Cassel drafted comments on a Clean Air Act New Source Review permit and prepared manuals on how to use Guatemalan and Honduran environmental laws to protect the Mesoamerican Barrier Reef. Ms. Cassel was a summer associate at the Legal Assistance Foundation of Metropolitan Chicago in 2006, and before attending law school, Ms. Cassel wrote and edited grant proposals for medical research.

Ms. Cassel earned her B.A. in International Studies, with general and departmental honors and Phi Beta Kappa, in 2000 from Vassar College. She was awarded

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