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## Environmental Law

### New Jersey's Reaction to Climate Change

Global Warming Response Act is heating up the demand for federal initiatives

By Barbara Koonz and Larry Jacobs

New Jersey has adopted a Kyoto-type scheme that covers all economic sectors and is consistent with the type of plan that might have been required of the states if the federal government had ratified the international protocol on GHG emissions.

Climate Change Law is no longer a speculative international issue with little direct impact on the New Jersey business community. Concerns over climate change and its relationship to green house gas (GHG) emissions are the impetus for New Jersey's recent Global Warming Response Act and for an emerging body of voluntary and mandatory initiatives and litigation-driven programs that will impact businesses in New Jersey. Climate change is a global concern regulated on the international level — most notably, the Kyoto Protocol, which requires signatory nations to meet specific goals for reducing GHG emissions from industrialized nations. The United States, although a signatory to Kyoto, did not ratify or

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mandate its goals. In the absence of federal legislation, states and private parties have taken it upon themselves to compel consideration of GHG emissions through local government initiatives, regional partnerships, voluntary pilot programs and litigation aimed at combating federal inertia and at redressing harms relating to GHG emissions. For the present and immediate future, the targeted communities will be subject to a variety of regulatory schemes that are comprised of both mandatory and voluntary goals for GHG reduction and which vary from state to state and region to region. Until such time as the federal government exerts authority on GHG emissions and establishes a uniform federal standard of regulation, GHG emissions will be regulated on a sporadic and inconsistent basis.

On July 6, Governor Corzine signed the New Jersey Global Warming Response Act, N.J.S.A. 26:2C-37 et. seq. (GWRA). GWRA requires reduction of New Jersey's GHG emissions to 1990 levels by 2020, an estimated 20 percent reduction, and to less than 80 percent of 2006 levels by 2050. GWRA requires the New Jersey Department of Environmental Protection (NJDEP) to establish the relevant inventories of GHG emissions prioritize the sources of GHG emission reductions and adopt regulations to achieve the act's goal of a reduction to 1990 levels by 2020. New Jersey joined California and Hawaii as

the third state to enact legislation to cap GHG emissions to 1990 levels by 2020 and it was the first state to set emissions requirements so far into the future.

The scientific consensus behind this emerging body of law is that human activities impact global warming trends by increasing GHG emissions. GHGs are compounds, such as carbon dioxide (CO<sub>2</sub>), and include both naturally occurring and anthropogenic. GHGs heat the earth by capturing infrared radiation which would otherwise escape into space and emitting some of that radiation back to the earth's surface, thereby warming it. GHGs distribute nearly uniformly across the global atmosphere regardless of origin. One of the leading authorities reporting on global climate change is the Intergovernmental Panel on Climate Change (IPCC) created in 1988 by the United Nations and the World Meteorological Organization. The IPCC confirms that climate change is occurring and that there exists only a 5 percent possibility that it could be caused by natural processes alone. IPCC reports that radiation from certain of the greenhouse gases, specifically including carbon dioxide, methane and nitrous oxide, have increased more rapidly from 1750 to the present than they had in the prior 650,000 years and that those increases are tied to human activity with a greater than 90 percent degree of scientific certainty. The IPCC concludes

that more than 50 percent of the increases in average global temperatures since the mid-20th century are due to anthropogenic GHG contributions. During the 21st century, the IPCC predicts with a 90 percent degree of certainty that there will be a rise in temperature of 2 to 11.5 degrees Fahrenheit, sea level will rise seven to 23 inches, there will be more frequent heat waves and heavy rains.

The state and regional initiatives and voluntary pilot programs are aimed at slowing, halting or reversing these predicted trends.

Regardless of ones' position on the science, GHG emissions will be stringently regulated in New Jersey, reductions of GHG emissions will be mandatory, and the costs of compliance and of litigation to redress harms alleged to be caused by GHG emissions will be significant and will pose real concerns for the regulated community.

The United Nations Framework Convention on Climate Change (UNFCCC), a May 29, 1992, treaty, established an international framework to develop and implement climate change initiatives. The membership was almost universal, with 191 nations ratifying the treaty, including the United States. UNFCCC states that climate is a shared resource, which can be impacted by industrial and other GHG emissions. Under UNFCCC, information on GHG emissions and national policies are to be shared among the international communities. National initiatives aimed at stabilizing GHG levels for industrialized (Annex I) nations and providing financial and technological support to emerging nations were envisioned. UNFCCC requires national GHG inventories and implementation of GHG controls. UNFCCC encouraged international cooperation in technological development to prepare for the impact of climate change and in reaching the goal of returning GHG emissions to 1990 levels. The treaty was followed by a pact, appended to the UNFCCC, which specified protocols to establish reduction requirements for the United States and other Annex I countries to reach 1990 GHG emission

levels.

More specific agreements were embodied in the Kyoto Protocol in December 1997. The Kyoto Protocol committed its signatory countries to legally binding targets of reduced GHG emissions. Kyoto required the U.S. to reduce GHG emissions to 93 percent of its 1990 levels by 2012 and to demonstrate substantial progress towards that goal by 2005. Kyoto established mechanisms to help countries reduce the cost of meeting their emissions targets, including carbon emissions trading. The United States and the European Union (EU) nations were among the 175 parties that signed Kyoto. The EU agreed to fulfill its individual national requirements under Kyoto to reduce GHG emissions jointly. The EU Emissions Trading Scheme, the largest cap and trade scheme in the world, was launched in 2005 and is the primary instrument for Kyoto compliance.

Although Kyoto was signed by the United States, it was never submitted to Congress for ratification. Accordingly, federal regulation that compels compliance with the international limits and reductions of GHG emissions pursuant to Kyoto were not authorized. While Kyoto has not been adopted, there has been a recent flurry of federal activity in response to state and private action that may move the United States closer to implementing some of Kyoto's goals. This activity includes an estimated 40 climate related bills in the current 110th Congress, many of which are bipartisan and address issues such as GHG emissions, carbon taxes, cap-and-trade programs, energy efficiency and renewable energy portfolio standards. There are a number of bills in progress that are expected to be presented this term. There has also been a marked increase in the days of congressional hearings on climate-related matters from seven days in the 105th Congress to over 70 days so far in the 110th Congress. Certainly this activity evidences the added pressure placed upon Congress to develop a coherent GHG policy. In the interim, states are leading the federal government

in addressing climate change. New Jersey is a leading participant in the Regional Greenhouse Gas Initiative (RGGI) to reduce carbon dioxide GHG from fossil fueled power plants. New Jersey is also among the first states to pass comprehensive legislation to reduce GHG emissions.

The goal of the New Jersey GWRA is to reduce the state's GHG emission to 1990 levels by 2020 and to 80 percent of 2006 emission levels by 2050. Regulated GHGs include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and any other gases deemed by the New Jersey Department of Environmental Protection (NJDEP) to contribute significantly to global warming. Within a year of enacting GWRA, NJDEP must establish the relevant 1990, 2006 and current global warming emissions inventories and must prioritize sources for emissions reductions.

NJDEP is directed to work together with the Board of Public Utilities (BPU), the Department of Transportation (DOT), the Department of Community Affairs (DCA) and other stakeholders, to evaluate methods and policies to meet and exceed the 2020 target reductions. NJDEP has held three stakeholder meetings and New Jersey businesses across the economic sectors were encouraged to participate in developing the Departments' recommendations. The items considered to meet the emissions targets will take into account the economic benefits and costs of implementation. The evaluation must also be made in conjunction with the State's Energy Master Plan, which will incorporate the GWRA greenhouse gas reduction goals. The goals and initiatives considered by NJDEP and stakeholders and the draft of the state's emission inventories can be found on the state's global warming Web site, [www.state.nj.us/global\\_warming](http://www.state.nj.us/global_warming).

By January 1, 2009, NJDEP must develop rules and regulations for monitoring current greenhouse gas levels and reporting so that goals can be accurately tracked. The emissions monitoring and reduction program will require interim

emissions reduction requirements from specific significant emitters. NJDEP will report progress on the status of the monitoring and reporting program and progress towards the target reductions to the governor and the Legislature no less than every two years.

On its face, the GWRA does not limit the regulated community to specific industries, activities or products. It regulates those GHG emission sources, which are at a level which NJDEP deems "significant." There are provisions that concern reporting of GHG emissions from specified industries, including oil refineries, oil storage facilities, natural gas pipelines, fuel wholesale and retail distributors, any gas public utility, any entity generating electricity in the state and from any entity that generates electricity outside the state that is delivered for end use in the state. There are also provisions related specifically to the energy industry consistent with New Jersey's regional agreements to reduce CO<sub>2</sub> GHG emissions from power suppliers, including conditions for establishment of an emissions portfolio standard and requirements for alternate energy mandates applicable to public utilities. New Jersey is one of 11 states to participate in the Regional Greenhouse Gas Initiative (RGGI) to address carbon dioxide GHG emissions from power plants. RGGI requires stabilization of emissions at current levels through 2014, with a 10 percent reduction by 2019. A regional cap and trade program is envisioned under RGGI and that may be a mechanism of achieving the GWRA goals in New Jersey.

The GWRA does not contemplate exemptions for any industry or economic sectors or other GHG sources. The GWRA goals will require GHG reductions from a wide range of sources. Discussions at the stakeholders meetings reveal that carbon impacts (GHG emissions) will be considered for a variety of sectors and activities previously not regarded as subject to air regulation. These include expansion of RGGI to other sectors, such as cement and steel;

aggressive transportation and land-use planning portfolios, home heating and water system upgrades; transportation programs and a consideration of carbon impacts for all state funded projects.

The numerous considerations and complex analysis required to implement GWRA will result in many more opportunities for participation of citizens and stakeholders. Companies are encouraged to be proactive and to work with the state in its development of the regulations.

In the absence of federal regulation, litigation is a mechanism to prompt activity regarding GHGs on the federal level. Climate change lawsuits are proliferating. In the landmark decision of the United States Supreme Court in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), 12 states, including New Jersey, and other plaintiffs sought to compel EPA to regulate carbon dioxide GHG emissions by establishing emissions standards for mobile sources under Section 202 of the Clean Air Act, 42 U.S.C. §§ 7401 et seq. (CAA). The significant hurdle of standing was overcome in part by a finding that Massachusetts had alleged a direct injury from potential loss of sovereign territory from climate change and the resultant sea level rise caused by GHG emissions from motor vehicles. The Court found that EPA regulation of GHG emission from motor vehicles would reduce the impact of climate change. The substantive questions addressed by the Supreme Court were: (1) whether the EPA has authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1); and (2) whether the EPA may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1). On April 2, a divided Court held that: (1) the Clean Air Act gives EPA authority to regulate carbon dioxide as an air pollutant associated with climate change under section 202(a)(1) and that GHGs fall within the CAA's definition of an air pollutant; and (2) the EPA was

required to review its decision to decline regulating carbon dioxide and other GHG emissions. The Court found that EPA's justification was inadequate because EPA lacked a scientific basis to decline regulating carbon dioxide. EPA was directed to reconsider its position. Although EPA could reconsider and still decline to regulate GHGs, the regulated community anticipates that EPA will issue regulations of GHGs under the CAA and the pressure for separate federal climate change legislation to mold those regulations will intensify.

A number of climate change lawsuits were held in abeyance pending the Supreme Court's decision in *Massachusetts v. EPA*, in anticipation that the decision might clarify the status of GHG's under the CAA. Those cases include a suit against the EPA for failing to regulate GHG emissions from the energy sector. The power generating energy sector is reported to be the primary source of GHG emissions nationally. As those suits move forward they are likely to increase the pressure on EPA to regulate GHG emissions.

Other examples of cases to force climate change regulation or influence policy at the national level are a series of cases related to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (NEPA). In *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007), advocacy groups challenged the funding of projects by independent U.S. government corporations alleging the wrongful failure of Overseas Private Investor's Corporation (OPIC) and Export-Import Bank (Ex-Im) to conduct environmental assessments as required by NEPA prior to funding GHG generating projects overseas. The plaintiffs allege that the GHG emissions from overseas fossil fuel projects contribute to domestic climate change, which impacts plaintiffs' use and enjoyment of natural resources around the globe. The plaintiffs overcame significant standing challenges and have defeated summary judgment motions. The matter is proceeding and is in the case management phase. The

court did hold during consideration of motions to dismiss that some of defendants' overseas projects are subject to NEPA. The broader implication of the NEPA cases is that consideration of GHG emissions and climate change impacts may be required in federal action, which can include funding of development, financing, energy projects, and actions which impact urban sprawl.

Litigation of greatest concern to industry are private citizen suits against the regulated community, which will increase. Private tort suits are anticipated to allege a wide variety of damages, including property losses, failure to protect human health and the environment, disease and personal injuries as a result of GHG emissions and climate change. The threat of these private suits alone should further propel companies to address GHGs and to formulate a strategy now that establishes a baseline of emissions, a plan for reduction of GHG emissions if indicated and a risk assessment relating to compliance costs and potential litigation.

Risk management must include considerations of regulation, potential litigation and disclosure requirements. The regulated industry is encouraged to be proactive and participate in developing regulation on the local, state or federal level. Climate change litigation has been opined to be the next tobacco or asbestos-type litigation. The insurance industry is acutely aware of the risk posed by GHG emissions and is calling upon clients to assess their risk from global climate change, including the risk of being the subject of climate change litigation and compliance costs when mandatory schemes are in place. The insurance industry is also concerned with what harms the insured's business may face because of global warming. For example, a business based in the agricultural or tourism industry may see damages as a result of a change in temperature or a rise of sea level.

SEC reporting requirements are also at issue. Companies need to be in a

position to fully disclose the potential risks to stakeholders and the SEC as required. Very generally, SEC disclosure requires disclosure of trends and uncertainty likely to have a material impact on the industry. Reporting thresholds can be varied and low. To properly disclose the company needs to assess its risk and understand how global climate change may affect the bottom line.

The first step a company would take is to assess its carbon emissions inventory. There are a number of protocols used and until one is mandated, the important characteristics are that it be credible, quantifiable and verifiable. The goal is to use an inventory method, which is reportable to the state, regional, national or international scheme the company is working under. One methodology is under the Department of Energy's Section 1605(b) voluntary reporting and registry of GHG emissions program. This is a step-by-step guide available on-line to calculate GHG emissions. It is a good program for U.S.-based companies that are tracking credits for future mandatory schemes. Multinational companies recommend using the World Business Council for Sustainable Development protocol for corporate-level or project-level GHG accounting and reporting. Extensive information on national greenhouse gas inventories and protocol are also available from IPCC on its Web site. [www.ipcc](http://www.ipcc). The ISO 14064 standard is the emerging standard anticipated to be most widely used for international and national GHG accounting and verification. ISO provides for third-party verification. Once a business has completed the inventory, it should be kept up to date and recorded in the participating program to establish a baseline of emissions and track reductions.

The carbon emissions inventory is the basis for developing a strategy to address GHG emissions. The strategy may include an assessment of future compliance costs and potential tort exposure if the company is a large GHG emitter. The company baseline of emis-

sions may determine if it will be a buyer or seller of carbon credits. The company's ability to bank credits for emissions reductions or energy efficiency can be assessed. A determination to participate in the trading market or voluntary programs can be made. The inventory can also contribute to the accuracy of state, regional or national inventories. Finally, the information can be the basis for full stakeholder disclosure and satisfaction of SEC reporting obligations.

Some of the voluntary programs to track and reduce GHG emissions that companies are participating in include the Chicago Climate Exchange pilot program and the Business Environmental Leadership Council. The goal of the Chicago Climate Exchange formed in 2002 was to reduce GHG's of participants to 5 percent below 1990 levels in five years. The Exchange is a cap-and-trade program where a cap of allowable emissions is established and credits or allowances are created to account for all of the allowed emissions. An entity with excess allowances for exceeding its GHG emissions reduction goal can sell them to a company that can purchase the allowances and use them to meet its GHG-reduction goal where it could not do so because of expansion or because it was unable to economically reduce its emissions. Allowances can also be earned and sold from offset projects, such as expansion of a forest that reduces or captures GHGs.

Another voluntary initiative is the Business Environmental Leadership Council, which was created through the Pew Center on Global Climate Change, to promote business participation in developing effective and efficient solutions to climate change and emission reductions. It is the largest business association working cooperatively to impact climate change and its regulation. Participants include AEP, BP, DuPont, IBM, PG&E and New Jersey's Johnson and Johnson. Participating in the cooperative scheme establishes baseline emissions, strategies to reduce

GHG emissions, increase energy efficiency and participate in the regulatory process. The Web site is a very useful resource for a broad spectrum of climate change issues as well as for specific corporate initiatives and pending legislation. [www.pewclimate.org](http://www.pewclimate.org).

The clear indication is that regulation of GHG emissions is happening

now and should be addressed. In New Jersey, state and regional mandatory requirements will be implemented shortly. Federal regulation will likely occur within the next few years. The regulated industry can best manage the risks posed by the evolving body of climate change law by taking a proactive position and developing a GHG strate-

gy now. As counsel, we can serve the regulated sectors by encouraging clients to participate in the development of regulations; to establish emissions inventories as a basis for risk assessment; complete disclosure to corporate stakeholders and the SEC; and create comprehensive GHG emissions strategies for the future. ■