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Dealing with Climate Change in the United States: The Non-Federal Response

*James A. Holtkamp**

Today, only a few lawyers in the United States deal with climate change issues as part of their practice. That is primarily because there are not that many legal requirements dealing with climate change in the United States. However, the number of state programs is growing, and there is an expectation that a mandatory federal program is just a few years away. The lack of a federal response to climate change is interesting in large part because it illustrates one of the great strengths of the federal system of government in the United States.

At few other places on the planet do sub-national governments have the sovereign power to fill a void occasioned by the absence of action from the national government. In the United States, over fifty sub-national entities have sovereign authority to address environmental and health issues, including climate change, without having to secure approval from the federal government.¹ Indeed, not too long ago I had the occasion to review what was happening in every single state and in several territories to address climate change. I found that in some form or another, almost every state is dealing with climate change issues. Some states simply have established policy statements or executive orders from the governor directing that the light bulbs be changed to a certain specification. That may not be much, but it is a beginning. At the other end of the spectrum, some states have comprehensive programs such as those adopted in California and the northeastern states.

This paper reviews these programs, which vary widely in detail and complexity. It provides a taste of what is happening at the state level. It also provides a glimpse of what a future federal program may look like.

The state approaches to climate change can be grouped into various categories ranging from simple statements of goals, to mandatory programs, to emissions trading, to multi-state regional initiatives. Some states are taking steps that will significantly affect activities outside their borders, and some have developed climate change action plans. Others are providing economic incentives for energy

* Manager of the Global Climate Change Practice Group at Holland & Hart and a resident partner at the firm's Salt Lake City office. He has been actively involved in greenhouse gas mitigation, air pollution control, groundwater cleanup, contaminated property, and radioactive and hazardous waste issues on behalf of industry and government clients throughout the United States and in Europe. He previously served on the staff of the U.S. Senate Select Committee on Presidential Campaign Activities (Watergate Committee) in 1974 and as a U.S. Department of the Interior attorney before entering private practice in 1977. He is an adjunct professor of law at the University of Utah.

¹ Federal law, of course, often preempts state environmental requirements. *See, e.g.*, 42 U.S.C. § 7543 (2006) (dealing with the limitations on a state's authority to regulate tailpipe emissions from motor vehicles).

efficiency measures. This presentation will highlight a few states which are representative of these various approaches.

California has been both a bellwether and a pioneer in environmental regulation. Much, if not most, of the approaches to air pollution control in the federal Clean Air Act, and in various state air pollution control laws, were first developed in California. Governor Arnold Schwarzenegger announced in 2006 that California “will reduce carbon emissions to 1990 levels by the year 2020. That’s a 25 percent reduction. And by 2050, [California] will reduce emissions to 80 percent below 1990 levels.”² That is a very aggressive goal which is driving a lot of California. It affects all sectors, not just major sources like refineries and power plants. The focus is on every sector of the economy in California. The aggressive goals in the action plan were codified in the California Global Warming Solutions Act of 2006, which passed the California Legislature and Governor Schwarzenegger signed in August, 2006.³

In 2002, the California Legislature enacted a statute requiring the California Air Resources Board to adopt and implement rules that would require that vehicles, including cars and light duty trucks, sold in California beginning with model year 2009 have 22 percent lower carbon dioxide emissions from the tailpipe than 2002 levels, and then 30 percent lower than 2002 levels by model year 2016.⁴

The City of Los Angeles owns and operates its electricity and water system. Although it is a municipal utility, it is one of the largest utilities in the United States. One of the major events in California environmental regulation occurred when Los Angeles announced that it was going to implement energy conservation programs.⁵ This was a major paradigm shift for a municipal utility that had historically dealt with growth by adding generation, much of it located in other states. Los Angeles also indicated that it would not develop additional coal-fired generation, which led to its withdrawal from the Intermountain Power Project Unit 3 in western Utah.⁶

New Mexico is the first major energy producing state to announce significant greenhouse gas reduction targets. The goal is to reduce statewide emissions of

² Press Release, Office of the Governor of California, Gov. Schwarzenegger Signs Landmark Legislation to Reduce Greenhouse Gas Emissions (Sept. 27, 2006), *available at* <http://gov.ca.gov/index.php?/press-release/4111/> (last visited Nov. 29, 2006).

³ California Global Warming Solutions Act, A.B.32, 2005–06 Sess. (Cal. 2005).

⁴ A.B.1493, 2001-2002 Sess. (Cal. 2001).

⁵ City Res. 005-265, Resolution Approving LADWP’s Renewable Portfolio Standard Policy (2005), *available at* http://clkrep.lacity.org/councilfiles/05-1113_rpt_dwp_5-31-05.pdf (last visited Nov. 29, 2006).

⁶ CAL. ENERGY COMM’N, STAFF REPORT CEC-700-2005-016, 2005 ENVIRONMENTAL PERFORMANCE REPORT OF CALIFORNIA’S ELECTRICAL GENERATION SYSTEM 10 (JUNE 2005), *available at* <http://www.energy.ca.gov/2005publications/CEC-700-2005-016/CEC-700-2005-016.pdf> (last visited Nov. 29, 2006).

carbon dioxide by 75 percent by 2050.⁷ Although some suggest that this goal is a political gesture by a governor with presidential aspirations, there is strong public support for the goal. New Mexico has also created the New Mexico Climate Change Advisory Group, which is a group of forty stake holders charged with developing the means to reach the reduction goal.⁸

Other states have adopted mandatory reductions or restrictions of some kind on greenhouse gas emissions. Typically, the initial focus is on the major sources, which offer the least expensive reduction opportunities. The more difficult reductions are those that would be required of smaller sources like personal vehicles and individual activities.

Massachusetts recently adopted restrictions on carbon dioxide emissions from its six existing coal-fired power plants. Plant operators can reduce, sequester or avoid carbon dioxide emissions at the plant site or elsewhere to meet the reduction obligations.⁹

Emissions-trading is a key mechanism to achieve reductions in carbon dioxide emissions. This consists of a governmental entity issuing authorization to emit certain amount of carbon dioxide. Those holding the authorization may trade them to offset emissions somewhere else. The Acid Rain Program established by Title IV of the 1990 Clean Air Act Amendments¹⁰ has been extremely successful in reducing sulfur dioxide emissions from power plants and is looked to as a model for greenhouse gas emissions trading. Emissions-trading is one of the compliance mechanisms allowed under the Kyoto Protocol for countries to meet their individual reduction targets.¹¹

A variety of greenhouse gas markets have emerged, including some in the United States. The Climate Trust (formerly known as Oregon Climate Trust) is one of the pioneers in greenhouse gas emissions trading. The state of Oregon requires new power plants to reduce their greenhouse gas emissions by 17 percent compared to a natural gas fired plant.¹² In other words, the carbon dioxide emissions have to be 17 percent less than they would be for a brand new combined cycle natural gas plant. The Oregon system allows a number of options. For example, an operator can choose to achieve the lower greenhouse gas emission rate or he can acquire credits from someone else who has reduced greenhouse gas emissions. Those credits can be used to offset against the reduction obligation.

⁷ Exec. Order No. 05-033 (N.M. 2005), *available at* http://www.governor.state.nm.us/orders/2005/EO_2005_033.pdf (last visited Nov. 29, 2006).

⁸ New Mexico Climate Change Advisory Group, *available at* <http://www.nmclimatechange.us/> (last visited Nov. 29, 2006).

⁹ Massachusetts Department of Environmental Protection, *available at* <http://www.mass.gov/dep/public/publications/1006co2.htm> (last visited Nov. 29, 2006).

¹⁰ 42 U.S.C. §§ 7651(b)-(d) (1990).

¹¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 17 (Mar. 16, 1998).

¹² Oregon Power Plant Emissions Standards, *available at* <http://www.newrules.org/electricity/climateor.html> (last visited Nov. 29, 2006).

The Climate Trust has generated standards for measuring and verifying credits.¹³ The credits must result from permanent and verifiable reductions. For example, if a steel plant in Utah County, Utah, is shut down permanently, a portion of the resulting carbon dioxide reduction could be used as credits to meet the Oregon reduction obligations to the extent that they otherwise meet the standards of the Climate Trust. The power plant owner may also make payments directly to the Oregon Climate Trust in lieu of credits or reductions. The Oregon Climate Trust uses those funds to assist private forests owners in managing their resources, which in turn facilitates carbon sequestration.

California has created the Climate Action Registry.¹⁴ Like the Oregon Climate Trust, the Climate Action Registry is not a state agency, but rather a non-profit organization designated as the entity to operate the program. The Climate Action Registry is a public-private partnership; and it has established a greenhouse gas registry to facilitate the quantification of carbon dioxide emission reductions. Typically, the registry process involves not just a one-time verification, but an annual audit. The reductions are often required to be in excess of regulatory requirements. The California registry and associated verification protocols are widely used to establish tradable carbon dioxide credits.

Illinois has established the Agricultural Carbon Credit Program, under which credits can be created by changing agricultural practices.¹⁵ For example, the traditional method of tilling involves breaking up and turning the earth over in the spring, which releases a fair amount of carbon. There are alternative tilling practices which result in equally productive yields and still keep carbon sequestered in the soil. This program addresses climate change and gives some economic benefits to farmers.

Many states are involved in regional greenhouse gas mitigation programs. The most prominent of these programs is the Northeastern States Regional Greenhouse Gas Initiative or "RGGI," which involves Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont.¹⁶ The purpose of the RGGI is to develop, among other things, a regional market for carbon dioxide credits in the northeastern United States. The program is a multi-state cap-and-trade system in which "emitters" are allocated rights to emit under a regional cap on greenhouse gas emissions. The governors of Rhode Island and Massachusetts

¹³ See generally Climate Trust Organization, <http://www.climatetrust.org> (last visited Nov. 29, 2006).

¹⁴ See generally California Climate Action Registry, <http://climateregistry.org> (last visited Nov. 29, 2006).

¹⁵ See generally Illinois Conservation & Climate Initiative, <http://illinoisclimate.org> (last visited Nov. 29, 2006).

¹⁶ See generally Regional Greenhouse Gas Initiative: An Initiative of the Northeast and Mid-Atlantic States of the U.S., available at <http://www.rggi.org> (last visited Nov. 29, 2006).

decided not to participate in the initial stages of the regional market because it would be economically harmful.¹⁷

On September 29, 2006, Governor Schwarzenegger signed Senate Bill 1368, which requires the California Public Utilities Commission to establish “a greenhouse gases emission performance standard for all baseload generation of load-serving entities, at a rate of emissions of greenhouse gases that is no higher than the rate of emissions of greenhouse gases for combined-cycle natural gas baseload generation.”¹⁸ The statute prohibits the Public Utilities Commission from approving “a long-term financial commitment by an electrical corporation unless any baseload generation supplied under the long-term financial commitment complies with the greenhouse gases emission performance standard established by the commission . . .”¹⁹ This statute codifies an earlier policy adopted by the Public Service Commission. The governors of California and Wyoming have signed a memorandum of understanding in which they pledge to work together to develop clean coal generating resources.²⁰ The harsh realities of California’s burgeoning load growth and the extreme difficulty of developing significant new generating resources in that state pose a considerable challenge to California.

Another approach the states have taken to climate change is to develop climate change action plans. Arizona, for example, has formed a climate change advisory group and is committed to having an action plan by 2006 containing recommendations to reduce greenhouse gas emissions and to develop a greenhouse gas inventory.²¹ The inventory will provide information on actual carbon dioxide emissions in the state, which is a necessary predicate to a regulatory program. New Mexico and Arizona have also announced that the two states will work together to develop action plans for reducing greenhouse gases.²²

Another state approach is to reduce greenhouse gas emissions through incentives. For example, the Washington Legislature is considering a proposal for business tax credits for greenhouse gas mitigation projects. Ideally, the economic impacts of environmental pollution would be addressed through a carbon tax.²³ Carbon taxes are already part of a suite of tools the United Kingdom uses to

¹⁷ See Regional Greenhouse Gas Initiatives, Conservation Law Foundation, *available at* <http://www.clf.org/programs/cases.asp?id=341> (last visited Nov. 29, 2006).

¹⁸ S.B. 1368 §8341(d), 2005-2006 Sess. (Cal. 2006).

¹⁹ S.B. 1368 §8341(b)(1), 2005-2006 Sess. (Cal. 2006).

²⁰ Memorandum of Understanding Between the Governors’ Offices of California and Wyoming, *available at* http://www.frontierline.org/summit/WY_CA_MOU.pdf (last visited Nov. 29, 2006).

²¹ See Arizona Climate Change Advisory Group, *available at* <http://www.azclimatechange.us> (last visited Nov. 29, 2006).

²² Southwest Climate Change Initiative, *available at* <http://www.azclimatechange.us/ewebeditpro/items/O40F8085.pdf> (last visited Nov. 29, 2006).

²³ See, e.g., C. Hansen & J. Hendricks, Jr., *Taxing Carbon to Finance Tax Reform*, Duke Energy/World Resources Institute Issue Brief (2006), *available at* http://pdf.wri.org/taxing_carbon_full.pdf (last visited Nov. 29, 2006).

encourage mitigation of greenhouse gas emissions,²⁴ and are under discussion by policymakers in a number of countries. In the United States, state and federal policy makers have shied away from carbon taxes because of strong political opposition. Emissions-trading sometimes is viewed as a surrogate for a tax to the extent that there is a transparent market which will generate prices for reductions equivalent to the societal costs of the emissions.

The number of states adopting climate change policies continues to increase. For example, Nebraska is looking at agricultural practices in the context of climate change mitigation.²⁵ In Utah, the governor has established a blue-ribbon panel on climate change, and the Utah Department of Environmental Quality is beginning to look at voluntary greenhouse gas inventory reporting and registration.²⁶

Also, a growing number of lawsuits are raising climate change issues. A case that has attracted wide attention is *Commonwealth of Massachusetts v. Environmental Protection Agency*.²⁷ In that case, several states challenged the EPA to force the regulation of greenhouse gases under the federal Clean Air Act, an issue that has been actively debated for over a decade in various fora. For example, during the Clinton administration, the EPA issued a legal opinion in response to an inquiry from an appropriations committee.²⁸ EPA concluded that it did have the authority to regulate greenhouse gases, but that it would not exercise its discretion to do so. The Bush Administration revoked that determination, and EPA issued another opinion, that rescinded the prior interpretation and held that carbon dioxide and other greenhouse gases are not pollutants under the Federal Clean Air Act.²⁹ That legal opinion was the basis for the rejection by EPA of a petition for rulemaking to regulate under Title II of the Clean Air Act.³⁰ That denial triggered the *Massachusetts* case. The District of Columbia Circuit upheld the denial of the petition.³¹ On April 2, 2007, the United States Supreme Court

²⁴ See U.K. Finance Act 2000, Part II, Clause 30, Schedules 6, 7 (2000), available at <http://www.opsi.gov.uk/acts/acts2000/00017f.htm#30> (last visited Nov. 29, 2006).

²⁵ See State Carbon Sequestration Advisory Committee, formed by the Nebraska legislature in 2000 through L.B. 957, 96th Leg., 2nd Sess. (Neb. 2000).

²⁶ See Brandy Lee, *Huntsman Creates a Climate Panel*, DESERET MORNING NEWS, ¶¶ 1, 14 (Sept. 8, 2006), available at http://ff.org/centers/csspp/library/co2weekly/20060907/20060907_10.html (last visited Nov. 29, 2006).

²⁷ 415 F.3d 50 (D.C. Cir. 2005).

²⁸ See Memorandum from Jonathan Z. Cannon, EPA General Counsel, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998), available at <http://www.law.umaryland.edu/environment/casebook/documents/EPACO2memo1.pdf> (last visited Nov. 29, 2006).

²⁹ See Memorandum from Robert E. Fabricant, EPA General Counsel, EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act (Aug. 28, 2003), available at <http://www.epa.gov/airlinks/co2petitiongcmemo8-28.pdf> (last visited Nov. 29, 2006).

³⁰ See Control of Emissions From New Highway Vehicles and Engines, 68 Fed.Reg. 52,922 (Sept. 8, 2003).

³¹ See *Mass. v. Env'tl. Prot. Agency*, 415 F.3d 50 (D.C. Cir. 2005).

handed down a 5-4 decision reversing the D.C. Circuit ruling.³² The Court held that the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from automobiles and ordered EPA to determine whether such emissions endanger public health and welfare, a necessary predicate to actual regulation under the Act.³³

Another significant case is a public nuisance action brought by several states against American Electric Power Company and other large electric utility operators of coal-fired power plants, complaining that carbon dioxide emissions from power plants caused climate change, which in turn resulted in adverse consequences to the states.³⁴ The lawsuit is primarily a federal public nuisance cause of action. The federal court for the Southern District of New York ruled that the issue is a political question that belongs in the legislative and the executive branches, not in court. An appeal is pending.

In August, 2006, the State of California filed a lawsuit in state court against various automobile manufacturers under state nuisance law.³⁵ That action is but the latest in a series of cases implicating both federal and California state law as applied to climate change issues.

One other movement deserves mention. Publicly held corporations are addressing climate change in a variety of ways. There are an increasing number of shareholder initiatives. Large institutional investors, universities, and government pension funds (most notably the California Public Employees Pension Fund) demand that companies in which they have interests disclose and assess the climate change impacts of their operations. One concern is that by making voluntary public disclosures, a public company may commit itself politically, if not legally, to repeating the disclosure each year, even in the absence of uniform guidelines on what and how to disclose. Nonetheless, many companies are making efforts to establish such guidelines for reporting. For example, four utilities in the Midwest have agreed to a standard for issuing annual reports to their shareholders about the amount and impact of greenhouse gases emitted by their operations.³⁶

Most companies of significant size have developed corporate climate change policies. Some are vague platitudes regarding being "climate change friendly." Others describe specific steps the company is taking or will take to reduce its climate change footprint. A few companies, such as BP, have internal carbon

³² *Mass. v. Env'tl. Prot. Agency*, 127 S.Ct. 1438 (2007).

³³ 42 U.S.C. § 7521(a)(1) (2006).

³⁴ *See Conn. v. Am. Elec. Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005).

³⁵ *See* Press Release, Office of Att'y Gen. of Cal., Attorney General Lockyer Files Lawsuit Against "Big Six" Automakers for Global Warming Damages in California (Sept. 20, 2006), available at <http://ag.ca.gov/newsalerts/index.php?year=2006&month=9&PHPSESSID=ac8d5a22be33c97244b973a05dac98d4> (last visited Nov. 29, 2006).

³⁶ *See* Press Release, Peyton Fleming, Ceres, Four Electric Power Companies in Midwest Agree to Disclose Climate Risks (Feb. 21, 2006), available at http://www.ceres.org/news/news_item.php?nid=144 (last visited Nov. 29, 2006).

trading programs which are intended not only to reduce carbon dioxide emissions but also to prepare the company for inevitable mandatory controls.³⁷

Finally, a number of companies, governments, and non-governmental organizations have joined the Chicago Climate Exchange, a private marketplace for trading carbon credits. The Exchange is looked to both as a model of a private market initiative and as an important link to government exchanges.

These various threads—state programs, litigation, corporate climate change policies, and private markets—are intertwining into a system that will facilitate, if not force, a comprehensive federal climate change program.

³⁷ See e.g., BP, P.L.C. Website, *Power Marketing & Trading: Emissions Trading*, http://www.bpalternativenergy.com/liveassets/bp_internet/alternative_energy/emissions_trading_power_marketing.html (last visited Nov. 29, 2006).