REPORT OF THE ENVIRONMENTAL REGULATION COMMITTEE

The following is the initial report of the Energy Bar Association's Environmental Regulation Committee, the successor to the Climate Change and Emissions Committee. In this report, the Committee summarizes key developments in Federal and State environmental regulation from June 2010 to August 2011 that may be of particular interest to practitioners.*

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I. FEDERAL DEVELOPMENTS

A. Regulatory Developments

1. New Source Performance Standard Settlement Agreements

The U.S. Environmental Protection Agency's (EPA) development of proposed New Source Performance Standards (NSPS) for greenhouse gas emissions (GHG) from new and existing steam electric generating units (EGU) and petroleum refineries continued after years of litigation and delays. On December 23, 2010, the EPA entered into a pair of proposed settlement agreements that established a schedule for the agency to promulgate GHG performance standards for EGUs and refineries under Clean Air Act (CAA) section 111.[1] While the settlement agreements shed little light on the ultimate

* Special thanks are due to the following Committee members for their efforts in contributing to the Committee Report: Kevin M. Gallagher, Walter R. Hall, II, Diana Jeschke, Christian D. McMurray, Zachary L. Seder, and Adam White.

1. Settlement Agreement at 2, New York v. EPA, No. 06-1322 (D.C. Cir. Dec. 23, 2010) [hereinafter EGU Settlement Agreement], *available at* http://www.epa.gov/airquality/pdfs/boilerghgsettlement.pdf; *see also* Notice of Proposed Settlement Agreement, Proposed Settlement Agreement: Clean Air Act Citizen Suit, 75

design of the standards, they effectively resolved lawsuits brought by a number of states and environmental groups in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that challenged a pair of agency rulemakings amending existing performance standards for EGUs and refineries under section 111.

CAA section 111 authorizes the EPA to regulate emissions of air pollutants from stationary sources. Section 111(b) requires the EPA to set emission standards for any category of new or modified stationary sources that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[2] For all listed source categories, the EPA must establish "standards of performance" (NSPS) based on the best demonstrated technology (BDT).[3] Once proposed, these standards apply to all sources, described as "affected sources," that are constructed, modified, or reconstructed. Under section 111(d), subject to certain exceptions, the EPA has authority to regulate existing sources of listed source categories.[4] Rather than authorizing the EPA to directly set national standards, this provision authorizes the EPA to issue "emission guidelines" that states must meet when they regulate emissions of existing sources in a source category.[5]

The two settlement agreements affect separate rulemakings under section 111 for EGUs and refineries. The first agreement applies to certain new source and existing EGUs that burn fossil fuels.[6] The agreement addresses a rule issued by the EPA in February 2006 amending the standards of performance for EGUs subject "to 40 C.F.R. part 60, subpart Da."[7] In response to the rule, several states and environmental groups filed petitions for judicial review contending that the Clean Air Act required the EPA to include NSPS for GHG emissions from EGUs.[8] The settlement agreement requires the EPA to issue rules addressing GHG emissions from EGUs.[9] If the EPA does so, the agreement forecloses any further action by state and environmental petitioners to compel

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Fed. Reg. 82,392 (Dec. 30, 2010); Settlement Agreement, American Petroleum Inst. v. EPA, No. 08-1277 (D.C. Cir. Dec. 23, 2010) [hereinafter Refinery Settlement Agreement], *available at* http://www.epa.gov/airquality/pdfs/refineryghgsettlement.pdf; *see also* Notice of Proposed Settlement Agreement, Proposed Settlement Agreement, 75 Fed. Reg. 82,390 (Dec. 30, 2010); *see generally Addressing Greenhouse Gas Emissions*, EPA.GOV, http://www.epa.gov/airquality/ghgsettlement.html (last visited Oct. 6, 2011); Clean Air Act (CAA), 42 U.S.C. § 7411 (2006).

2. CAA § 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A) (2006).

3. 42 U.S.C. § 7411(a).

4. 42 U.S.C. § 7411(d).

5. *Id.*

6. EGU Settlement Agreement, *supra* note 1, at 2.

7. Final Rulemaking, Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units, 71 Fed. Reg. 9,866 (Feb. 27, 2006) (to be codified at 40 C.F.R. pt. 60). Under subpart Da, an affected facility generally refers to boiler and steam generators of a fossil-fueled facility capable of generating 73 MWh of electricity through combustion and for which construction, modification, or reconstruction commenced after September 18, 1978. 40 C.F.R. § 60.40Da(a) (2011).

8. EGU Settlement Agreement, *supra* note 1. Petitioner states included New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, along with the Commonwealth of Massachusetts, the District of Columbia, and the City of New York. Environmental petitioners included the Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund.

9. *Id.* ¶¶ 1-6.

the EPA to act.[10] In the agreement, the EPA commits to issue a proposed rule to establish "standards of performance for GHGs for new and modified EGUs . . . subject to 40 C.F.R. part 60, subpart Da" under section 111(b).[11] The agency also agreed that the proposed rule would include emissions guidelines pursuant to section 111(d) "for GHGs from existing EGUs that would [qualify under] 40 C.F.R. part 60, subpart Da if they were new sources."[12]

The settlement agreement originally set the deadline for the proposed rulemaking as July 26, 2011.[13] However, on June 13, 2011, the parties entered into a modified settlement agreement that changed the deadline for the proposed rule to September 30, 2011.[14] The May 26, 2012 deadline established by the original agreement for the EPA to sign final rules for new or modified and existing EGU stationary sources, respectively, remains in effect.[15] The EPA will coordinate the rulemaking actions required by the agreement with other required regulatory actions affecting emissions of traditional pollutants from EGUs, including the Utility MACT rule,[16] the Cross-State Air Pollution Rule,[17] and NSPS for criteria pollutants.

The second settlement agreement, signed the same day as the first, resolved a similar set of petitions for review brought in the D.C. Circuit by states[18] and environmental groups.[19] In addition, the agreement resolved petitions for reconsideration brought before the agency by the same parties on August 25, 2008. In the D.C. Circuit petitions, consolidated as *American Petroleum Institute v. EPA*, the refinery petitioners had challenged the agency's failure to establish performance standards for GHGs in a final rule amending existing performance standards for refineries under 40 C.F.R. part 60, subparts J and Ja.[20]

The agreement establishes a delayed rulemaking schedule that will allow the EPA to undertake a comprehensive approach to regulating emissions of

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10. *Id.* ¶ 7.

11. *Id.* ¶ 1.

12. *Id.* ¶ 2.

13. *Id.*

14. Modification to Settlement Agreement at 3, New York v. EPA, No. 06-1322 (D.C. Cir. June 13, 2011) [hereinafter Modification to EGU Agreement], *available at* http://www.epa.gov/airquality/pdfs/20110613ghgsettlementmod.pdf.

15. EGU Settlement Agreement, *supra* note 1, at ¶¶ 3-4.

16. Proposed Rule, Proposed National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Extension of Comment Period, 76 Fed. Reg. 38,590 (proposed July 1, 2011) (to be codified at 40 C.F.R. pts. 60, 63).

17. Final Rule, Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, 97) [hereinafter *CSAPR*].

18. Refinery Settlement Agreement, *supra* note 1, at p. 1. The state petitioners included the States of New York, California, Connecticut, Delaware, Maine, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the District of Columbia, as well as the City of New York.

19. *Id.* The environmental petitioners included the Natural Resources Defense Council, Sierra Club, and Environmental Integrity Project.

20. Final Rule, Standards of Performance for Petroleum Refineries, 73 Fed. Reg. 35,838 (June 24, 2008) (to be codified at 40 C.F.R. pt. 60); Refinery Settlement Agreement, *supra* note 1, at ¶¶ 2-3.

GHGs and other pollutants from affected facilities at refineries under section 111.[21] Under the terms of the agreement, the EPA committed to promulgate GHG performance standards under section 111(b) "for affected facilities at refineries that are subject to" performance standards under NSPS subparts J, Ja, Db, Dc, GGG and QQQ; to issue emissions guidelines for GHGs under section 111(d) and 40 C.F.R. § 60.22 for "existing affected facilities at refineries . . . covered by those . . . subparts;" to conduct a risk and technology review of current air toxic standards for refineries; and to resolve issues raised in the August 25, 2008 petition for reconsideration of the refinery NSPS, as well as other issues raised by the Petitioners.[22] The agreement requires the EPA to issue the proposed rule by December 10, 2011 and the final rule by November 10, 2012.[23]

Pursuant to both settlement agreements, the respective cases before the D.C. Circuit will be held in abeyance pending further order. If the EPA fails to issue the GHG performance standards as required by the agreements, the petitioners will have the right to ask the D.C. Circuit to lift the stay of the proceedings on the original petitions for review.[24] As part of the process of designing the new rules in compliance with the settlement agreements, the EPA subsequently held a series of listening sessions with stakeholders. Conducted during February and March 2011, the listening sessions for representatives from the electric power industry, environmental and environmental justice organizations, states, tribes, coalition groups, and the petroleum refinery industry were intended for EPA to obtain stakeholder input on the design of the performance standards.[25]

2. Mobile Source Greenhouse Gas and Fuel Economy Regulations

The regulatory agenda for mobile sources of GHGs precipitated by the U.S. Supreme Court's decision in *Massachusetts v. EPA* saw significant activity.[26] On the heels of their May 2010 emission standards for light-duty vehicles for model years (MY) 2012-2016,[27] the EPA and the National Highway Transportation Safety Agency (NHTSA) issued on September 30, 2010 a Notice of Intent (NOI) to develop new standards for GHG emissions and fuel economy for light-duty vehicles for MY 2017-2025.[28] The NOI provided an "initial

21. Refinery Settlement Agreement, *supra* note 1, at ¶¶ 2-3; *see also* 75 Fed. Reg. 82,390, 82,391 (accepting public comments on American Petroleum Inst. v. EPA, No. 08-1277 (D.C. Cir. Dec. 23, 2010)).

22. Refinery Settlement Agreement, *supra* note 1, at ¶ 2.

23. *Id.* at ¶¶ 2-3.

24. *Id.* at ¶ 7.

25. *Listening Sessions on Greenhouse Gas Standards for Fossil Fuel Fired Power Plants and Petroleum Refineries*, EPA.GOV, http://www.epa.gov/airquality/listen.html (last updated Mar. 10, 2011).

26. Massachusetts v. EPA, 549 U.S. 497 (2007).

27. Final Rule, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600). For further discussion of the light-duty vehicle standards, see last year's report of the Energy Bar Association's Climate Change and Emissions Committee, the predecessor to the Environmental Regulation Committee. *Report of the Climate Change & Emissions Committee*, 31 ENERGY L.J. 571, 572-574 (2010) [hereinafter *2010 Report*].

28. Notice of Intent to Conduct Joint Rulemaking, 2017 and Later Model Year Light Duty Vehicle GHG Emissions and CAFE Standards, 75 Fed. Reg. 62,739 (Oct. 13, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600).

assessment of potential levels of stringency for a" MY 2017-2025 regulatory program and outlined the steps the agencies would take to refine the assessment.[29]

The agencies released with the NOI an Interim Joint Technical Assessment Report (TAR) that analyzed a range of potential MY 2017-2025 regulatory scenarios representing the equivalent of approximately 47-62 miles per gallon by model year 2025.[30] On November 30, 2010, the agencies issued a supplemental NOI that addressed public comments on the NOI and TAR and outlined the agencies' plans for developing a proposed rulemaking.[31] Although the California Air Resources Board (ARB) initially announced that California would independently promulgate standards for MY 2017-2025 by March of 2011, CARB reconsidered and committed in late January 2011 to join the EPA and NHTSA in a unified timeframe that would have the three agencies promulgate GHG standards for MY 2017-2025 by September 30, 2011.[32]

On November 30, 2010, the EPA and the NHTSA took the first step in the process of extending mobile source GHG regulations to heavy-duty vehicles.[33] As proposed, the EPA and the NHTSA will adopt complementary regulations for on-road heavy-duty vehicles for MY 2014-18 pursuant to their respective authorities under the Clean Air Act and Energy Independence and Security Act of 2007.[34] The rules will apply to all on-road vehicles rated at a gross vehicle weight at or above 8,500 pounds and the engines that power them, except for those covered by the GHG and Corporate Average Fuel Economy standards already issued for MY 2012-2016.[35] A second phase of the rulemaking will be undertaken in the future to cover model years beyond 2018.[36]

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29. *Id.* at 62,739.

30. OFFICE OF TRANSP. AND AIR QUALITY, EPA ET AL., INTERIM JOINT TECHNICAL ASSESSMENT REPORT: LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSION STANDARDS AND CORPORATE AVERAGE FUEL ECONOMY STANDARDS FOR MODEL YEARS 2017-2025 (2010).

31. Supplemental Notice of Intent to Conduct Joint Rulemaking, 2017 and Later Model Year Light-Duty Vehicle GHG Emissions and CAFE Standards, 75 Fed. Reg. 76,337 (Dec. 8, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600).

32. Press Release, U.S. Envtl. Prot. Agency, EPA, DOT and California Align Timeframe for Proposing Standards for Next Generation of Clean Cars (Jan. 24, 2011), *available at* http://yosemite.epa.gov/opa/admpress.nsf/1e5ab1124055f3b28525781f0042ed40/6f34c8d6f2b11e58852578220 06f60c0!OpenDocument. On July 29, 2011, the agencies issued another supplemental NOI that announced the agencies' plans for promulgating the proposed rule. According to the supplemental NOI, which resulted from a series of negotiations between the three agencies and automakers that whose fleets would be regulated by the standard, the agencies intend to proposed standards that would achieve by 2025 a projected 54.5 mpg on an average industry fleet-wide basis. Supplemental Notice of Intent, 2017-2025 Model Year Light-Duty Vehicle GHG Emissions and CAFÉ Standards, 76 Fed. Reg. 48,758, 48,759 (Aug. 9, 2011) (to be codified at 40 C.F.R. pts. 85, 86, 600).

33. Proposed Rule, Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 74,152 (Nov. 30, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 1036, 1037, 1065, 1066, 1068).

34. Final Rule, Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1033, 1036, 1037, 1039, 1065, 1066, 1068).

35. *Id.* (stating that the EPA and the NHTSA issued the final rulemaking establishing GHG standards for medium- and heavy-duty engines and vehicles). The structure and stringency of the final rule is largely unchanged from the proposed rule.

36. *Id.* at 57,108.

3. Stationary Source Greenhouse Gas Regulations: PSD and Title V

The ramifications of *Massachusetts v. EPA* continued to shape the EPA's stationary source programs.[37] Following the issuance of the Endangerment Finding[38] in 2009 and the Tailoring Rule on May 13, 2010,[39] the EPA began the process of developing rules to ensure that by January 2, 2011[40] state permitting programs would be prepared to issue permits for GHG emissions from new major stationary sources and major modifications at existing major stationary sources under the Clean Air Act's Prevention of Significant Deterioration (PSD)[41] and Title V Operating Permit[42] programs. In the first of two rules issued August 12, 2010, the EPA found that PSD permitting regulations in the state implementation plans (SIP) of thirteen states were substantially inadequate because they failed to cover emissions from GHG-emitting sources and required the states to revise their SIPs to correct the inadequacies.[43] The second rule proposed, in the event that any state failed to revise its SIP to provide for permitting of GHG sources under the PSD program, a federal implementation plan (FIP) under CAA section 110 that would enable the EPA to assume permitting authority in such states.[44]

The EPA next issued guidance to assist state and local permitting authorities in implementing the pending rules for GHG permitting.[45] Initially issued on November 10, 2010, and subsequently updated in March 2011, the guidance confirmed that, under the PSD, GHG regulations best available control technology (BACT) determinations would continue to be a state- and project-specific decision conducted according to the five-step, top-down BACT process

37. Massachusetts v. EPA, 549 U.S. 497 (2007).

38. Final Rule, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71). *See also 2010 Report*, *supra* note 27, at 572-573.

39. Final Rule, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71). *See also 2010 Report*, *supra* note 27, at 572-573.

40. As described in the Tailoring Rule, January 2, 2011 was the earliest date at which a MY 2012 vehicle subject to the light-duty vehicle GHG regulations could be sold. As a result, that was the date on which CO_2 became "subject to regulation," thereby triggering the requirements of the Clean Air Act's PSD and Title V provisions.

41. 40 C.F.R. § 52.21 (2011).

42. 40 C.F.R. §§ 70-70.12 (2011).

43. Proposed Rule, Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 53,892 (Sept. 2, 2010) (to be codified at 40 C.F.R. pt. 52). The 13 states included on the "Presumptive SIP Call List" were Alaska, Arizona, Arkansas, California, Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada, Oregon, and Texas.

44. Proposed Rule, Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan, 75 Fed. Reg. 53,883 (Sept. 2, 2010) (to be codified at 40 C.F.R. pt. 52).

45. OFFICE OF AIR QUALITY PLANNING AND STANDARDS, EPA, PSD AND TITLE V PERMITTING GUIDANCE FOR GREENHOUSE GASES (Nov. 2010, updated Mar. 2011), *available at* http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf. The guidance consists of the general guidance document, as well as a number of GHG Control Measures white papers. *Clean Air Act Permitting for Greenhouse Gases*, EPA.GOV, http://www.epa.gov/nsr/ghgpermitting.html (last updated Sept. 28, 2011).

in place for conventional pollutants.[46] Although the guidance did not identify BACT for specific categories of emission sources and granted states significant discretion in issuing BACT determinations, the guidance did emphasize the importance of BACT options that improve energy efficiency.[47]

The EPA issued the final SIP Call rule on December 13, 2010.[48] In addition to finalizing the determination of substantial inadequacy for the thirteen states, the final SIP Call established specific dates by which each state would submit their revised plan to the agency.[49] After seven states failed to meet their SIP Call deadlines, on December 23, 2010, the EPA issued a finding that the states had failed to submit the required SIP revisions.[50] The finding was one of six rulemakings issued that day by the EPA that constituted the final procedural steps necessary for implementation of GHG permitting requirements under the PSD GHG program. In addition to the finding of failure, one of these rules, a final order, established an EPA-directed FIP to cover PSD and Title V permitting in the seven states that failed to submit SIP revisions by their established deadline.[51] Two others ensured that existing SIPs would not apply PSD permitting and Title V requirements to small GHG sources below the thresholds established in the agency's June 2010 "Tailoring Rule."[52]

The two remaining rules issued on December 23 specifically addressed the State of Texas, which occupied a prominent place in the agency's PSD and Title V activities throughout the year. Because Texas failed to revise its SIP in accordance with the final SIP Call, one of these rules contained an interim final rule that disapproved the Texas SIP and put in place a FIP to provide for PSD and Title V permitting in the state.[53] The second Texas-related rulemaking established a parallel rule disapproving of the Texas SIP and establishing a FIP that the agency opened for public comment on the various issues related to

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46. *Id.* at 17-18. The updated guidance incorporated responses to substantive comments, as well as technical corrections, to the Nov. 2011 guidance.

47. *Id.* at 21.

48. Final Rule, Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698 (Dec. 13, 2010) (to be codified at 40 C.F.R. pt. 52).

49. *Id.*

50. Final Rule, Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure to Submit State Implementation Plan Revisions Required for Greenhouse Gases, 75 Fed. Reg. 81,874 (Dec. 29, 2010) (to be codified at 40 C.F.R. pt. 52) (The seven states affected by the finding were Arizona, Arkansas, Florida, Idaho, Kansas, Oregon, and Wyoming).

51. Final Rule, Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan, 75 Fed. Reg. 82,246 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52).

52. Final Rule, Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans, 75 Fed. Reg. 82,536 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52); Final Rule, Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 82,254 (Dec. 30, 2010) (to be codified at 40 C.F.R. pts. 52, 70).

53. Interim Final Rule, Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, 75 Fed. Reg. 82,430 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52).

agency's action.[54] On April 22, 2011, the EPA took the next step in the rulemaking process by issuing a final FIP that enabled the agency to assume permitting responsibilities for new and modified sources of GHGs in the state until Texas revises its SIP to conform with applicable requirements.[55]

Throughout the rulemaking process related to PSD and Title V permitting for GHG emissions, Texas, other states and various utility groups challenged the EPA's regulatory actions in the courts. As of the time of this writing, some of the procedural challenges to the EPA's promulgation and implementation of GHG regulations had been resolved. However, challenges by Texas and two utility trade groups of the SIP Call remain under review before the United States District Court of Appeals for District of Columbia.[56] In addition, the same plaintiffs have challenged the EPA's May 3, 2011 FIP that allowed the agency to assume control of the Texas permitting program.[57]

4. The Cross-State Air Pollution Rule

The EPA issued the final Cross-State Air Pollution Rule (CSAPR) on July 6, 2011.[58] The rule, which was originally proposed as the Transport Rule, requires power plants in twenty-seven eastern, midwestern, and southern states to significantly reduce their emissions of nitrogen oxides (NO_X) and sulfur dioxide (SO_2).[59] The emission reductions are based on the EPA's determination that those emissions "contribute significantly to nonattainment . . . or interfere with maintenance in one or more downwind states with respect to one or more of three [existing] air quality standards – the annual" fine particle matter ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) "promulgated in 1997, the 24-hour $PM_{2.5}$ NAAQS promulgated in 2006, and the ozone NAAQS promulgated in 1997."[60] CSAPR replaces the Clean Air Interstate Rule (CAIR), which the D.C. Circuit remanded to the agency in its 2008 *North Carolina v. EPA* decision.[61] At the same time that it issued the final CSAPR, the EPA issued a supplemental proposal to request comment on its conclusion that six additional states significantly affect downwind states ability to attain and maintain compliance with the 1997 ozone NAAQs.[62]

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54. Proposed Rule, Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, 75 Fed. Reg. 82,365 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52).

55. Final Rule, Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program, 76 Fed. Reg. 25,178 (May 3, 2011) (to be codified at 18 C.F.R. pt. 52).

56. Texas v. EPA, No. 10-1425 (filed D.C. Cir. Feb. 11, 2011); Utility Air Regulatory Grp. v. EPA, No. 11-1037 (filed D.C. Cir. Feb. 11, 2011); SIP/FIP Advocacy Grp. v. EPA, No. 11-1250 (filed D.C. Cir. Feb. 11, 2011). *See also* Chase Power Dev., LLC v. EPA, No. 11-1249 (filed D.C. Cir. Feb. 28, 2011).

57. Texas v. EPA, No. 11-1128 (filed D.C. Cir. May 4, 2011); Utility Air Regulatory Grp. v. EPA, No. 11-1249 (filed D.C. Cir. July 5, 2011); Chase Power Dev., LLC v. EPA, No. 11-1249 (filed D.C. Cir. July 5, 2011); SIP/FIP Advocacy Grp. v. EPA, No. 11-1250 (filed D.C. Cir. July 5, 2011).

58. *CSAPR*, *supra* note 17.

59. *Id.* at 48,209.

60. *Id*.

61. North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008), *modified*, 550 F.3d 1176 (D.C. Cir. 2008).

62. Proposed Rule, Federal Implementation Plans for Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin to Reduce Interstate Transport of Ozone, 76 Fed. Reg. 40,662 (July 11, 2011) (to be codified at 40 C.F.R. pts. 52, 97).

CAIR was issued by the EPA in 2005 pursuant to its authority under CAA section 110(a)(2)(D)(i)(I), also known as the "good neighbor" provision.[63] Under CAIR, states are required to mitigate cross-border air pollution and to reduce pollution affecting downwind states by establishing a cap-and-trade regime for NO_X and SO_2.[64] In 2008, the D.C. Circuit overturned CAIR, finding that the rule was "fundamentally flawed."[65] The CSAPR will replace CAIR in order to comply with the Court's order.[66] The first phase of compliance with the CSAPR begins on January 1, 2012;[67] until then, CAIR remains in place through the close of the 2011 compliance period.

In the final CSAPR, the EPA identified

> emission reduction responsibilities of upwind states [and] promulgated enforceable FIPs to achieve the required emission reductions in each state through . . . requirements for power plants. Each state has the option of replacing these federal rules with state rules to achieve the required amount of emission reductions from sources selected by the state.[68]

Under this section, states are required to submit SIPs that prohibit sources within the state from significantly contributing "to nonattainment in, or interfer[ing] with maintenance by, any other state with respect to [NAAQS]."[69] Title I of the Clean Air Act requires that each state adopt a SIP to meet primary and secondary NAAQS.[70]

The EPA rule extends compliance obligations upon much of the eastern United States. Under the annual and/or 24-hour $PM_{2.5}$ NAAQS, the EPA determined twenty-three states were responsible for reducing SO_2 and annual NO_X emissions.[71] The rule also found "that 20 states have ozone-season NO_X emission reduction responsibilities" "[w]ith respect to the 1997 ozone NAAQS."[72] If the EPA finalizes its supplemental proposal to extend the CSAPR, then Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin will

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63. CAA § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(1)(I) (requiring the elimination of upwind state emissions that significantly contribute to nonattainment or interfere with maintenance of a NAAQS in another state).

64. Final Rule, Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 70 Fed. Reg. 25,162 (May 12, 2005) [hereinafter Clean Air Interstate Rule or CAIR].

65. *North Carolina*, 531 F.3d at 929 (D.C. Cir. 2008), *modified*, 550 F. 3d 1176, 1178 (D.C. Cir. 2008) (remanding CAIR to EPA without vacatur, thereby allowing EPA to attempt to remedy the flaws within the rule).

66. *CSAPR*, *supra* note 17, at 48,211.

67. *Id.* (noting that the first compliance phase includes SO_2 and annual NO_X reductions, while ozone-season NO_X reduction compliance begins on May 1, 2012. A second, more stringent, phase of SO_2 reductions begins January 1, 2014).

68. *Id.* at 48,209.

69. *Id.*; *see also* 42 U.S.C. § 7410(a)(2)(D).

70. *CSAPR*, *supra* note 17, at 48,209.

71. *Id.* at 48,213 tbl. III-1, 48,214 (requiring the following states to reduce downwind $PM_{2.5}$ concentrations by reducing NO_X and SO_2 emissions: Alabama, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin).

72. *Id.* (including Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia).

be required to reduce emissions.[73] The states may achieve the required reductions through trading of emission allowances.[74]

The CSAPR "allocate[s] emission allowances to existing units . . . based [up]on historic heat-input data."[75] Similar to the proposed rule, the final CSAPR distributes the state allotment to individual electric generating units in the form of tradable allowances and allows limited interstate trading as well as unlimited intrastate trading.[76] Each emission allowance "authorize[s] the emission of one ton of SO_2, annual NO_X, or ozone season NO_X."[77] The new allowances for the Transport Rule trading program are unrelated to allowances under the CAIR trading program, and there is no "carryover of banked SO_2 and NO_X allowances."[78] The new program design is purported to have dramatic benefits.

The EPA estimates that "[b]y 2014, the [CSAPR] and other final state and EPA actions will reduce power plant SO_2 emissions by 73 percent from 2005 levels . . . [, and] [p]ower plant NO_X emissions will drop by 54 percent."[79] The EPA also estimates that the CSAPR will improve "air quality for over 240 million Americans . . . result[ing] in [annual benefits of] $120 to $280 billion . . . , including the value of avoiding 13,000 to 34,000 premature deaths each year."[80] The power sector, meanwhile, is expected to have increased annual costs of $800 million more than the $1.6 billion already being spent annually to comply with CAIR.[81]

The final rule will face a legal challenge. One affected party has requested reconsideration in response to the CSAPR,[82] because, despite the EPA's original proposal to only include Texas in the ozone season program, the final rule subjects Texas to the annual program for both SO_2 and NO_X.[83]

73. *Id.* at 48,214.

74. *Id.* at 48,210-48,211.

75. *Id.* at 48,212.

76. *Id.* at 48,271-48,272.

77. *Id.* at 48,212.

78. *Id.*

79. EPA, FACT SHEET: THE CROSS-STATE AIR POLLUTION RULE: REDUCING THE INTERSTATE TRANSPORTATION OF FINE PARTICULATE MATTER AND OZONE 2 (July 18, 2011), *available at* http://www.epa.gov/crossstaterule/pdfs/CSAPRFactsheet.pdf.

80. *Id.* at 1.

81. *Id.*

82. Luminant Generation Co., Request for Partial Reconsideration and Stay of EPA's Final Rule Titled "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States" Signed July 6, 2011, Docket No. EPA-HQ-OAR-2009-0491 (Aug. 5, 2011), *available at* http://www.luminant.com/pdf/Luminant's%20Petition%20for%20Reconsideration%20and%20Stay%20of%20Final%20Transport%20Rule%20(CSAPR)%20(Aug.%205,%202011)%20(Final).pdf.

83. *Id.* at 2; *see also* EPA, SUMMARY OF INTERAGENCY WORKING COMMENTS ON DRAFT LANGUAGE UNDER EO 12866 INTERAGENCY REVIEW 11, Docket No. EPA-HQ-OAR-2009-0491-4133 (posted July 11, 2011) (noting in the Office of Management and Budget's report that: "It is unclear if states and affected facilities will be prepared for a January 1, 2012 start date, especially given other changes that EPA is making in the draft final rule. For instance, modeling results used in the final rule are substantially different than those in the original August 2, 2010 Proposed Rule and subsequent notices. Six (6) States are being dropped from the proposed rule; Texas is being added; 3 states have their SO_2 Group status change; and the sheer magnitude of change to the budgets of all of the states results in a significantly different rule than originally proposed.").

B. Judicial Developments

1. Displacement of Federal Common Law Nuisance Claims: *American Electric Power Co. v. Connecticut*

In *American Electric Power Co. v. Connecticut*, the Supreme Court unanimously held that several states and other plaintiffs could not bring claims of federal common law nuisance against power companies for harms allegedly caused by the power companies' greenhouse gas emissions.[84] According to the Court, the Clean Air Act's grant of regulatory authority to the EPA displaced any common law nuisance claims that theoretically may have been available absent the Act.[85]

The case arose from two separate complaints filed in the U.S. District Court for the Southern District of New York.[86] Collectively, the plaintiffs were eight states, New York City, and three nonprofit land trusts.[87] They filed their suits against four private companies and the federal Tennessee Valley Authority, whom the plaintiffs characterized as "the five largest emitters of carbon dioxide in the United States."[88] The plaintiffs alleged that "the defendants' carbon dioxide emissions created a 'substantial and unreasonable interference with public rights' in violation of the federal common law of interstate nuisance," harming habitats, infrastructure, and health.[89] To prevent that harm, they requested injunctive relief – specifically, the imposition of emissions caps.[90]

The District Court dismissed the suits as non-justiciable "political questions."[91] The plaintiffs appealed to the Second Circuit, which received briefs and then heard oral arguments in 2006, but did not issue its decision until three years later (after one of the three panelists, Judge Sonia Sotomayor, was appointed to the Supreme Court).[92]

On certiorari to the Supreme Court, two questions were presented: first, whether the plaintiffs had "standing" to bring the suit; and second, whether plaintiffs could claim relief under federal common law.[93] On the first question, the eight justices hearing the case were equally divided, and therefore the Second Circuit's grant of standing to the plaintiffs was affirmed.[94]

As to the second question, the Court unanimously held that the Clean Air Act "displaced" plaintiff's asserted federal common law claims.[95] Expressly

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84. American Elec. Power Co. v. Connecticut (*AEP*), 131 S. Ct. 2527, 2532 (2011).

85. *Id.*

86. *Id.* at 2533.

87. *Id.* at 2533-2534.

88. *Id.* at 2534. The private defendants were: American Electric Power Company, Inc., Southern Company (a wholly owned subsidiary), Xcel Energy Inc., and Cinergy Corporation. *Id.* at 2534 n.5.

89. *Id.*

90. *Id.*

91. Connecticut v. American Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

92. Connecticut v. American Elec. Power Co., 582 F.3d 309 (2d Cir. 2009). Judge Sotomayor took no part in the Second Circuit's decision. *Id.* at 314 n.*.

93. *AEP*, 131 S. Ct. 2527 at 2535.

94. *Id.* Justice Sotomayor, who had heard the case as a Second Circuit judge years earlier, recused. *Id.* at 2540.

95. *Id.* at 2532.

avoiding any judgment on the factual merits of climate-change theory,[96] the Court held that because the Clean Air Act assigns to the EPA the authority to regulate greenhouse gas emissions – *i.e.*, the Court's prior holding in *Massachusetts v. EPA*[97] – "the statute speaks directly to the question at issue" and, therefore, "displace[s] any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."[98]

The Court further noted that its holding was not dependent upon the EPA ultimately choosing to exercise its statutory mandate by imposing regulations.[99] If the EPA ultimately declines to regulate greenhouse gas emissions, then plaintiffs' exclusive remedy is to petition the EPA for a rulemaking and (if EPA refuses) then challenge the EPA's response in court.[100] Similarly, if the EPA promulgates regulations that dissatisfy the plaintiffs, then the plaintiffs can petition the courts to review those regulations.[101]

Finally, the Court noted that plaintiffs' original district court complaints had raised state tort law claims in addition to their federal common law claims.[102] The Second Circuit did not reach those claims, and thus the issue was neither raised before, nor decided by, the Supreme Court.[103]

C. Legislative Developments

1. Legislative Limitations on EPA Authority to Regulate Greenhouse Gases

Unlike in recent years, where major legislation on energy matters was actively developed and voted upon, such has not been the case in Congress in 2011. Although much of the legislation considered in prior years remains unpassed and has been reintroduced in the 112th Congress, the partisan division and changes in philosophy toward government programs and energy matters brought by the many new members elected in November 2010 render it likely (and in some cases certain) that such legislation will not be passed during this Congress.[104] Moreover, an increased concern for fiscal matters and the Federal

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96. *Id.* at 2533 n.2.

97. Massachusetts v. EPA, 549 U.S. 497, 526 (2007).

98. *AEP*, 131 S. Ct. at 2537 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)) (quotation marks and brackets omitted).

99. *Id.* at 2538-2540.

100. *Id.* at 2538.

101. *Id.* at 2539.

102. *Id.* at 2534, 2540.

103. *Id.* at 2540.

104. Major legislation considered in 2010 in the 111th Congress included GHG Cap & Trade Legislation (*i.e.*, American Clean Energy & Security Act, H.R. 2454, 111th Cong. (2009), and Clean Energy Jobs & American Power Act, S. 1733, 111th Cong. (2009)) and the American Clean Energy Leadership Act of 2009, S. 1462, 111th Cong. (2009), the latter of which sought to establish a federal renewable electricity standard and to promote by various means the development of clean energy technologies and energy efficiency. This, and other more specific legislation considered in 2010, is more fully described in *2010 Report*, *supra* note 27, at 580-586. Cap-and-trade legislation to address global warming concerns has not been reintroduced in the 112th Congress.

Government's deficit on the part of certain new and existing members complicates passage of much of the legislation considered in recent years.[105]

The Administration, in its proposed budget, and the Senate, in proposed legislation, has continued to seek enactment of measures to promote renewable and clean energy sources, including federal supported financing and tax based incentives, while proposing elimination of historic tax incentives granted to petroleum and natural gas development.[106] The renewable energy incentive measures, however, typically involve a cost to the federal government, and it is unclear that, in the current deficit environment, that such measures can achieve sufficient support with members of either political party to become law. The new Republican majority in the House of Representatives has proposed and passed legislation to: 1) encourage petroleum and natural gas development by reducing permitting burdens and delays in obtaining regulatory approval;[107] 2) encourage renewable energy projects by reducing National Environmental Policy Act review requirements;[108] and 3) eliminate the authority of or block implementation by the EPA of certain regulations described above whose purpose is the reduction of GHG emissions.[109] As with Senate measures, it is unclear (and in some cases very doubtful) that these House passed or proposed measures can attract sufficient support to become law. In addition, each political party has developed legislation in the 111th Congress proposing adoption of a renewable or clean energy portfolio standard, and, with the greatest perceived likelihood of passage, legislation has been proposed to extend tax credits

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105. *See, e.g.,* Brian Friel, *A Deficit of Policy*, 69 CQ WEEKLY 1056, 1057 (May 16, 2011). The article notes that federal grants, tax breaks, loans and loan guarantees in 2009 equaled $56.2 billion as the result of stimulus legislation, as compared to $19.1 billion in 2007 before the recession. In an analysis provided at the request of GOP members, DOE's Energy Information Administration advised that direct federal financial interventions and subsidies in energy markets increased from $17.9 billion in 2007 to $37.2 billion in 2010. *EIA: Renewables Support Nearly Tripled in '10*, CLEAN ENERGY REP., Aug. 3, 2011, http://cleanenergyreport.com/201108032371846/Clean-Energy-Report-Blog/Blogging-Clean-Energy/eia-renewables-support-nearly-tripled-in-10/menu-id-204.html. Thus, the recent focus on fiscal issues has resulted in opposition from some members of Congress toward existing and proposed energy programs. *See also Senate Panel Backs CCS but Highlights Budget Threats to Clean Energy*, CLEAN ENERGY REP., May 26, 2011, http://cleanenergyreport.com/201105262365233/Clean-Energy-Report-Daily-News/News/senate-panel-backs-ccs-but-highlights-budget-threats-to-clean-energy/menu-id-202.html.

106. *See*, *e.g.*, *Senate Panel Advances Bills to Promote Clean Energy Technologies*, CLEAN ENERGY REP., July 14, 2011, http://cleanenergyreport.com/201107142370086/Clean-Energy-Report-Daily-News/News/senate-panel-advances-bills-to-promote-clean-energy-technologies/menu-id-202.html; *Bingaman Seeks to Report Clean Energy Bank, Reactor Bills by Recess*, CLEAN ENERGY REP., May 3, 2011, http://cleanenergyreport.com/201105032362697/Clean-Energy-Report-Daily-News/News/bingaman-seeks-to-report-clean-energy-bank-reactor-bills-by-recess/menu-id-202.html. Senator Reid has indicated that one or more of these measures, termed an "energy jobs bill," will be addressed by the full Senate late in the year. *Reid: Energy Bill Third in Line for Action This Fall*, CLEAN ENERGY REP., Aug. 10, 2011, http://cleanenergyreport.com/201108102372516/Clean-Energy-Report-Blog/Blogging-Clean-Energy/reid-energy-bill-third-in-line-for-action-this-fall/menu-id-204.html.

107. *See, e.g.,* Putting the Gulf of Mexico Back to Work Act, H.R. 1229, 112th Cong. (2011), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h112-1229.

108. *See, e.g.,* Cutting Federal Red Tape to Facilitate Renewable Energy Act, H.R. 2170, 112th Cong. (2011), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h112-2170.

109. *See, e.g.,* Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (2011), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h112-910.

provided to renewable energy technologies (*i.e.*, wind, solar, etc,) that expire at the close of this year.[110]

In Spring 2011, the National Research Council of the National Academies, Committee on America's Climate Choices, issued its Report, *America's Climate Choices*, in response to a request from Congress (Public Law 110-161)[111] that it issue a Report addressing issues associated with Global Climate Change, including an assessment of the underlying science and available responsive strategies.[112] The Report concludes:

> Climate change is occurring, is very likely caused by human activities, and poses significant risks for a broad range of human and natural systems. Each additional ton of greenhouse gases emitted commits us to further change and greater risks. In the judgment of the Committee on America's Climate Choices, the environmental, economic, and humanitarian risks of climate change indicate a pressing need for substantial action to limit the magnitude of climate change and to prepare to adapt to its impacts.[113]

Although also concluding that "uncertainties" exist respecting the nature and magnitude of these future risks and that, therefore, policies and programs may need to be revised as future improved information becomes available, the Committee urges that a beginning be made in "the process of substantially reducing [greenhouse gas] emissions" in a magnitude reflecting "societal judgments about how much risk is acceptable."[114] Further recommendations urge that the Federal government lead in developing research programs to both understand better the risks and how to respond to the impacts of climate change and to coordinate the Nation's response.[115]

2. Clean Water Cooperative Federalism Act

On May 26, 2011, Representative John Mica of Florida submitted H.R. 2018, entitled the "Clean Water Cooperative Federalism Act."[116] The Act significantly circumscribes the EPA's ability to directly oversee implementation of the Clean Water Act by preventing the EPA from challenging state determinations.[117] Specifically, the Act prohibits the EPA from revising state water quality standards for which approval has already been granted and from overruling a determination by a state that a discharge of pollutants conforms to

110. *Lugar Seeks Murkowski Backing for Alternative to Bingaman CES Bill*, CLEAN ENERGY REP., June 7, 2011, http://cleanenergyreport.com/201106072366181/Clean-Energy-Report-Daily-News/News/lugar-seeks-murkowski-backing-for-alternative-to-bingaman-ces-bill/menu-id-202.html; *Senate Finance Drafting Energy Tax Plan as Broader CES Languishes*, CLEAN ENERGY REP., Apr. 5, 2011, http://cleanenergyreport.com/2011 04052360080/Clean-Energy-Report-Daily-News/News/senate-finance-drafting-energy-tax-plan-as-broader-ces -languishes/menu-id-202.html.

111. Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844 (2008).

112. COMM. ON AMERICA'S CLIMATE CHOICES, NAT'L RESEARCH COUNCIL, AMERICA'S CLIMATE CHOICES vii, 1-5 (2011), *available at* http://www.nap.edu/catalog.php?record_id=12781.

113. *Id*. at 1.

114. *Id.* at 2-4.

115. *Id.* at 3-5.

116. Clean Water Cooperative Federalism Act of 2011, H.R. 2018, 112th Cong. (2011) (as passed by the House on July 13, 2011), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h112-2018.

117. CONGRESSIONAL RESEARCH SERV., SUMMARY OF H.R. 2018: CLEAN WATER COOPERATIVE FEDERALISM ACT OF 2011 (2011), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h112-2018&tab=summary.

applicable effluent limitations.[118] The Act also restricts the EPA's ability to influence permitting under the National Pollution Discharge Elimination System (NPDES) by objecting to the issuance of a NPDES permit by a state or holding back federal funds to a state NPDES program.[119] Additionally, the Act prevents the EPA from blocking dredge and fill permits for discharges into navigable waters on the basis that the proposed discharge would "adverse[ly] affect . . . municipal water supplies, shellfish beds, [or] fishery areas."[120] The Clean Water Cooperative Federalism Act was passed by the House of Representatives on July 13, 2011 and now awaits a vote by the Senate.

II. STATE AND REGIONAL DEVELOPMENTS

A. *The California Cap-and-Trade Program and Attendant Legal Battles*

1. Cap-and-Trade Program Development

On October 28, 2010, the California Air Resources Board (ARB) released the proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanism Regulation (proposed cap-and-trade regulation) for public comment.[121] On December 16, 2010, ARB held a public hearing, where it considered and endorsed the proposed cap-and-trade regulation.[122]

The proposed cap-and-trade regulation outlines a program to establish a limit, or cap, on greenhouse gas emissions commencing in 2012 and declining over time.[123] The proposed cap-and-trade regulation covers major sources of greenhouse gas emissions, beginning with electricity and large industrial facilities and expanding to include distributors of transportation fuels, natural gas, and other fuels beginning in 2015.[124]

The proposed cap-and-trade regulation provides that a covered entity would have an annual obligation to surrender compliance instruments to cover a percentage of the entity's greenhouse gas emissions from the previous year, and at the end of each multi-year compliance interval, the covered entity would surrender compliance instruments covering the remainder of its greenhouse gas emissions during that compliance interval.[125] Compliance instruments include allowances and offset credits and are "equivalent to up to one metric ton of

118. *Id.*

119. *Id.*

120. *Id.*

121. *See also* CAL. AIR RES. BD., INITIAL STATEMENT OF REASONS: PROPOSED REGULATION TO IMPLEMENT THE CALIFORNIA CAP-AND-TRADE PROGRAM at app. A (proposed Oct. 28, 2010) (to be codified at CAL. CODE REGS. tit. 17, §§ 95800-96022), *available at* http://www.arb.ca.gov/regact/2010/capandtrade10/capv1appa.pdf.

122. CAL. AIR RES. BD., RESOLUTION 10-42, CALIFORNIA CAP-AND-TRADE PROGRAM (Dec. 16, 2010), *available at* http://www.arb.ca.gov/react/2010/capandtrade10/res1042.pdf.

123. Notice of Public Hearing to Consider the Adoption of a Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulations, 44-Z Cal. Regulatory Notice Reg. 1832 (Oct. 29, 2010), *available at* http://www.oal.ca.gov/res/docs/pdf/notice/44z-2010.pdf.

124. CAL. AIR RES. BD., INITIAL STATEMENT OF REASONS: PROPOSED REGULATION TO IMPLEMENT THE CALIFORNIA CAP-AND-TRADE PROGRAM at II-9 (Oct. 28, 2010), *available at* http://www.arb.ca.gov/regact/2010/capandtrade10/capisor.pdf.

125. *Id.* at II-23, A-67 to A-69.

CO_2e."[126] Under the proposed cap-and-trade regulation, allowances would be distributed through a combination of direct allocation and allowance auctions,[127] and the number of allowances available each year would decline in accordance with the declining cap on greenhouse gas emissions.[128]

ARB advised that modifications to the proposed cap-and-trade regulation are necessary prior to the regulation being finalized.[129] In addition, ARB announced that while the cap-and-trade program will be initiated in 2012, compliance obligations will not begin until 2013.[130]

2. Challenges Related to AB 32

In November 2010, California voters considered a measure that would suspend the California Global Warming Solutions Act of 2006 (AB 32)[131] until the unemployment rate in California "drops to 5.5 percent or less for four consecutive [calendar] quarters."[132] The measure was defeated by California voters.[133]

As directed by AB 32,[134] ARB prepared and, in 2008, approved a Climate Change Scoping Plan (Scoping Plan) to achieve reductions in California's greenhouse gas emissions.[135] The Scoping Plan included a cap-and-trade program as an emission reduction measure.[136] In *Association of Irritated Residents v. California Air Resources Board*, petitioners challenged aspects of the Scoping Plan, "asserting that ARB failed to meet the mandatory statutory requirements of AB 32 and the California Environmental Quality Act [(CEQA)[137]] by essentially treating the Scoping Plan as *a post hoc* rationalization for ARB's already chosen policy approaches."[138] In December 2010, a hearing was held on the Petition for Writ of Mandate, and on March 17, 2011, the Superior Court issued a Statement of Decision.[139] The Superior Court concluded that in approving the Scoping Plan, ARB did not violate requirements of AB

126. *Id*. at A-11.

127. *Id.* at ES-3.

128. *Id.* at A-60.

129. *See generally id.*

130. Testimony of Mary Nichols, Cal. Senate Select Comm. on Env't, Econ. & Climate Change, A.B. 32 Market Mechanisms Overview Before the Cal. Senate Select Comm. on Env't, Econ. & Climate Change at 5 (June 29, 2011), *available at* http://www.arb.ca.gov/cc/testimony/testimony.pdf.

131. Cal. A.B. 32, 2006 Cal. Stat. ch. 488.

132. 2010 Cal. Proposition 23 *in* DEBORA BOWEN, CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE at 38, 106 (Aug. 10, 2010), *available at* http://cdn.sos.ca.gov/vig2010/general/pdf/english/complete-vig.pdf.

133. DEBORA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE 6 (Jan. 6, 2011), *available at* http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf.

134. CAL. HEALTH & SAFETY CODE § 38561 (West 2011).

135. CAL. AIR RES. BD., CLIMATE CHANGE SCOPING PLAN (Dec. 2008), *available at* http://www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf.

136. *Id*. at 27-38.

137. CAL. PUB. RES. CODE § 21000 (West 2011).

138. Statement of Decision: Order Granting in Part Petition for Writ of Mandate at 2, Association of Irritated Residents v. California Air Res. Bd., Case No. CPF-09-509562 (Cal. Super. Ct. S.F. Cnty. Mar. 18, 2011), 2011 WL 991534.

139. *Id*.

32,[140] but in doing so "ARB failed to adequately describe and analyze alternatives sufficient for informed decision-making and public review"[141] and "failed to comply with the informational requirements of CEQA and its own certified regulatory program when it issued Resolution 08-47 and began implementing the Scoping Plan . . . without first completing the environmental review process."[142] On May 20, 2011, the Superior Court issued the Judgment and the Peremptory Writ of Mandate ordering ARB to set aside its approval of the Scoping Plan "as it relates to cap-and-trade" and "enjoin[ed] ARB from engaging in any cap and trade-related . . . activity," including rulemaking and implementation activities, until ARB "comes into complete compliance with [its] obligations under its certified regulatory program and CEQA."[143] The Judgment has been appealed, and enforcement of the Superior Court's Peremptory Writ of Mandate, dated May 20, 2011, is stayed "pending consideration of the appeal."[144]

B. *Regional Greenhouse Gas Accords*

The Regional Greenhouse Gas Initiative (RGGI) of ten Northeastern and Mid-Atlantic States continued to operate through 2010-2011. As discussed in the Committee's 2010 Report, GHG emissions in the ten states are, due to the recession, well below the levels employed to determine auctioned allowances, and thus only approximately 75% of such allowances are sold. Further, these sales are occurring at prices (presently less than $2.00 per ton) well below those expected and viewed as needed to incent investments to achieve desired emission reductions.[145] The program, however, has produced $886.4 million in revenues since its 2009 inception, 80% of which have been used by participating states to invest in energy efficiency and other strategic energy programs.[146]

On May 26, 2011, Governor Chris Christie announced his intention to withdraw New Jersey from RGGI by year's end.[147] The Governor explained

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140. *Id.* at 18.

141. *Id.* at 32.

142. *Id.* at 34.

143. Order Granting in Part and Denying in Part Petition for Writ of Mandate at 3-4, Association of Irritated Residents v. California Air Res. Bd., Case No. CPF-09-509562 (Cal. Super. Ct. S.F. Cnty. May 20, 2011).

144. Order Granting Writ of Supersedeas, California Air Res. Bd. v. Ass'n of Irritated Residents, No. A132165 (Cal. Ct. App. 1st Dist. June 24, 2011).

145. *See generally 2010 Report*, *supra* note 27, at 593-595. *See also* Reg'l Greenhouse Gas Initiative (RGGI), *Program Overview*, RGGI.ORG, http://www.rggi.org/design/overview (last visited Oct. 11, 2011).

146. BNA, *Regional Clean Energy Economy Boosted With $25.5 Million in RGGI Auction Proceeds*, CLIMATE.BNA.COM, June 10, 2011, http://climate.bna.com/climate/document.aspx?ID=164859; *see also* RGGI, FACT SHEET: RGGI CO_2 ALLOWANCE AUCTIONS (Mar. 3, 2011), *available at* http://www.rggi.org/docs /RGGI_Auctions_in_Brief.pdf; *see also* RGGI, FACT SHEET: INVESTING IN THE CLEAN ENERGY ECONOMY, (Sept. 9, 2011), *available at* http://www.rggi.org/docs/RGGI_Proceeds_in_Brief.pdf.

147. Gov. Chris Christie, *New Jersey's Future is Green*, STATE OF NEW JERSEY (May 26, 2010), http://www.nj.gov/governor/news/news/552011/approved/20110526a.html; *Clean Energy Firms Seek to Strengthen Northeast Climate Program*, CLEAN ENERGY REP., July 25, 2011, http://cleanenergyreport.com/201107252371026/Clean-Energy-Report-Daily-News/News/clean-energy-firms-seek-to-strengthen-northeast-climate-program/menu-id-202.html; Lisa Wood, *New Hampshire Governor Vetoes Legislation to Withdraw from RGGI*, ELEC. POWER DAILY (July 7, 2011), *available at* http://plattsenergyweektv.com/story.aspx?storyid=157

that, while his administration does not question the existence of global warming, it views RGGI as ineffective and an undesirable tax on business and that alternative clean energy development programs are a preferred response.[148] Legislation has been introduced in the New Jersey legislature to block this proposed withdrawal but it is unclear that supporters have sufficient votes to pass the legislation over the Governor's veto.[149] RGGI also saw challenges in New Hampshire and Maine, where resolutions seeking withdrawal from RGGI were passed by each State's Legislature. In New Hampshire, the bill was vetoed by the Governor.[150] In Maine, the bill provided for withdrawal only upon specified conditions (*i.e.*, withdrawal or reduction in GHG emissions equivalent to that of another major New England state) which are not presently satisfied, and thus Maine's withdrawal is not imminent.[151] RGGI is preparing for a 2012 performance review of its initial three-years of operation and to establish new emission level reductions to serve as the basis for auctioned allowances over the next three years.[152]

The Western Climate Initiative continues development of processes needed to support its planned start of operation on January 1, 2012 but has suffered further diminution in its likely initial participants. This diminution is due to New Mexico revoking its necessary regulations to support participation. Prior to New Mexico's action, only five of the seven states and four Canadian provinces participating in design of the program were expected to actively join the program at its initiation.[153] Trade Press articles further speculate that one or more of the three Canadian Provinces preparing to participate in that start-up will in fact not be prepared or choose to do so.[154] Such participation requires a state or province to have developed a substantial set of regulations to support the cap-and-trade program.[155]

III. INTERNATIONAL DEVELOPMENTS

Modest progress continued in international acceptance and definition of a program to prevent or mitigate the effects of climate change on world

639&catid=293; Maria Gallucci, *NJ Legislators Working to Block Christie's Carbon Market Exit*, REUTERS June 24, 2011, 2:00 PM, http://www.reuters.com/article/2011/06/24/idUS72002050520110624.

148. Christie, *supra* note 147.

149. Gallucci, *supra* note 147.

150. Wood, *supra* note 147.

151. Amy Quinton, *Three States Consider Withdrawal from RGGI*, N.H. PUB. RADIO (Apr. 7, 2011), http://www.nhpr.org/three-states-consider-withdrawal-rggi.

152. *See generally Program Review,* RGGI.ORG, http://www.rggi.org/design/program_review (last visited Oct. 11, 2011).

153. *See generally 2010 Report*, *supra* note 27, at 595-596.

154. *See, e.g.*, *Inaction by Canadian Provinces Casts More Doubt over Launch of WCI*, CLEAN ENERGY REP., Jan. 31, 2011, http://cleanenergyreport.com/201101312352785/Carbon-Control-Daily-News/News/inaction-by-canadian-provinces-casts-more-doubt-over-launch-of-wci/menu-id-202.html.

155. *Reid's Summit Will Focus on Creation of a Western Clean Energy Accord*, CLEAN ENERGY REP., July 26, 2011, http://cleanenergyreport.com/201107262371120/Clean-Energy-Report-Daily-News/News/reids-summit-will-focus-on-creation-of-a-western-clean-energy-accord/menu-id-202.html; *Inaction by Canadian Provinces Casts More Doubt over Launch of WCI*, CLEAN ENERGY REP., Jan. 31, 2011, http://cleanenergyreport.com/201101312352785/Carbon-Control-Daily-News/News/inaction-by-canadian-provinces-casts-more-doubt-over-launch-of-wci/menu-id-202.html.

populations. In December 2011, the 16th Session of the Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC) met in Cancun, Mexico and achieved agreement in principle on a number of significant matters within the context of the Copenhagen Accords of December 2010.[156] Unlike the Copenhagen Conference which involved World Leaders and addressed broad issues of program development, *i.e.* such as whether a binding legal agreement could be adopted and the form and levels of developed and developing country mitigation commitments, Cancun addressed important but technical matters within the already established (but not legally binding) Copenhagen program, such as how individual country mitigation pledges would be reflected in the UNFCCC context (the Conference "takes note" of such pledges); defining a system of transparency to measure whether individual nations' mitigation commitments are being honored including "assessments" for developed countries and "consultations" for developing countries; enhancements in the structure of developing country deforestation mitigation programs including the adoption of national strategies and action plans; the structure and establishment of the Green Climate Fund administered by the World Bank to assist poorer nations in achieving GHG emission reductions; establishment of an international climate technology center and mechanisms to facilitate the transfer of technology needed to mitigate climate change while maintaining economic development to developing nations; and an enhanced framework (Cancun Adaptation Framework) and Committee to further international action and cooperation on achieving adaptation to climate change.[157] Cancun produced agreements in principle as to the establishment of these matters. However, there is still much negotiation required to develop processes for their actual implementation.

Continuing disagreements, however, particularly among developing and developed countries, on whether there should be implemented a second round of mandated Kyoto carbon emission limitations applicable solely to developed countries or whether mandatory limitations should be adopted under the Long-term Cooperative Action program applicable to both developed and developing countries (particularly larger developing economies, such as China who has opposed this step), have prevented adoption of broader, legally binding agreements.[158] Thus, focus, at least by the US Government, has been on creation

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156. *See, e.g.*, PEW CTR. ON GLOBAL CLIMATE CHANGE, SIXTEENTH SESSION OF THE CONFERENCE OF THE PARTIES TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE AND SIXTH SESSION OF THE MEETING OF THE PARTIES TO THE KYOTO PROTOCOL (2011), *available at* http://www.pewclimate.org/docUploads/cancun-climate-conference-cop16-summary.pdf; Todd Stern, U.S. Statement at COP-16 (Dec. 9, 2010) (Delivered in Cancun, Mex.), *available at* http://www.state.gov/g/oes/rls /other/2010/152621.htm; Todd Stern, Special Envoy for Climate Change, U.S. Dep't. of State, Briefing on the UN Climate Change Conference in Cancun (Dec. 14, 2010), *available at* http://www.state.gov/g/oes/rls/remar ks/2010/152847.htm; Todd Stern, A New Paradigm: Climate Change Negotiations in the Post-Copenhagen Era (Oct. 8, 201), *available at* http://www.state.gov/g/oes/rls/remarks/2010/149429.htm. *See generally 2010 Report*, *supra* note 27, at 600-607.

157. *See generally* PEW CTR. ON GLOBAL CLIMATE CHANGE, *supra* note 156; Stern, Briefing, *supra* note 156.

158. *Id.* The United States and other developed economies assert that binding commitments are required on developing economies whose contribution to climate change causing emissions are growing rapidly and expected to exceed 65% of the total by 2030, as well as due to the substantial expansion of their economies (by

of "politically" binding commitments at the international level employing mandatory national programs and emission reduction standards supported by necessary transparency measures to permit measurement of progress and the provision of funding for poorer developing countries.[159] Meetings continue in 2011 under the UNFCCC with the objective of designing the specifics to implement the Cancun Agreements and obtain their adoption at the Durban Meeting in December 2011 as the next step toward a successful, operational international program. In addition, the "Fast Start Financing Program," a three year $30 billion program (2010 to 2012) based on contributions from multiple nations to assist developing nations with technology transfer and adaptation has been implemented with $1.7 billion dollars of US funds supporting a number of active projects worldwide.[160] Also, partnerships and action plans for climate change related emission reductions with major developing country economies (*i.e.*, including China, India, Mexico and Indonesia) have also been announced by the U.S. Government in 2011.[161]

Work continues on AR5 – The Fifth Assessment Report on climate change and methods for its mitigation being prepared by the Intergovernmental Panel on Climate Change (IPCC), an organization sponsored by the United Nations Environmental Program and the WMO.[162] Working Group Reports assessing the physical science basis for the Report's climate change conclusions (Working Group I), projected impacts, adaptation, and vulnerabilities to climate change (Working Group II), and mitigation alternatives (Working Group III) will begin to be released in September 2013 with the full report completed and released by October 2014.[163] As described in the Committee's 2010 Report, a number of assessments of Report preparation procedures were prepared after criticisms or earlier Assessment Reports, and changes in those procedures have been adopted.[164] The Report is to include expanded discussion of the socio-economic aspects of climate change and its implications for sustainable development and more detailed information on regional impacts. The IPCC has also issued two special reports. The first describes the IPCC Assessment process and its relationship to major UNFCCC actions such as the initiation of negotiations for

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over 6 times in the case of China) since the 1992 UN Framework Convention was adopted. Stern, Briefing, *supra* note 156.

159. Todd Stern, Special Envoy for Climate Change, Statement to the House Committee on Foreign Affairs (May 25, 2011), *available at* http://www.state.gov/s/climate/releases/168093.htm; Todd Stern, Special Envoy for Climate Change, Remarks Made at the MIR Earth Week Colloquium in Boston (Apr. 21, 2011), *available at* http://www.state.gov/s/climate/releases/168098.htm; Congressional Testimony of Elliot Diringer on the Global Climate Talks and U.S. Action, Vice President for Int'l Strategies, Pew Ctr. on Global Climate Change (May 25, 2011), *available at* http:www.pewclimate.org/print/federal/congress/testimony/dirngere/congressional-testimony.htm.

160. U.S. DEP'T OF STATE, FAST START FINANCING: U.S. CLIMATE FUNDING IN FY 2010 (2011), *available at* http://www.state.gov/g/oes/rls/rpts/fast2010/index.htm.

161. *See generally Bilateral Climate and Energy Partnerships*, U.S. DEP'T OF STATE, http://www.state.gov/g/oes/climate/c22820.htm (last visited Oct. 11, 2011).

162. *See, e.g.*, IPPC, THE IPCC'S FIFTH ASSESSMENT REPORT (AR5) (Nov. 2010), *available at* http://www.ipcc.ch; IPPC, IPCC 33RD SESSION DOCUMENTS SETTING FORTH DECISIONS TAKEN WITH RESPECT TO IPCC PROCESSES (2011), *available at* http://www.ipcc.ch.

163. *Id.*

164. *2010 Report, supra* note 27, at 607-612.

the Kyoto Protocol and adoption of the Bali Action Plan.[165] The second special report is an evaluation of the potential of renewable energy to address climate change concerns and how six technologies for the production of such energy can be integrated into the electric grid.[166]

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165. IPPC, UNDERSTANDING CLIMATE CHANGE: 22 YEARS OF IPCC ASSESSMENT (2010), *available at* http://www.ipcc.ch/pdf/press/ipcc_leaflets_2010/ipcc-brochure_understanding.pdf.

166. IPPC, IPCC SPECIAL REPORT ON RENEWABLE ENERGY SOURCES AND CLIMATE CHANGE MITIGATION (2011), *available at* http://srren.ipcc-wg3.de/report/srren-full-report.

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