

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE DELEGATES

FEBRUARY 11, 2008

RECOMMENDATION

RESOLVED, That the American Bar Association urges the United States government to take a leadership role in addressing the issue of climate change through legal, policy, financial, and educational mechanisms.

FURTHER RESOLVED, That the American Bar Association urges Congress to enact and the President to sign legislation that would:

1. Cap and reduce United States greenhouse gas emissions to help prevent the rise of worldwide atmospheric greenhouse gas concentrations to dangerous levels;
2. Utilize market mechanisms designed to minimize compliance costs, such as cap and trade, carbon taxation, or emissions trading;
3. Recognize and incorporate sustainable development principles;
4. Increase fuel economy and energy efficiency standards, promote greater use of renewable energy, promote fuel diversity through the use of carbon neutral or low carbon technologies, and encourage development and deployment of other technologies that reduce, eliminate, or sequester emissions of greenhouse gases and minimize costs of controls or mitigation measures;
5. Provide for broad coverage of various sectors of the economy responsible for greenhouse gas emissions;
6. Enable the United States to adapt to existing and projected climate changes in a way that minimizes individual hardship, damage to its natural resources, and economic cost;
7. Coordinate and integrate state, local and territorial actions into a federal program; and
8. Require the United States government to encourage all other countries to take steps to limit their greenhouse gas emissions so that world levels of emissions will be reduced to prevent dangerous anthropogenic climate change.

FURTHER RESOLVED, That the American Bar Association urges the United States government to engage in active international discussions and to negotiate and ratify treaties or other agreements to address and reduce climate change.

REPORT

In August 2003, the American Bar Association's House of Delegates endorsed "the internationally accepted concept of sustainable development, as recognized by the United Nations Conference on Environment Development and subsequent international conferences: simultaneous achievement of environmental protection, economic development, social development, and peace, at the same time, for present and future generations." The House of Delegates also agreed to "promote the principles of sustainable development in relevant fields of law."

Climate change presents significant risks to this and future generations. Climate change presents environmental risks, to be sure, but it also presents security, economic, and social risks. At the same time, the national and international response to climate change provides major opportunities for improving environmental quality, fostering economic growth and job creation, and enhancing domestic and global security. To foster sustainable development, the United States should play a leadership role in addressing climate change.

1. Scientific Evidence and Consequences

Climate change is occurring, human activities contribute to it, and climate change will have adverse effects on the United States and the rest of the world. While there remain some uncertainties about its magnitude, the evidence of climate change easily passes the certainty tests that are used to make decisions in other relevant areas of law and policy. According to the Intergovernmental Panel on Climate Change, which synthesizes peer-reviewed scientific literature on climate change (and which shared the 2007 Nobel Peace Prize):

- "Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level."
- "Eleven of the last twelve years (1995-2006) rank among the 12 warmest years in the instrumental record of global surface temperature (since 1850)."
- "The last time polar regions were significantly warmer than present for an extended period (about 125,000 years ago), reductions in polar ice volume led to 4 to 6m of sea level rise."
- "Most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations."
- "There is *high confidence* that the rate of observed sea level rise increased from the 19th to the 20th century. The total 20th-century rise is estimated to be 0.17[0.12 to 0.22] m."
- "Snow cover is projected to contract. Widespread increases in thaw depth are projected over most permafrost regions.... Sea ice is projected to shrink in both the Arctic and Antarctic....In some projections, late-summer sea ice disappears almost entirely by the latter part of the 20th century....It is very likely that hot extremes, heat waves, and heavy precipitation events will continue to become more frequent....Based on a range of

models, it is likely that future tropical cyclones (typhoons and hurricanes) will become more intense, with larger peak wind speeds and more heavy precipitation associated with ongoing increases of tropical sea surface temperatures.”¹

According to a 2001 report issued by the National Academy of Sciences/National Research Council, climate change is likely to have adverse effects on the United States. Climate change is likely to increase adversely affect agriculture;² will likely have a negative effect on water supplies, particularly in the west;³ is likely to worsen water quality and increase flooding;⁴ will adversely affect ecosystems;⁵ will increase the risk of infectious disease and respiratory illness;⁶ and could increase flooding and storm damage in coastal areas, where 53% of the U.S. population lives.⁷ The report modeled these projected effects only up to 2100; more severe effects are highly likely after that time if nothing is done to curb greenhouse gas emissions.⁸ “Hence national policy decisions made now, and in the longer-term future will influence the extent of any damage suffered by vulnerable human populations and ecosystems later in this century.”⁹

Significantly, prominent climate scientists have expressed surprise at the speed with which the projected effects of warming are unfolding:

As practicing scientists who study the earth’s climate system, we and many in our profession have long understood that continued human caused emission of greenhouse gases--primarily carbon dioxide (CO₂), but also methane (CH₄), nitrous oxide (N₂O), and fluorocarbons--would eventually warm the earth's surface. Most were skeptical that we would see strong signs of human induced climate change in our lifetimes. But by the beginning of this decade, we observed that global temperatures are rising, plant and animal ranges are shifting, glaciers are in retreat globally, and arctic sea ice is retreating. Sea levels are rising and the oceans are becoming more acidic. To the extent that these changes result from human alteration of the atmosphere, we know that they are just the first small

¹ IPCC FOURTH ASSESSMENT, WORKING GROUP I, SUMMARY FOR POLICYMAKERS at 5-7, 9, 10 & 15 (2007), http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf. The Bush Administration participated in the development of this and the other two working group reports, and supports these findings. Office of Science and Technology Policy, Executive Office of the president, Intergovernmental Panel on Climate Change Finalizes Report, Feb. 2, 2007, <http://www.whitehouse.gov/news/releases/2007/02/20070202.html>.

² NATIONAL ACADEMY OF SCIENCES/NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 4 (2001) (“The optimal climate for crops may change, requiring significant regional adaptations. Some models project an increased tendency toward drought over semi-arid regions, such as the U.S. Great Plains.”)

³ *Id.* (“Hydrologic impacts could be significant over the western United States, where much of the water supply is dependent on the amount of snow pack and the timing of the spring runoff.”).

⁴ *Id.*

⁵ *Id.* at 20.

⁶ *Id.*

⁷ *Id.* (“With higher sea level, coastal regions could be subject to increased wind and flood damage even if tropical storms do not change in intensity.”). *See also id.* at 20. Hurricane Katrina occurred in 2005.

⁸ *Id.*

⁹ *Id.* at 1.

increment of climate change yet to come if human societies do not curb emissions of greenhouse gases.¹⁰

The Supreme Court's 2007 decision in *Massachusetts v. EPA* underscores the compelling nature of the science. The Court held that EPA must make a decision under the Clean Air Act on a petition to regulate greenhouse gas emissions from motor vehicles, and in so holding cited the 2001 NAS/NRC report and other scientific sources indicating the seriousness of the problem.¹¹

The adverse effects of climate change are likely to be significant for the United States and the rest of the world. Most states that have taken action to address climate change have done so because of threats to ocean shorelines, key businesses and industries, water supplies, and agriculture. The seriousness of the issue is underscored by the Military Advisory Board, comprised of 11 retired admirals and generals, which concluded in April 2007 that "climate change poses a serious threat to America's national security" by adding to and exacerbating threats and tensions around the world.¹² President Bush has acknowledged that human activity is a major cause of rising surface temperatures,¹³ and has described climate change as one of the "great challenges of our time."¹⁴ Senior administration officials have described climate change as a serious problem.¹⁵

The United States has a history of acting to protect human health and the environment based on risk (not certainty) of harm. In a civil courtroom setting, a judge or jury makes a decision based on whether a particular harm is more likely than not caused by the defendant's activity, a probability of just over 50%. Even when risks from pollutants are relatively small (for example, a risk of cancer of 1 in 10,000 or 1 in 1,000,000), they are considered serious enough to justify regulation. For climate change, by contrast, the likelihood of many of the adverse effects described above is 90 percent or greater.¹⁶ Even less likely risks are significant because of their potential consequences. As the late Elliot Richardson observed, it is

¹⁰ Brief for David Battisti et al. as Amicus Curiae Supporting Petitioners 2, *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007) (No. 05-1120) at 2.

¹¹ *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438, ____ (April 2, 2007) ("A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.").

¹² MILITARY ADVISORY BOARD, NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE 6-7 (2007), <http://securityandclimate.cna.org/report/National%20Security%20and%20the%20Threat%20of%20Climate%20Change.pdf>.

¹³ White House, Fact Sheet: President Bush is Addressing Climate Change, June 30, 2005 ("We know that the surface of the Earth is warmer, and that an increase in greenhouse gases caused by humans is contributing to the problem."), <http://www.whitehouse.gov/news/releases/2005/06/20050630-16.html>.

¹⁴ Kenneth T. Walsh, *Bush Moves on Climate Change*, U.S. NEWS & WORLD REPORT, Oct. 11, 2007, available at <http://www.usnews.com/blogs/news-desk/2007/10/4/bush-moves-on-climate-change.html>.

¹⁵ "I want to stress that the United States takes climate change very seriously, for we are both a major economy and a major emitter," Secretary of State Condoleezza Rice said. "Climate change is a global problem, and we are contributing to it; therefore, we are prepared to expand our leadership to address the challenge." Dean Scott, *Rice Says Meeting Supports Bali Talks; U.N. Official Urges Comprehensive Accord*, 38 Environment Rep. (BNA) No. 38, at 2067 (Sept. 28, 2007).

¹⁶ Climate Scientists' Amicus Brief, *supra* note 10, at 2.

inappropriate to treat the risks of increasing greenhouse gases differently than the risks of other environmental pollutants.¹⁷

The social and human health impacts of climate change are likely to be significant:

Poor communities can be especially vulnerable, in particular those concentrated in high risk areas. They tend to have more limited adaptive capacities, and are more dependent on climate-sensitive resources such as local water and food supplies....Projected climate change-related exposures are likely to affect the health status of millions of people, particularly those with low adaptive capacity, through:

- increases in malnutrition and consequent disorders, with implications for child growth and development;
- increased deaths, disease and injury due to heat waves, floods, storms, fires and droughts;
- the increased burden of diarrheal disease
- the increased frequency of cardio-respiratory diseases due to higher concentrations of ground-level ozone related to climate change; and
- the altered spatial distribution of some infectious disease vectors.¹⁸

In Africa alone, by 2025, between 75 million and 250 million people are projected to be subject to increased water stress due to climate change and in some countries, rain-fed agricultural yields could be reduced by 50% by 2030. In Asia, decreased freshwater availability is projected to adversely affect more than a billion people by the 2050s.¹⁹

2. International Framework

The United States participated actively in the negotiations that led to United Nations Framework Convention on Climate Change²⁰ (Framework Convention), and played a major role in shaping it. The United States signed the Convention on June 12, 1992, at the United Nations

¹⁷ Elliot L. Richardson, *Global Warming and the Risk of Disaster: How Much Do We Care What Happens to the World After We Are Gone?*, LOOKING AHEAD (ABA Section of Natural Resources, Energy, and Environmental Law, Chicago, Ill.), Jan./Feb. 1999, at 6 (remarks at section meeting in Hilton Head, South Carolina, Oct. 9, 1998)(summarizing IPCC findings). See also *Massachusetts v. EPA*, n. 7 (“Congress amended § 202(a)(1) in 1977 to give its approval to the decision in *Ethyl Corp. v. EPA*, 176 U.S. App. D.C. 373, 541 F.2d 1, 25 (CADC 1976) (en banc), which held that the Clean Air Act ‘and common sense . . . demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.’” The *Ethyl Corp* decision was based on the concept that the public health can be endangered “‘both by a lesser risk of a greater harm and by a greater risk of a lesser harm.’”]

JAS Comment – (1)Add paragraph on impacts described in the Working Group II report – ex. ecosystem impacts, infectious disease vectors, food and water shortages in Africa, dislocation, etc. (3) Provide statistics on the U.S. contribution to global greenhouse gas emissions.

¹⁸ IPCC FOURTH ASSESSMENT, WORKING GROUP II, SUMMARY FOR POLICYMAKERS 12 (2007) <http://www.ipcc.ch/SPM13apr07.pdf>.

¹⁹ *Id.* at 12.

²⁰ *United Nations Framework Convention on Climate Change*, U.N. Doc. A/AC.237/18 (1992), reprinted in 31 I.L.M. 849 (1992).

Conference on Environment and Development in Rio de Janeiro. The Senate gave its advice and consent on October 7, 1992.²¹ Less than a week later, on October 13, President George H.W. Bush signed the instrument of ratification and transmitted it to the Convention Secretariat,²² making the U.S. the fourth country in the world to ratify the Convention.²³ The Framework Convention took effect in 1994, and now has 185 additional parties, for a total of 189.²⁴ In 2001, President George W. Bush specifically reaffirmed U.S. commitment to the Convention.²⁵

As its name indicates, the Convention creates an international legal framework, including reporting, scientific and technological research, and annual meetings of the conference of the parties, to address climate change. The Framework Convention does not contain any binding commitments to reduce greenhouse gas emissions by a certain amount by a date certain. The Convention treats developed countries and developing countries differently. As the Framework Convention's preamble states, developed countries have contributed "the largest share of historical and current global emissions of greenhouse gases, and have higher per capita emissions levels than developing countries."²⁶ The developed countries' historic contribution to greenhouse gas emissions has lasting cumulative effects because of the persistence of these gases in the atmosphere. Thus, in ratifying the Framework Convention, developed countries agreed to adopt policies and measures that will demonstrate that they "are taking the lead" in addressing climate change.²⁷ Developed countries agreed to the "aim" of reducing their greenhouse gas emissions to 1990 levels by 2000.²⁸ The Convention requires all parties, both developed and developing, to establish, implement, and periodically update national programs to mitigate climate change.²⁹ The Convention also contains a commitment to review the adequacy of developed country commitments, including the "aim" commitment.³⁰

In December 1997, at their annual meeting in Kyoto, Japan, the parties to the Convention agreed to a protocol containing binding greenhouse gas emission limits for developed countries.³¹ Under the Kyoto Protocol, developed countries agreed to reduce their net

²¹ 138 Cong. Rec. S17150, S17156 (daily ed. Oct. 7, 1992) (reporting Senate approval of ratification of the resolution).

²² United States Instrument of Ratification, United Nations Framework Convention on Climate Change (Oct. 13, 1992) (copy on file with author).

²³ United Nations Framework Convention on Climate Change: Status of Ratification (*last modified on 24 May 2004*), <http://unfccc.int/resource/conv/ratlist.pdf>.

²⁴ *Id.*

²⁵ George W. Bush, President Bush Discusses Global Climate Change (June 11, 2001), <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html> (last visited June 14, 2006).

²⁶ Framework Convention, *supra* note, preamble para. 3. In the preamble, parties also recognize the "special difficulties" of developing countries, including their need for access to new technologies to address climate change. *Id.* paras. 20 & 22.

²⁷ *Id.* art. 4.2(a).

²⁸ Framework Convention, *supra* note, art. 4.2(a) & (b).

²⁹ *Id.* art. 4.1(b).

³⁰ *Id.* art. 4.2(d).

³¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/197/L.7/Add. 1, art. 3.1 & Annex B, reprinted in 37 I.L.M. 22 (1998).

greenhouse gas emissions by at least five percent from 1990 levels by 2008-2012.³² No comparable commitment is included for developing countries. The Protocol contains somewhat different commitments for individual developed countries; the U.S. commitment is seven percent below 1990 levels.³³ Greenhouse gas emissions in the United States are now projected to be more than 25 percent higher in 2012 than they were in 1990. Thus, the Kyoto target is about 30 percent below projected “business as usual” emissions.³⁴

Several months earlier, in July 1997, the Senate, by a vote of 95-0, passed a resolution sponsored by Senators Robert Byrd (D.-W.Va.) and Chuck Hagel (R.-Neb.). The Byrd-Hagel resolution expressed the sense of the Senate that the United States should not sign any protocol to the Climate Convention unless the protocol met several key conditions.³⁵ According to the resolution, the protocol must not “mandate new commitments to limit or reduce greenhouse gas emissions” for developed countries unless it also “mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period.”³⁶ In addition, the protocol should not “result in serious harm to the economy of the United States.”³⁷ The resolution did not address the issue of developed country leadership, as expressed in the Convention. President Clinton did not submit the Kyoto Protocol to the Senate for its advice and consent.

On March 13, 2001, President George W. Bush, referring to the Byrd-Hagel resolution, said he opposed the Protocol “because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy.”³⁸ He also said the Administration “takes the issue of global climate change very seriously,” and that he would work with “our friends and allies...to develop technologies, market incentives, and other creative ways to address global climate change.”³⁹

On February 16, 2005, following Russia’s ratification, the Kyoto Protocol went into effect.⁴⁰ Among major developed countries, only the United States and Australia are not parties. By contrast, the European Union has a well developed program for reducing greenhouse gas

³² *Id.* art. 3.1. The Annex I or developed countries also agreed to make “demonstrable progress” by 2005 in meeting their commitments. *Id.* art. 3.2

³³ *Id.* Annex B.

³⁴ NATIONAL COMMISSION ON ENERGY POLICY, ENDING THE ENERGY STALEMATE: A BIPARTISAN STRATEGY TO MEET AMERICAN’S ENERGY CHALLENGES 25 (2004).

³⁵ S. RES. 98, 105th Cong., 1st Sess. (July 22, 1997); 143 CONG REC. S8138 (daily ed. July 25, 1997).

³⁶ *Id.* §1(1) (A). During debate on the resolution, Senator Byrd stated several times that it did not mean developing country commitments would have to be the same as developed country commitments. 143 CONG. REC. S8117 (daily ed. July 25, 1997). “While countries have different levels of development, each must make unique and binding commitments of a pace and kind consistent with their industrialization.” *Id.* at S8131.

³⁷ S. RES. 98, *supra* note 35, §(1) (B).

³⁸ Letter from President George W. Bush to Senators Hagel, Helms, Craig, and Roberts (March 13, 2001), <http://www.whitehouse.gov/news/releases/2001/03/20010314.html>.

³⁹ *Id.*

⁴⁰ The Protocol could not become effective until countries accounting for 55 percent of the carbon dioxide generated by “Annex I” industrialized nations had ratified it. Kyoto Protocol, *supra* note 31, art. 24.1. After the U.S. declined to ratify the Protocol, the Protocol could only become effective if Russia ratified it.

emissions and has begun an emissions trading program that is providing countries with valuable experience in how to make such a trading program work effectively.

Parties to the Kyoto Protocol have already begun discussions for the next round of emissions cuts. The Kyoto reductions are to be achieved by 2008-12, which means that the next round of cuts under the Framework Convention would be sought for a date after that time. In the meantime, the U.S. is making an effort to secure emissions reduction commitments from major emitting countries, both developed and developing. According to President Bush, the objective is to agree on “the process by which the major economies would, by the end of 2008, agree upon a post-2012 framework that could include a long-term global goal, nationally defined mid-term goals and strategies, and sector-based approaches for improving energy security and reducing greenhouse gas emissions.” The European Union, France, Germany, Italy, and the United Kingdom, Japan, China, Canada, India, Brazil, South Korea, Mexico, Russia, Australia, Indonesia, and South Africa were invited to join this effort.⁴¹ Speakers at this meeting, which was held on Sept. 27-28, 2007, emphasized the central role of the Framework Convention in any climate change discussion, stated that developed and developing countries had common but differentiated responsibilities under the Convention, and welcomed the U.S. effort as a contribution to efforts under the Convention.⁴²

3. State and Local Efforts

States and local governments are playing a leading role in addressing climate change in the United States. These efforts involve more and more states, and are becoming increasingly ambitious and regional in scope. Differences among states as well as their lack of national scale, however, mean that states are not an effective substitute for national action and leadership and an internationally effective program.

Many states are employing a planning process that involves a greenhouse gas reduction goal and implementation of a suite of legal and policy measures to achieve that goal. Others are acting without quantifiable reduction goals, but are nonetheless employing a suite of tools. These tools include, but are not limited to, renewable electricity portfolio standards, energy efficiency portfolio standards, net metering, carbon dioxide limits on new power plants, energy efficiency provisions in building codes, public funding or benefit programs for efficiency and renewable energy, tax credits, and registries for early greenhouse gas reductions. In addition to reducing greenhouse gas emissions, these tools reduce negative external costs of energy generation, require energy conservation activities with benefits exceed their costs, and use markets that reduce net emissions. They also limit and even lower energy costs for the poor, and create employment and economic growth. These tools encourage technological innovations that can lead to even greater greenhouse gas reductions in the future. Many of them also provide greater public understanding of greenhouse gas sources and ways of limiting emissions. Use of

⁴¹ President George W. Bush, Invitation to Meeting of Major Economies on Energy Security and Climate Change, Aug. 3, 2007, <http://www.whitehouse.gov/news/releases/2007/08/20070803-7.html>.

⁴² U.S. Department of State, Final Chairman’s Summary: First Major Economies Meeting On Energy Security and Climate Change, Sept. 27-28, 2007, <http://www.state.gov/g/oes/climate/mem/93021.htm>.

these tools can also reduce emissions of other air pollutants, including sulfur dioxide, nitrogen oxides, fine particulates, ozone, and mercury.⁴³

A growing number of states are acting on a regional basis. Ten northeastern states (Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, Vermont, Massachusetts, Rhode Island and Maryland) are participating in the Regional Greenhouse Gas Initiative to develop a regional emissions cap and trade program. RGGI has developed a model rule to establish a cap and trade program for electric utilities.⁴⁴ Most of the RGGI states have already proposed individual state rules to implement the model rule. Six western States (Arizona, California, New Mexico, Oregon, Utah, and Washington) and two Canadian provinces (British Columbia and Manitoba) participate in the Western Climate Initiative to adopt a regional emissions cap for multiple economic sectors and a cap-and-trade system.⁴⁵ Finally, 39 states, two Canadian provinces, and three Indian tribes are members of The Climate Registry, which is developing a common set of criteria for registering measures to reduce emissions and a cap-and-trade program.⁴⁶ At the local level, more than 500 U.S. municipalities have signed the Mayors Climate Protection Agreement, under which they agree to strive to meet or exceed the Kyoto Protocol goal of a seven percent reduction in greenhouse gas emissions from 1990 levels by 2012.⁴⁷ In addition, more than 150 U.S. cities and local governments have joined the Cities for Climate Protection of ICLEI-Local Governments for Sustainability. As members, they seek to reduce greenhouse gas emissions while improving community livability.⁴⁸

Many observers see state and local activity as a next-best approach in the absence of federal legislation and effective international agreements. State and local governments provide an important laboratory for working out many of the difficult questions involved in the development of national climate legislation, and states have shown that legal and policy measures to address energy and climate policy can create economic and other opportunities. In addition, Congress will need to effectively engage states in any future national legislation if it expects that legislation to be fully effective.⁴⁹ Yet differences among state laws and the lack of a unified national strategy for addressing climate change handicap even the most advanced and most regional efforts at the present time.

⁴³ See, e.g., John Dernbach and the Widener University Law School Seminar on Global Warming, *Moving the Climate Debate from Models to Proposed Legislation: Lessons from State Experience*, 30 ENVTL. L. REP. (Envtl. L. Inst.) 10,933 (2000).

⁴⁴ Regional Greenhouse Gas Initiative, Model Rule and Amended Memorandum of Understanding, <http://www.rggi.org/modelrule.htm> (last visited Sept. 21, 2007).

⁴⁵ Western Climate Initiative, <http://www.westernclimateinitiative.org/Index.cfm> (last visited Sept. 21, 2007).

⁴⁶ The Climate Registry, <http://www.theclimateregistry.org/index.html> (last visited Sept. 21, 2007).

⁴⁷ The U.S. Conference of Mayors, U.S. Conference of Mayors Climate Protection Agreement, <http://www.usmayors.org/climateprotection/agreement.htm> (last visited Oct. 11, 2007).

⁴⁸ International Council for Local Environmental Initiatives (ICLEI), Cities for Climate Protection, <http://www.iclei.org/index.php?id=1118> (last visited Nov. 12, 2007).

⁴⁹ Thomas D. Peterson, Robert B. McKinstry, Jr., & John C. Dernbach, *Developing a Comprehensive Approach to Climate Change Policy in the United States: Integrating Levels of Government and Economic Sectors*, 25 VA. ENVTL. L. J. ____ (forthcoming 2007).

4. National Efforts

The United States has no overall goal for reducing the total amount of greenhouse gas emissions, and no legal structure in place to achieve that result. On the other hand, the United States does have a goal of reducing the greenhouse gas intensity of the U.S. economy by 18% by 2012, which is projected to prevent the emission of 500 million metric tons of emissions over the decade. Greenhouse gas intensity measures the relationship between GDP and greenhouse gas emissions; it is not an absolute measure of greenhouse gas emissions.⁵⁰ The United States has several kinds of laws in place that have the indirect effect of reducing greenhouse gas emissions, but also other laws that in all likelihood tend to increase emissions (e.g., subsidies for fossil fuels). In spite of, or perhaps partly because of, these laws, U.S. greenhouse gas emissions continue to increase. Net greenhouse gas emissions were 16.3 percent higher in 2005 than they were in 1990.⁵¹

The United States has had laws for several decades that support energy efficiency and conservation. The primary laws fostering efficiency and conservation are 1) efficiency standards for appliances and other equipment under the National Appliance Energy Conservation Act of 1987;⁵² 2) state energy efficiency standards for buildings, which are prompted to some degree by a requirement in the Energy Policy Act of 1992 that each state review and consider upgrading the energy efficiency provisions of its residential and commercial building codes;⁵³ and 3) corporate average fuel economy (CAFE) standards for motor vehicles, which are established under the Energy Policy and Conservation Act.⁵⁴

The U.S. also has laws fostering the use of renewable energy. These include the production tax credit for wind turbines. In addition, the Energy Policy Act of 2005 requires EPA to establish regulations requiring the volume of renewable fuel sold or introduced into commerce in the U.S. annually to increase from 4.0 billion gallons in 2006 to 7.5 billion gallons in 2012.⁵⁵ The United States also has a variety of other voluntary programs, many of them international partnerships that are intended to in various ways to reduce greenhouse gas emissions and develop new and alternative technologies to address climate change.⁵⁶

⁵⁰ White House, *Global Climate Change Policy Book* (2002), <http://www.whitehouse.gov/news/releases/2002/02/climatechange.html> (last visited July 21, 2006). Reducing greenhouse gas intensity has reduced the growth in U.S. greenhouse gas emissions, but it has not reduced the overall level of U.S. emissions.

⁵¹ U.S. ENVIRONMENTAL PROTECTION AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2005 at ES-3 (2007), <http://www.epa.gov/climatechange/emissions/downloads06/07CR.pdf>.

⁵² Pub.L. 100-12, 101 Stat. 103, codified at 42 U.S.C. " 6291-97, 6299, 6302, 6303, 6305, 6306, 6308, & 6309.

⁵³ 42 U.S.C. " 6832(15) & 6833(a) (residential building code); *id.* " 6832(16) & 6833(b) (commercial building code).

⁵⁴ 42 U.S.C. §§ 32901-19.

⁵⁵ 42 U.S.C. § 7545.

⁵⁶ U.S. Council on Environmental Quality, Clean Energy and Climate Change, <http://www.whitehouse.gov/ceq/clean-energy.html> (last visited Oct. 11, 2007).

By reducing energy use, and increasing the use of renewable energy, each of these has the effect of ensuring that U.S. greenhouse gas emissions are lower than they would otherwise be. These laws and programs have not, however, stopped the growth in greenhouse emissions.

Nor does the United States appear to be prepared to adapt to the consequences of climate change. The two most certain effects of climate change, increased surface temperatures and rising sea levels, are already occurring and are likely to continue even if serious efforts are made to mitigate climate change. Accordingly, adaptation is a necessary part of any national effort to address climate change. Rising sea levels, for example, raise a variety of legal issues that have yet to be fully addressed.⁵⁷

The U.S. business community is disadvantaged by the absence of a comprehensive federal program and the consequent proliferation of inconsistent state and regional regulations, as well as litigation that is intended to force (or substitute for) federal regulation. The lack of a federal program also makes capital expenditure planning very difficult, inhibits research and development, robs businesses of economies of scale and of markets for climate-friendly technologies and products, and puts them at a disadvantage compared to companies in countries that have ratified the Kyoto Protocol. U.S. companies would also have greater opportunities to engage in carbon trading if the U.S. was part of an international cap-and-trade system.

There is growing Congressional interest in comprehensive climate change legislation. Seven bills were pending in late 2007. These bills apply to most or all sectors of the economy, not just, for example, electrical generation or transportation.

5. Conclusion: Need for U.S. leadership

The United States has a history of leadership on key international issues, including many issues involving international environmental law. The United States played an instrumental role in designing and carrying out the post World War II international legal architecture, including the United Nations, the Bretton Woods institutions, and the post war reconstruction of Europe. Many U.S. environmental laws, including the National Environmental Policy Act of 1969, have been modeled throughout the world. The United States helped lead the international effort for Montreal Protocol, under which both developed and developing countries have agreed to reduce or phase out production of certain substances that deplete the stratospheric ozone layer. It now appears that the reduction in those substances has also had a large and positive effect in mitigating climate change. The U.S. sulfur dioxide emissions trading program in the Clean Air Act served as a model for the Kyoto Protocol trading programs. In addition, the United States has led recent international efforts to protect high seas fisheries, prevent lead poisoning, integrate environmental considerations into trade agreements, and incorporate environmental impact reviews and public participation in World Bank projects.

⁵⁷ Ira R. Feldman and Joshua H. Kahan, Preparing for the Day After Tomorrow: Frameworks for Climate Change Adaptation, *SUSTAINABLE DEVELOPMENT L. & POL'Y* (forthcoming); James G. Titus, *Does the U.S. Government Realize that the Sea is Rising? How to Restructure Federal Programs so that Wetlands and Beaches Survive*, 30 *GOLDEN GATE U. L. REV.* 717 (2000).

As in many other areas of law and policy, U.S. ability to influence other countries to reduce greenhouse gas emissions is directly dependent on what we do at home. This is particularly true because the historic contribution of developed countries to greenhouse gas emissions, and their superior financial and technological resources, are acknowledged by the Framework Convention to which the U.S. is a party. Moreover, it is widely acknowledged that negative climate change effects will occur disproportionately in developing countries that are most vulnerable to climate change and that lack the resources to adapt effectively. The many strengths of the United States—including its technological capacity, economic strength, educational system, commitment to innovation, and legal institutions—give this country a unique and unparalleled opportunity to play a significant and constructive role in addressing climate change.

Respectfully Submitted,
Lee A. DeHihns, III, Chair
Section of Environment, Energy, and Resources
February 2008

GENERAL INFORMATION FORM

Submitting Entities: Section of Environment, Energy, and Resources

Submitted By: Lee A. DeHihns, III, Chair, Section of Environment, Energy, and Resources

1. Summary of Recommendation(s).

The American Bar Association urges the United States Government to take a leadership role in addressing the issue of climate change through legal, policy, financial, and educational mechanisms; urges Congress to enact and the President to sign appropriate climate change legislation; and urges the United States Government to engage in active international discussions to address climate change.

2. Approval by Submitting Entity.

Approved by the Section of Environment, Energy, and Resources Council on November 9, 2007.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

In 2003 the ABA adopted a resolution reaffirming the ABA's 1991 commitment to sustainable development, and further encouraging governments, businesses and nongovernmental entities to promote sustainable development and recognizing that good governance and the rule of law are essential to achieving sustainable development. In August 2007, the ABA adopted a resolution urging governments, businesses, nongovernmental organizations and other organizations to integrate and consider Rule of Law Initiatives with global environmental issues.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

In 1993 the Association adopted a resolution supporting NAFTA and procedures and institutions for the conduct of trade in North America. In 1995 the ABA adopted a resolution promoting meaningful and effective involvement of all affected stakeholders and interest through the public participation provisions of environmental laws, international environmental agreements and treaties. In 2003 the Association adopted a policy resolution reaffirming the ABA's 1991 commitment to sustainable development, and further encouraging governments, businesses and nongovernmental entities to promote sustainable development and recognizing that good governance and the rule of law are essential to achieving sustainable development. In August 2007, the ABA adopted a resolution urging governments, businesses, nongovernmental organizations and other organizations to integrate and consider Rule of Law Initiatives with global environmental issues.

5. What urgency exists which requires action at this meeting of the House?
The Association is on record supporting sustainable development and the rule of law. Few issues raise the need for sustainable development and the rule of law more squarely and urgently than climate change. As the report explains, climate change is likely to affect human quality of law in a variety of negative ways, both in the United States and in other countries. Congress, in addition, is already considering a variety of comprehensive climate change bills. Through this policy initiative the Association will be able to play a more effective role in Congress and elsewhere on climate change because it will have taken a position on the issue.
6. Status of Legislation. (If applicable.)
A variety of bills are now before Congress that would establish comprehensive programs to address climate change. Two proposals, companion bills in many respects, are S. 280, the Climate Stewardship and Innovation Act of 2007 (Sen. Lieberman and six cosponsors, including Sen. McCain) and H. R. 620, the Climate Stewardship Act of 2007 (Rep. Olver and 17 cosponsors). The other four are S. 1766, the Low Carbon Economy Act of 2007 (Sen. Bingaman and six cosponsors), S. 309, the Global Warming Pollution Reduction Act (Sen. Sanders and ten cosponsors), S. 485, the Global Warming Reduction Act of 2007 (Sen. Kerry and one cosponsor), and H.R. 1590, the Safe Climate Act of 2007 (Rep. Waxman and 131 cosponsors). A seventh bill, S. 2191, America's Climate Security Act, is cosponsored by Senators Joseph Lieberman and John Warner and has eight cosponsors. (Two major energy bills, H.R. 6 (passed by the Senate June 27, 2007) and H.R. 3221 (passed by the House August 3, 2007), contain renewable energy and energy efficiency provisions that would indirectly address climate change, but do not attempt to comprehensively reduce greenhouse gas emissions.)
7. Cost to the Association. (Both direct and indirect costs.)
This resolution does not impose costs on the Association beyond those already being incurred to promote Goal VIII and advance the Rule of Law.
8. Disclosure of Interest. (If applicable.)
The cosponsoring entities engage in activities that address climate change, including CLE programming, providing information of ABA activities to governments, NGOs and others as well as development of policy resolutions. No individual associate with this resolution will benefit personally from adoption of the resolution.
9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)
As it was being developed, this Report with Recommendations was circulated to representatives of the ABA Section of Environment, Energy, and Resources; the Standing Committee on Environmental Law; Administrative Law and Regulatory Practice; Business Law; Dispute Resolution; International Law; Law Practice Management; Litigation; Public Utility, Communications and Transportation Law; Real Property, Trust and Estate Law; State and Local Government Law; Taxation; Tort Trial and Insurance

Practice; and Young Lawyers Division. Circulation to all ABA Sections is being made following this submission.

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

Lee A. DeHihns, III, Chair, Section on Environment, Energy, and Resources
Alston & Bird LLP, 1201 West Peachtree St., Atlanta, GA 30309-3424, PH: 404-881-7151, Email: lee.dehahns@alston.com

11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

R. Kinnan Golemon, Section Delegate to the ABA House of Delegates, Brown
McCarroll, L.L.P., Austin, TX, phone: (512) 479-9707; email:
kgolemon@mailbmc.com

Sheila Slocum Hollis, Section Delegate to the ABA House of Delgates, Duane Morris
LLP, Washington, DC, phone: (202) 776-7810; email: sshollis@duanemorris.com

Lee A. DeHihns, III, Chair, Section on Environment, Energy, and Resources, Alston &
Bird LLP, Atlanta, GA, phone: (404) 881-7151; email: lee.dehahns@alston.com

EXECUTIVE SUMMARY

1. Summary of the Recommendation.

The American Bar Association urges the United States Government to take a leadership role in addressing the issue of climate change through legal, policy, financial, and educational mechanisms; urges Congress to enact and the President to sign appropriate climate change legislation; and urges the United States Government to engage in active international discussions to address climate change.

2. Summary of the issue which the Recommendation addresses.

Humans are contributing to climate change through emissions of greenhouse gases, principally carbon dioxide. Climate change presents significant risks to this and future generations. Climate change presents environmental risks, to be sure, but it also presents security, economic, and social risks. At the same time, the national and international response to climate change provides major opportunities for improving environmental quality, fostering economic growth and job creation, and enhancing domestic and global security. There is bipartisan agreement that climate change is a serious issue that requires further legal action at the national and international levels.

3. An explanation of how the proposed policy position will address the issue.

The proposed policy addresses this issue in three ways. First, it would have the United States take a leadership role in addressing climate change. Second, it would have Congress adopt comprehensive legislation to limit greenhouse gas emissions. Third, it would have the U.S. government engage in active efforts at the international level to reduce greenhouse gas emissions.

4. A summary of any minority views or opposition which have been identified.

The proposed policy has been circulated and discussed intensively within the leadership of the Committee on Climate Change, Sustainable Development, and Ecosystems. It has also been circulated and discussed within the Section on Environment, Energy, and Resources as well as the Standing Committee on Environmental Law; the Section of Real Property, Trust and Estate Law; and the Section of Public Utility, Communications and Transportation Law. Changes have been made in the proposal in response to numerous comments and suggestions.