

# International Environmental Law Committee Newsletter

Vol. 10, No. 3

May 2008

---

## MESSAGE FROM THE CHAIRS

---

**Joe Siegel**  
**Bill Blackburn**  
**Jane Luxton**

As we did last year, the Section of Environment, Energy, and Resources' International Environmental Law Committee and Climate Change, Sustainable Development, and Ecosystems Committee have jointly produced a newsletter focused on the timely and critical issue of climate change. Despite the wide number of conferences and publications devoted to this topic, there is always more to discuss in this rapidly changing field. In this edition, we are focussing on the interrelationship between climate change and ecosystems, both because of the interests and expertise of our sections and because climate change will have major impacts on world ecosystems and sustainable development. For example, the sustainable management of forests and avoidance of deforestation are now seen as a major solution to reducing the global emission of greenhouse gases. We are excited to have four articles from top experts in the climate change and ecosystem fields in this joint issue of our newsletter.

This newsletter's first article, by Kenneth Markowitz, sets the stage by providing a summary of recent developments in climate change law and policy in the international, domestic, and litigation arenas. Next, Katherine Hamilton discusses reduced emissions from avoided deforestation and degradation secured through carbon markets. She provides a background as to the

acceptance and workability of land-based credits in both voluntary and regulated carbon trading systems. Richard Blaustein's article also focuses on deforestation, but examines the concept as developed at the international level through negotiations at the United Nations. Finally, Carl Bruch addresses the critical issue of adaptation to climate change, emphasizing the need to reform environmental law so as to best achieve a robust system that can respond.

We hope you find this issue of our newsletter helpful in your understanding of climate change and ecosystems law. If you would like to get involved in our committees' work on these topics, please contact us. We welcome your membership, input, and participation.

---

## RECENT DEVELOPMENTS IN CLIMATE CHANGE LAW AND POLICY

---

**Kenneth J. Markowitz**

The majority of the world's leading scientists now agree that human behavior is causing our climate system to change. Governments perceive climate change as one of the greatest threats to national security; businesses across a broad range of sectors recognize the significant risks and opportunities associated with rapidly evolving regulatory environments at the international, national, and local levels. There is cautious optimism that countries will

**International Environmental Law  
Committee Newsletter  
Vol. 10, No. 3, May 2008  
James W. Rubin, Editor**

***In this issue:***

Message from the Chairs  
*Joe Siegel, Bill Blackburn, and  
Jane Luxton* ..... 1

Recent Developments in Climate Change  
Law and Policy  
*Kenneth J. Markowitz* ..... 1

REDD Taking Root in the Voluntary  
Carbon Markets  
*Katherine Hamilton* ..... 7

REDD Gets Off the Ground  
*Richard J. Blaustein* ..... 9

Adaptation Law and the Future of  
Environmental Law: How Climate Change  
Will Reshape Environmental Governance  
*Carl Bruch* ..... 13

© Copyright 2008. American Bar Association. All rights reserved. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly should not be construed as representing the policy of the ABA.

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



reach agreement on a successor to commitments made under the Kyoto Protocol for the long-term mitigation of greenhouse gas (GHG) emissions and adaptation to the impacts of climate change. In the United States, President Bush recently called for stopping GHG emissions growth by 2025, Congress is developing federal, economy-wide GHG legislation, and regional programs are advancing in the Northeast, Western States, and Upper Midwest.

Lawyers across a wide range of practice areas—litigation, corporate, funds, global projects, tax, trade, intellectual property, and more—will need to understand climate change laws and policies to help clients manage complex risks and seize emerging opportunities.

This article summarizes recent developments in international and domestic climate change law and policy. It includes an overview of selected court proceedings related to climate change and GHG emissions.

**International Law and Policy**

In December 2007, some 190 countries, parties to the United Nations Framework Convention on Climate Change (UNFCCC) met in Bali, Indonesia, to launch a two-year negotiation over a new agreement to succeed the Kyoto Protocol, whose commitments made by 175 nations (but excluding the United States) expire at the end of 2012. Financing mechanisms, technology transfer, and flexibility to meet compliance obligations were central to the contentious, but productive, discussions in Bali.

UNFCCC Parties issued the “Bali Action Plan,”—a roadmap to guide negotiations on “measurable, reportable and verifiable” emission reduction commitments from both developed *and* developing countries, while recognizing the “principle of common but differentiated responsibilities and respective capabilities.” The Bali Action Plan recognizes that emission reductions in developed countries alone will not protect against the potentially devastating impacts of severe climate change to global security and the global economy. The Action Plan anticipates that

developing countries will agree to “nationally appropriate mitigation actions” if adequately “supported and enabled by technology, financing and capacity-building.” The relationship between enabling access to clean technologies for the developing world and protecting the intellectual property rights of technology developers and investors is highly contentious. The debate, driven by the United States and China, is playing out on many fronts beyond the UNFCCC climate negotiations, including in the Group of Eight (G8) process, the World Trade Organization Doha round, and other multilateral and bilateral processes.

The Kyoto Protocol introduced three flexibility mechanisms to help Parties meet compliance obligations: emissions trading, the Clean Development Mechanism (CDM), and Joint Implementation (JI). In Bali, the Parties sought to improve administrative procedures of the CDM and enhance compliance and environmental integrity throughout this system, which creates billions of euros worth of carbon offset credits from sustainability projects in developing nations. Parties highlighted the need for “policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries.” The concept of “reduced emissions from deforestation and degradation” (REDD) demonstrates a major shift in how the global climate framework could realign economic incentives so that the value of the ecosystem goods and services flowing from an intact forest is greater than the market value of the timber or other economic benefits from deforested land.

The first post-Bali steps occurred during the first week of April 2008 in Bangkok, Thailand. The major news out of the Bangkok meetings was the strong reaction to a Japanese proposal. Japan offered a plan where emissions reduction targets would be set on an industry or sector basis, rather than solely relying on national quotas. Countries in the developing world strenuously opposed the plan, fearing that it could harm opportunities to continue the industrialization process. Do not expect this to be the last that is heard on adopting a sectoral approach, however, as this is likely to become an important argument advanced by G8

countries. China also strengthened an alliance with Brazil and India, and continued to push forward on legal and moral obligations for technology transfer.

As part of its own post-Kyoto planning, the European Commission issued a proposed Directive on Jan. 23, 2008 for its third phase of carbon regulation (2013 to 2020). The Directive includes revisions to the European Union Emissions Trading System (EU-ETS), a market established to provide countries of the EU with economic flexibility to meet their compliance commitments under the Kyoto Protocol. The EU Council and the European Parliament will now debate the proposal in anticipation of approval by early 2009. The Commission’s proposal calls for a 20 percent reduction in GHG emissions across the EU, as compared to 1990 levels. That goal will increase to a 30 percent reduction if other industrialized countries (*i.e.*, the United States) agree to an equivalent goal in a post-Kyoto agreement. Major proposed changes to the EU-ETS include: setting one EU-wide emissions cap instead of twenty-seven national caps, harmonizing the rules governing free allocation of emissions allowances, and including new industries (e.g., aviation, aluminum and ammonia producers). In addition, the proposal mandates new requirements and provides incentives for the use of renewable energy, while prohibiting use of offset credits from forest and land use projects in the trading system.

## **Domestic Law and Policy**

In the United States, both the White House and Congressional leaders have been active in seeking ways to reduce carbon emissions while minimizing the impacts to our economy. President Bush spoke on April 16, 2008, outlining a new national goal of stopping the growth of U.S. GHG emissions by 2025. The goal will be accomplished by encouraging technological innovation with “long-lasting” “technology-neutral” and “carbon-weighted” incentives, which will encourage development of the most promising low-emissions energy technologies. President Bush also spoke about the importance of not leaving “[d]ecisions with such far-reaching impact . . . to unelected regulators and judges.” Instead, they “should be debated openly and made by the elected

representatives” in Congress.

The president’s comments indicate that the administration does not intend to pursue GHG emissions regulations through the Environmental Protection Agency (EPA). EPA regulations were widely expected after the Supreme Court decision in *Massachusetts v. EPA* ordering EPA to determine whether GHG emissions from vehicles endanger public health and welfare. If an endangerment finding is made, EPA would be required to regulate vehicle emissions. EPA recently issued notice of its intent to publish an Advanced Notice of Proposed Rulemaking (ANPR) for regulating GHG emissions from vehicles. An ANPR is a way for the administration to gather comments on the subject, but does not evince any intent to promulgate rules at this time. As a result, it appears that we can expect Congress to play the most significant role in shaping the national response to climate change.

The leading bill in the Senate, the Lieberman-Warner Climate Security Act, which would create a federal cap and trade program for carbon emissions, passed out of the Senate Environment and Public Works Committee in early December 2007. The full Senate plans to debate the bill in the early summer of 2008. Cost containment, economic impacts and competitiveness, treatment of offsets, linkages with foreign markets, and early action credit are among the interesting issues to watch.

In the House, progress has been slower. Rep. Dingell (D-MI), chair of the House Energy and Commerce Committee, is expected to propose a plan in the spring of 2008. In the meantime, his committee is issuing a series of white papers analyzing the effects of economy-wide carbon regulation. One looked at the economic and competitive impacts if the United States takes action to control GHG emissions and rapidly industrializing (*i.e.*, China, India, Brazil, Korea) economies fail to act, concluding this scenario would not reduce global GHG emissions and likely would have serious effects on our economy, manufacturing in particular. Another white paper considered federalism concerns and roles for different levels of government. It concluded that some state efforts to regulate GHG emissions should be preempted by federal programs, aligning it with positions taken recently by the Bush

administration. At the same time, the paper recognized that state and local governments and initiatives, such as building codes and land use decisions, play an important role in reducing GHG emissions and fill gaps in a federal cap and trade program.

Despite significant progress, prospects for meaningful economy-wide carbon legislation this year are not all bright. With a current president who has repeated his opposition to cap and trade programs and uncertainties in the economy weighing against quick action on this critical concern, the political posturing should provide for exciting times in Congress as it debates prospective climate change laws. All remaining presidential candidates have pledged support for federal cap and trade legislation.

EPA’s decision to deny California’s request to set its own auto emissions regulations has also captured significant attention. EPA concluded that the state did not meet the Clean Air Act’s (CAA’s) “compelling and extraordinary effects” test, given that climate change is a global problem and the effects are not unique to California. Under the CAA, states may not regulate emissions from new automobiles. California, however, has a special exemption allowing it to apply for a waiver. If approved, other states may choose between the federal standard and the California standard. California and several other states immediately sued EPA for denying the waiver, arguing that the decision was arbitrary and capricious, and several members of Congress introduced legislation to immediately grant California’s waiver application. These matters were both pending as of the date of this article.

Other issues getting significant attention include EPA’s consideration of life cycle analysis methodology related to biofuels and corresponding provisions in the Energy Act of 2007, the Federal Trade Commission’s decision to consider carbon offsets and green marketing in the context of consumer protection, and the emergence of regional and state leadership in the design and implementation of carbon legislation, such as the Regional Greenhouse Gas Initiative, which begins Jan. 1, 2009, with allowance auctions in the Fall of 2008, and California’s implementation of its climate change framework law, AB 32.

Several other agencies have also begun to look at various aspects of the climate change debate. The Federal Trade Commission (FTC), for example, held a workshop in January 2008 that examined the growth in the markets for carbon offset products and renewable energy certificates. A lack of transparency and accountability in these products brought the FTC's attention, as doubts are being raised about the validity of many "green" claims. The FTC recently closed a public comment period on whether to update its "Green Guides" to address the carbon markets and other "green" claims related to climate change. The Securities and Exchange Commission (SEC), meanwhile, received a petition in January from a group of institutional investors concerned over corporate disclosure requirements. The petition demanded that public companies be required to identify and quantify the impacts of climate change on their business. This would include disclosure of physical, financial, and legal risks derived from climate change. It is not known at this time whether the SEC will issue any new disclosure mandates.

## Litigation

U.S. courts, both federal and state, have been extremely busy with challenges to GHG legislation, consideration of climate change in permitting decisions, and alleged damages resulting from the impacts of climate change.

For example, a very important case is currently pending before the Ninth Circuit, relating to the Corporate Average Fuel Economy (CAFE) standards for light trucks, model years 2008 to 2011. The Center for Biological Diversity (CBD) sued the National Highway Traffic Safety Administration (NHTSA) claiming that the CAFE standards were arbitrary and capricious because the agency failed to monetize the value of the reduction in GHG emissions from alternative standards that would increase fuel economy. In November 2007, a three-judge panel of the Ninth Circuit agreed with the plaintiffs and ordered the agency to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) that accounts for the effect of auto emissions on climate change (*CBD v. NHTSA*, 508 F.3d 508).

NHTSA filed for a rehearing *en banc* in February 2008.

Climate change has also become a major driver of litigation involving permitting decisions. Challenges have been brought against a number of permit applications for coal-fired power plants under the CAA and state laws. A prominent case is in Kansas, where the Sunflower Electric Corporation has been attempting to expand a facility. The Kansas Department of Health and Environment denied an air quality permit request on the grounds that the emissions would contribute to global warming. The Kansas Senate passed a bill to overturn the permit denial, but Gov. Sebelius vetoed the bill in March 2008. Other power plant challenges at the administrative level revolve around the requirement that certain facilities subject to the CAA's Prevention of Significant Deterioration program install the Best Available Control Technology for pollutants that are "subject to regulation" under the CAA—the issue being whether carbon dioxide emissions are in fact "subject to regulation." under the act. The Deseret Power Cooperative (PSD 07-03) case in Utah is currently under review by the EPA's Environmental Appeals Board, with EPA continuing to argue that carbon dioxide emissions are not currently subject to regulation under the CAA. A number of states, nongovernmental organizations, and industry groups have filed amici briefs in that case, and oral argument is scheduled for late May 2008.

Other plaintiffs have used common law claims to litigate the effects of climate change. Most recently, the Alaska Native coastal village of Kivalina filed a complaint in federal court against five oil companies, fourteen electric utilities, and the country's largest coal company for their alleged contribution to climate change. The suit contends that "[g]lobal warming is destroying Kivalina and the village thus must be relocated soon or be abandoned and cease to exist" as a result of the loss of arctic sea ice that protects the village from storms. The suit alleges that global warming is a public nuisance and accuses the defendants of engaging in a conspiracy by using "front groups, fake citizens organizations, and bogus scientific bodies" to create a "false scientific debate . . . in order

to deceive the public” that was “intended to further the defendants’ abilities to contribute to global warming” by emitting unlimited amounts of GHGs. This suit is particularly noteworthy for two reasons: (1) the plaintiffs alleged that they have suffered discrete harms from warming that the general public does not share and (2) their lawyers, who are well known from previous lawsuits waged against the tobacco industry for denying the harmful effects of smoking cigarettes, are seeking to make a similar case of conspiracy against the industry defendants.

A number of cases have also been filed against emitting sources alleging common law nuisance. Connecticut and other plaintiffs filed a suit against major electrical utilities claiming that GHG emissions from power plants constitute a public nuisance by contributing to climate change. *Connecticut v. American Electric Power* (406 F. Supp. 2d 265 (S.D.N.Y. 2005)). The district court dismissed the case after the judge ruled that the issues were subject to the political question doctrine—i.e., courts should not adjudicate this type of dispute. The plaintiffs appealed; oral arguments were heard in 2006, and almost two years later the case is still pending before the Second Circuit, suggesting perhaps that the court is struggling with its decision. A California district court dismissed a similar case, *California v. General Motors Corp.* (2007 U.S. Dist. LEXIS 68547), against the six largest auto makers, in September 2007, also citing the political question doctrine in its dismissal. A third case, in Mississippi, was filed by property owners who had suffered damage in Hurricane Katrina. They argued that a group of chemical, oil, and coal companies were responsible for the damages by virtue of contributing to climate change. The district court dismissed the case, which was appealed to the Fifth Circuit, where it currently sits. *Comer v. Murphy Oil* (CV 05-0436, (S.D. Miss. 2007)).

## Conclusion

Climate change is no longer just a debate with industry on one side and environmentalists on the other. Today, dealing with the effects of climate change is central to the practices of many attorneys. The issues being raised on the international, domestic, and litigation

fronts touch a diverse array of practice areas for lawyers representing the business community. As the federal government and the international community ponder new regulatory programs aimed at reducing GHG emissions, practitioners must stay abreast of the rapid developments to provide the best service to clients facing new risks and opportunities from climate change.

*Kenneth J. Markowitz is senior counsel at Akin Gump Strauss Hauer & Feld. He advises leading public- and private-sector clients on regulatory and policy developments associated with climate change. He leads a team of attorneys and policy advisors providing daily analysis of the regulatory, policy, and litigation developments that drive investment in climate change technologies, industrial sectors, and markets online at <http://www.ClimateIntel.com>.*

## ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

### Calendar of Section Events

#### **Global Warming II: How the Law Can Best Address Climate Change (36th National Spring Conference on the Environment)**

June 6, 2008

Baltimore, Maryland

(Cosponsored with the ABA Standing  
Committee on Environmental Law)

#### **ABA Annual Meeting**

Aug. 7-12, 2008

New York, New York

#### **16th Section Fall Meeting**

Sept. 17-20, 2008

Phoenix, Arizona

*For more information, see the  
Section Web site at  
[www.abanet.org/environ/](http://www.abanet.org/environ/).*