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ABA SECTION OF ENVIRONMENT ENERGY AND RESOURCES

Climate Change, Sustainable Development, and Ecosystems Committee Newsletter

Vol. 15, No. 2 **April 2012**

MESSAGE FROM THE CHAIRS

Mary Ellen Ternes and
Robert B. McKinstry Jr.

Happy early spring 2012 to everyone, adaptation issues aside. The committee wound up 2011 finishing its *The Year in Review 2011* report and finalizing page proofs in early March 2012. You should have your issue in your mailbox at about the time you receive this newsletter; however, future *YIR* publications will go the way of newsletters and be distributed electronically. Thanks to everyone for your contributions, and particularly Vice Chairs Marianne Tyrrell and Dianne Callan, who did a great job of managing the process.

On March 1, 2012, the committee cosponsored the Environmental Law Institute's webinar, "Debrief of the D.C. Circuit's Oral Arguments on EPA's GHG Rulemakings." See http://www.eli.org/Seminars/event.cfm?eventid=682, available for download in podcast. This is a great summary of the arguments, and really gives you an "in the room" perspective. Thanks to our former SEER chair, now ELI President John Cruden, ELI's Chandra Middleton, and all the panelists, for such a great webinar!

We hope you enjoyed the committee panels at the ABA SEER Annual Conference on Environmental Law in Salt Lake City, March 22–24, 2012. Specifically, the session Robert McKinstry moderated, "Letting Mother Nature Do the Work: The Role of Ecosystem Services in Satisfying Environmental Legal Requirements," with Randy Hayman, general counsel, District of Columbia Water and Sewer Authority, Margaret Peloso, Vinson & Elkins, and Sarah Stevenson, assistant city solicitor, Philadelphia, Pa. Also, the Saturday Plenary, "Federal Air Regulation of the Energy Sector: What to Expect for Oil, Natural Gas, and Coal," moderated by Richard Alonso, Bracewell & Guiliana, with Joel Beauvais, EPA Office of General Counsel, Janet Henry, American Electric Power, and Amy Trojecki, Exelon Corp.

June 20–22, 2012, will be Rio+20, to be held in Rio de Janeiro. The ABA has asked SEER to help put together an ABA delegation to Rio+20. SEER has a long history of working on sustainability initiatives; in addition to the fine work of this committee, the Section has also introduced sustainability-oriented resolutions before the House of Delegates, has adopted the Law Office Sustainability Initiative (with the hard work of former committee co-chair, now Vice Chair, Bill Blackburn), its work with the World Justice Project, the Million Trees project, and more. Current SEER Chair Irma Russell has appointed Lee DeHihns, former SEER chair, to chair the SEER delegation to Rio.

Coming up October 10–13, 2012, will be the ABA SEER's 20th Section Fall Meeting in Austin, Texas. This will be a great meeting at the Hilton Austin, with a national energy policy theme. Committee panels include "Greenhouse Gas Update: EPA Rule Challenges, Cap and Trade, LCFS, Common Law

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Vol. 15, No. 2, April 2012
Gabriel Calvo and Alan S. Miller, Co-Editors

In this issue:

Upcoming Section Programs—

For full details, please visit

www.ambar.org/EnvironCalendar

May 3, 2012
Wetlands Law and Regulation
Primary Sponsor: ALI-ABA
Washington, DC

May 3, 2012
Recent Decisions, Trends and Developments in Data Compensation under FIFRA
Brown Bag

May 4, 2012
Species Protection: Critical Legal Issues
Primary Sponsor: ALI-ABA
Washington, DC

May 9, 2012
The Natural Gas Boom: What Lawyers Should Know
CLE Webinar

May 10, 2012
Counseling the Local Food Movement: What a Practitioner Should Know
Primary Sponsor: General Practice, Solo and Small Firm Division
Webinar/Teleconference

May 15, 2012
Suspension and Debarment—An Administrative Tool for Addressing Non Compliance: Perspective from EPA
Brown Bag

May 31, 2012
The Sustainability Debate Over Biomass as a Renewable Energy Resource
Quick Teleconference

June 1, 2012
2012 National Spring Conference on the Environment
Baltimore, MD

Past program materials and podcasts are available for purchase. Click on the Section Calendar Archive page from here:

www.ambar.org/EnvironCalendar

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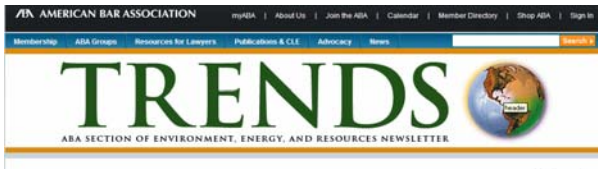
Litigation and Public Trust," as well as "Developments in EPA Regulation of Electric Generation," and panels covering national energy policy and legal authority, Electric Reliablity Council of Texas and the U.S. grid, next generation environmental compliance and enforcement, the water and energy nexus, endangered species and wind farm development, shale development, pipelines, and more. This conference will cover it all. And that weekend in Austin is the Austin City Limits Music Festival in beautiful Zilker Park, with more than 100 bands playing on eight stages. Last year, Stevie Wonder, Coldplay, Kanye West, Randy Newman, and Foster the People were among the performers. Check it out at www.ambar.org/EnvironFM.

Please join us in all this, post something on the listserv, write for our newsletter, send us ideas for program planning! Hope to see you in Austin!

This issue includes our two regular features, a review of recent EPA regulatory announcements by Leslie Griffith and a summary of judicial developments prepared by Cullen Howe, as well as three articles. Recent regulatory announcements include National Emission Standards for Hazardous Air Pollutants and performance standards for coal and oil-fired electric power plants. Judicial developments include ongoing litigation related to a California low carbon fuel standard (see two articles this issue related to this topic), a district court decision holding that a state air quality standard should consider greenhouse gases (GHGs) from oil refineries, and two settlements resolving Sierra Club challenges to coal plants in Arkansas and Texas.

This issue features three articles addressed to two of the most significant legal and regulatory developments in climate change policy. The first two offer insight into the implementation of the California Global Warming Solutions Act of 2006, commonly referred to by its legislative reference, Assembly Bill (AB) 32. The first article, by Kevin Haroff, provides a brief history and overview of three of the most consequential elements of the program — emission reduction targets, a low carbon fuel standard, and the cap-and-trade program. He concludes that the complexity and broad scope and impact of the program almost assure more litigation challenging the program. The second article, by Robert Lawrence and Dustin Till, focuses more specifically on the cap-and-trade regulations and several implementation challenges including the potential for differential impacts on utilities and large industrial emitters, and the administrative complexity and legality of rules relating to retention of some funds in the state treasury while rebating the remainder. They argue that the ongoing revision of rules with expected future modification is inconsistent with the certainty required for investment decisions. Like Haroff, they foresee "political, legislative and judicial attacks in the coming months" worth watching closely. (An additional article with a distinctly different view of the regulations is planned for the next issue.) The third article, by Josephine Yam, discusses the legal context and ramifications of the decision by the government of Canada last December to withdraw from the Kyoto Protocol. As Yam notes, this decision was the latest in a history of major swings in Canadian climate policy and largely driven by the reality that the growth of the country's GHG emissions made it impossible to meet its reduction target barring a politically unrealistic commitment to a multibillion dollar purchase of reduction credits. Yam describes the legal consequences of the decision, which did not cause the Kyoto Protocol to lose effectiveness, and considers the government's potential options going forward.



***Trends*: Section newsletter now in new electronic format**

The Section's newsletter *Trends* can be found in a new electronic format at www.ambar.org/EnvironTrends. Individual articles are now being posted in html format and contain hyperlinks to important cases and other resources cited in the text.

REGULATORY DEVELOPMENTS BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Leslie A. Griffith

New Source Performance Standard for CO_2 Emissions from New Fossil Fuel-Fired Power Plants

On March 27, 2012, the Environmental Protection Agency (EPA) announced a proposed rule that would require new fossil fuel-fired electric generating units (EGUs) greater than 25 megawatt electric (MWe) to meet an output-based standard of 1000 pounds of CO_2 per megawatt hour (lb CO_2/MWh), based on the performance of widely used natural gas combined cycle (NGCC) technology. Existing sources or facilities that will begin construction within 12 months are not subject to the proposed rule. The public comment period will extend for 60 days after the publication of the proposed rule in the *Federal Register*. This newsletter will provide analysis of the proposed rule in its next issue.

MACT Rule for Mercury and Air Toxics Emissions from Electric Utilities

On December 21, 2011, the Environmental Protection Agency (EPA) announced a rule establishing National Emission Standards for Hazardous Air Pollutants (NESHAP) and performance standards for coal and oil-fired electric utility plants. The rule requires coal and oil-fired power plants to use the maximum achievable control technology (MACT) to achieve significant reductions in emissions of mercury and other air toxics such as arsenic. EPA estimates the rule will result in more than $25 billion in net benefits. The rulemaking, which received more than 900,000 public comments, marks the first time EPA has regulated mercury emissions from electric utility plants under section 112 of the Clean Air Act. EPA first found it appropriate and necessary to regulate these emissions under section 112 in December 2000.

Secondary Lead Smelters NESHAP Residual Risk and Technology Review

EPA published a final rule amending its NESHAP for secondary lead smelters on January 5, 2012, after completing the residual risk and technology review. EPA issued its initial NESHAP for secondary lead smelters in 1997, and the MACT standard covers sixteen facilities engaged in recycling lead scrap metal. The new rule revises requirements for metal HAP emissions and work practice standards for mercury, and it finalizes emission limits for dioxin, furan, and total hydrocarbon. It also revises NESHAP requirements for emissions during start-up, shutdown, and malfunction. 77 Fed. Reg. 558.

Proposed Reconsideration for Area Source and Major Source NESHAP for Industrial, Commercial, and Institutional Boilers

On December 23, 2011, EPA issued a proposed reconsideration of its NESHAP for industrial, commercial, and institutional boilers and process heaters, which was promulgated on March 21, 2011. The March 21 rule set MACT standards for mercury and polycyclic organic matter and generally available control technology (GACT) standards for other emissions. EPA is now reconsidering, among other issues, the application of GACT to biomass and oil-fired area source boilers. For major sources, EPA's reconsiderations include revisions to carbon dioxide monitoring requirements and dioxin emissions limits. 76 Fed. Reg. 80,532 (area sources), 80,598 (major sources).

Reconsideration of Heat Exchange NESHAP for Petroleum Refineries and Uniform Standards

On January 6, 2012, in response to a petition for reconsideration from the American Petroleum Institute, EPA proposed amendments to the heat exchange requirements of the petroleum refinery NESHAP. EPA is also proposing national uniform standards for heat exchange systems based on the standards for petroleum refineries. The proposal would amend the petroleum refinery NESHAP to allow an alternative, less burdensome compliance option by cross-reference to the proposed uniform standards. The uniform standards, if finalized, would initially apply only to petroleum refineries, but EPA expects to extend them to other sources through future rulemaking to create consistent standards. Comments must be received by March 6, 2012. 77 Fed. Reg. 960.

Leslie Griffith *is a second-year student at Harvard Law School and an editor on the Harvard Law Review.*

JUDICIAL DEVELOPMENTS

J. Cullen Howe

Court and Agency Decisions

Northern Plains Resources Council, Inc. v. Surface Transportation Board (9th Cir. Dec. 29, 2011): The Ninth Circuit reversed in part a decision by the Surface Transportation Board approving an application from a railroad company to build a 130-mile railroad line in southwestern Montana to haul coal, holding that the agency failed to take the requisite "hard look" at several environmental issues raised by the project. Specifically, the court held that the agency's environmental impact statement (EIS) concerning the proposed line adequately considered the cumulative effect of the coal bed methane wells and the railroad on air quality and wildlife. However, the court held that the EIS ignored the combined impacts of future well development and coal mining projects in the area, improperly relying on a five-year timeline, which resulted in a faulty analysis. The court also held that the EIS did not provide baseline data for many wildlife and sensitive plant species.

Portland Cement Association v. EPA (D.C. Cir. Dec. 9, 2011): The D.C. Circuit held that EPA issued emissions standards for cement kilns without considering the effects of a related ongoing rulemaking to define solid waste incinerators. In particular, the court held that the rulemaking could have led to some kilns being classified as incinerators, which would mean that they would have different emissions limits. The court also dismissed arguments raised by environmental groups that the standards should include limits on greenhouse gases (GHGs), holding that EPA is continuing to collect this information and thus the court did not have jurisdiction until the agency issues a final rule.

Greater Yellowstone Coalition v. Servheen (9th Cir. Nov. 22, 2011): The 9th Circuit held that the U.S. Fish and Wildlife Service failed to justify its Endangered Species Act (ESA) delisting of the grizzly bears in the Yellowstone region because it did not consider the impact of climate change on a key source of the bear's food supply. The court reversed the agency's 2007 ruling to remove the bear's "threatened" status under the ESA. The decision affirms a lower court ruling that FWS did not adequately consider the impacts of climate change on white bark pine nuts, a major source of food for the bears. The decision stated that FWS's delisting decision did not articulate a rational connection between the data before it and its conclusion that white bark pine declines were not likely to threaten the Yellowstone grizzly bear.

Rocky Mountain Farmers Union v. Goldstene (E.D. Cal. Dec. 29, 2011): A federal district court in California temporarily enjoined California from enforcing its low carbon fuel standard. The California Air Resources Board (CARB) adopted the standard in April 2009. It measures the level of greenhouse gas emissions associated with the production, distribution, and consumption of gasoline and diesel fuels and their alternatives. It is designed to cut the average carbon intensity of fuels by 10 percent over 11 years. Ethanol producers filed suit, alleging that the standard violates the dormant Commerce Clause because it discriminates against out-of-state ethanol producers on its face. The court agreed and granted the preliminary injunction, holding that because the standard assigns more favorable carbon intensity values to corn-derived ethanol in California than to ethanol derived in California, it impermissibly discriminates against out-of-state entities. In addition, the court held that the standard impermissibly regulates channels of interstate commerce. The court further held that although the standard serves a legitimate local purpose, that purpose could be accomplished through other nondiscriminatory means. In addition, the court held that the plaintiffs' preemption claim raises a serious question as to whether the standard is preempted by the Clean Air Act (CAA).

Washington Environmental Council v. Sturdevant (W.D. Wash. Dec. 1, 2011): Two environmental nonprofit groups filed a lawsuit alleging that the Washington State Department of Ecology, Northwest Clean Air Agency, and the Puget Sound Clean Air Agency violated the CAA by failing to implement mandatory provisions of Washington's state implementation plan relating to the control of GHGs from oil refineries. The complaint alleged that four of the five companies that operate oil refineries in the state are operating under expired title V permits, and none of the permits contain requirements for controlling GHG emissions. Both sides moved for summary judgment. The district court granted the plaintiffs'

motion, holding that the law was clear that the state agencies were required to establish reasonably available control technologies (RACT) for GHGs and to apply the RACT standards to oil refineries.

Sierra Club v. U.S. Dept. of Energy (D.D.C. Nov. 18, 2011): A district court denied the Sierra Club's motion to preliminarily enjoin the Department of Energy (DOE) from providing funding assistance for the construction and operation of a coal-fired power plant in Mississippi on the grounds that the agency's EIS was legally insufficient. The court held that alleged harm is not from DOE's disbursement of funds, but from the power company's construction and operation of the plant. In addition, the court held that although the Sierra Club produced evidence that the project was unlikely to have commenced without federal funding, it did not make such a showing regarding the continued viability of the project without federal funding. Moreover, the company provided a sworn affidavit indicating that it will proceed with the project with or without federal assistance or a loan guarantee. Hence, the group failed to meet its burden of showing that it will likely succeed on the merits of its claims.

Sierra Club v. U.S. Army Corps of Engineers (W.D. Ark. Nov. 16, 2011): The Sierra Club and three chapters of the Audubon Society filed suit against the U.S. Army Corps of Engineers and related parties, seeking an injunction to halt construction of a planned 600-megawatt power plant in Hempstead County, Arkansas. The plaintiffs allege that the Corps violated the National Environmental Policy Act (NEPA) and the Clean Water Act when it issued the permit allowing the company to take water from the Little River and fill wetlands during project construction. After the plaintiffs settled with several defendants, the owner of the power plant moved to dismiss on standing and mootness grounds. The district court denied the motion, holding that the plaintiffs had standing to proceed with their case and that the case was not moot even though the construction of the plant was nearly complete.

Save Strawberry Canyon v. U.S. Department of Energy (N.D. Cal. Nov. 14, 2011): A district court held that DOE complied with NEPA when it determined that the construction of a "supercomputer" project on a college campus would have no significant environmental impact and did not require an environmental impact statement. Specifically, the court held that the environmental assessment (EA) took a hard look at direct and indirect GHG emissions, adequately analyzed the impacts of the project's GHG emissions, and made a reasonable determination that the GHG emissions did not significantly impact the environment. The court also held that the EA adequately described the methodology DOE used to reach its GHG emissions conclusions.

WildEarth Guardians v. U.S. Forest Service (D. Colo. Oct. 31, 2011): Environmental groups sued the U.S. Forest Service, alleging that in a final EIS concerning a coal mine, it failed to identify a reasonable range of alternatives to methane venting, as well as failing to identify measures such as flaring that would mitigate the effects of the release of the methane and failing to analyze the climate change impacts of methane venting. The district court, after finding that WildEarth had standing to maintain the action, upheld the Final Environmental Impact Statement, holding that the agency's decision not to flare or otherwise capture the methane gas was not arbitrary or capricious. In addition, the court held that the FEIS adequately addressed the climate change-related impacts of this decision.

Town of Babylon v. Fed. Housing Finance Agency (E.D.N.Y. June 13, 2011): A town commenced a lawsuit against the Federal Housing Finance Agency (FHFA) and several other related government agencies, seeking a declaration that the defendants' actions with respect to the town's Property Assessed Clean Energy (PACE) program on properties that had PACE liens violated several federal statutes, including NEPA. The town's PACE program allowed residential building owners to take out a low interest loan for energy efficiency upgrades and then repay these loans over time via an annual property tax assessment. Defendants moved to dismiss. The district court granted the motion, holding that it was without jurisdiction to review FHFA's actions in its role as a conservator and that the town lacked article III standing because it could not demonstrate redressability.

Association of Irritated Residents v. California Air Resources Board (Cal. Super. Ct. Dec. 6, 2011): A

California state court approved an expanded environmental analysis of alternatives to a cap-and-trade program for implementing the California Global Warming Solutions Act, otherwise known as AB 32. In their lawsuit, plaintiffs alleged that the program fails to minimize GHG emissions and protect vulnerable communities as required by AB 32. Plaintiffs also alleged that the agency violated the California Environmental Quality Act (CEQA) in approving the program. In March 2011, the court issued an order enjoining the state from implementing the program, holding that CARB had not adequately weighed alternatives to the cap-and-trade system. In June 2011, a state appellate court lifted the stay pending appeal. This stay was affirmed by the California Supreme Court in September 2011.

NRDC v. California Dept. of Transportation (Cal. Ct. App. Nov. 22, 2011): Several environmental groups filed a lawsuit challenging California Department of Transportation's approval of a new diesel truck expressway serving the ports of Long Beach and Los Angeles, alleging that the final environmental impact review (EIR) pursuant to the California Environmental Quality Act did not, among other things, sufficiently address GHG emissions and associated climate change. The trial court denied the petition. On appeal, the appellate court affirmed, holding that the EIR adequately investigated and discussed the GHG impacts from the project, that the agency's conclusion that the impacts would be "less than significant" was supported by substantial evidence, and that the agency was not required to make a quantitative analysis of GHG emissions in the EIR.

Drewry v. Town Council for the Town of Dendron, Virginia (Va. Cir. Ct. Nov. 21, 2011): A Virginia state court held that a Virginia town council unlawfully rezoned land to make way for a proposed coal-fired power plant. The lawsuit alleged that the Dendron Town Council failed to properly notify the public before it voted to approve four land use applications from the owner of the plant and amend the town's zoning plan in February 2010. The court held that the rezoning was unlawful because the notice circulated by the town before the meeting said it would receive public comments, but made no mention of a vote.

Ballona Wetlands Land Trust v. City of Los Angeles (Cal. Ct. App. Nov. 9, 2011): A land trust and several other parties challenged the certification of a revised EIR under CEQA concerning a proposed mixed-use real estate development. Among other things, the lawsuit challenged the EIR's analysis of sea level rise from climate change. A state trial court dismissed the challenge. On appeal, the state appellate court affirmed, holding that the EIR adequately discussed the impacts of sea level rise from climate change.

American Tradition Institute v. Rector and Visitors of the University of Virginia (Va. Cir. Ct. Nov. 1, 2011): A Virginia state court ruled that climate scientist Michael Mann can intervene in a lawsuit seeking e-mails and other documents he authored while a professor at the University of Virginia. In May 2011, a conservative legal organization filed a lawsuit under the Virginia Freedom of Information Act seeking documents related to the work of Professor Mann, who was involved in the so-called Climategate e-mail controversy.

Settlements

Sierra Club v. U.S. Army Corps of Engineers (W.D. Ark., consent decree filed Dec. 22, 2011): A power company and environmental groups reached a settlement that resolves a lawsuit challenging the construction of a 600-megawatt coal-fired power plant in Arkansas. Among other things, the company agreed to build no other generating units at the site and no other power plants within 30 miles of the facility. The company also agreed to construct or secure 400 megawatts of renewable energy resources by the end of 2014, use low-sulfur coal at the plant, and conduct additional stack testing at the plant to determine whether it could comply with more stringent emissions limits for coarse particulate matter. The groups filed the lawsuit in 2010, alleging that the preconstruction review of the proposed facility failed to comply with NEPA, the Clean Water Act, and the Endangered Species Act.

Sierra Club v. Sandy Creek Energy Associates LP (W.D. Texas, settled Dec. 9, 2011): The owner of a coal-fired power plant in Texas agreed to reduce mercury and particulate matter emissions in return for environmental groups dropping their challenge to its air permit. In a November 2010 decision, the Fifth Circuit held that the plant violated the Clean Air Act because, as a major source of a hazardous air pollutant, it

lacked a determination by a regulatory authority on required emissions control technology. According to the court, because the plant will emit more than 10 tons of mercury per year, it falls under the construction requirements of section 112(g) of the CAA, which governs hazardous air pollutants. This section prohibits construction of any major source of hazardous air pollutants unless a state or federal authority has determined that the source will meet maximum achievable control technology (MACT) emissions limits for new sources.

WildEarth Guardians v. Jackson (D.N.M., settlement order dated Nov. 9, 2011): A federal court approved a settlement between EPA and WildEarth, requiring the agency to act on the group's petition to block an air pollution permit for a 1800-megawatt coal plant in New Mexico. The New Mexico Environmental Department issued the permit in August 2010. Subsequently, WildEarth filed a petition with EPA urging the agency to reject the permit on the grounds that it did not comply with the Clean Air Act. The group then sued EPA after the agency missed the Clean Air Act's 60-day deadline to take final action on the petition.

New Cases and Court Filings

Center for Biological Diversity v. Bureau of Land Management (N.D. Cal., filed Dec. 8, 2011): Several environmental groups filed a lawsuit challenging the federal government's leasing of nearly 2,600 acres of public land in California to oil and gas developers, alleging that BLM failed to fully analyze the environmental impacts of high-pressure hydraulic fracturing, otherwise known as "fracking." In June 2011, BLM issued a final environmental assessment finding no significant environmental impact for the lease sale. The lawsuit alleges that the agency ignored or downplayed the impacts of the lease sale on endangered or sensitive species in the area and failed to address the impacts of fracking on water quality and other resources.

WildEarth Guardians v. U.S. Forest Service (D. Colo., filed Dec. 6, 2011): Three environmental groups sued the U.S. Forest Service (USFS) concerning the agency's consent to lease nearly 2,000 acres in the Thunder Basin National Grassland in Wyoming for coal mining, alleging violations of NEPA, the Administrative Procedure Act, the Surface Mining Control and Reclamation Act, and the National Forest Management Act. Under federal law, coal mining is prohibited on national grasslands without permission from USFS. The complaint alleges that the Bureau of Land Management's environmental impact statement concerning the coal leases was legally inadequate.

Texas v. EPA (D.C. Cir. Dec. 1, 2011): Texas filed suit against EPA, challenging a final rule issued by the agency extending its takeover of the state's GHG permitting authority under the Clean Air Act (CAA). The lawsuit challenges an EPA final rule under section 110 of the CAA that removed the agency's prior approval of Texas's state implementation plan for the prevention of significant deterioration after the state said that it would not implement a GHG permitting program. The lawsuit alleges that EPA's rule is arbitrary and capricious, an abuse of discretion, and contrary to the CAA. The final rule allows the state to continue issuing permits for other pollutants such as sulfur dioxide and nitrogen oxides. After asking the parties to brief whether the case should be held in abeyance while challenges to EPA's endangerment finding, emissions standards for cars and trucks, and a ruling limiting GHG permitting to the largest industrial sources were resolved, the court held that this case could proceed.

Poet, LLC v. California Air Resources Board (Cal. Super. Ct., filed Jan. 22, 2010): In a companion case to several lawsuits filed in federal court attacking the state's low carbon fuel standard (see above), a corn ethanol producer filed a lawsuit in California state court challenging the state's low carbon fuel standard. Among other things, the lawsuit alleges that California Air Resources Board violated CEQA and the California Health and Safety Code in establishing the standard.

Cullen Howe *is an environmental law specialist in Arnold & Porter's environmental practice group, where he focuses on climate change, green buildings, and other environmental issues.*

CALIFORNIA'S CLIMATE CHANGE PROGRAM COMES TOGETHER IN 2012—OR DOES IT?

Kevin Haroff

After years of planning and regulatory development, many of the key elements of California's landmark program to control greenhouse gas (GHG) emissions may finally be lining up.

The legislative parameters of the state's climate program initially were put into place with the adoption of the California Global Warming Solutions Act of 2006, more commonly known as Assembly Bill (AB) 32. AB 32 required the California Air Resources Board (CARB) to develop a comprehensive plan to reduce GHG emissions on a statewide basis to 1990 levels by the year 2020. The law also directed CARB to conduct major rulemaking activities to implement the plan and to have its approved rules and market-oriented control mechanisms ready to take effect by January 1, 2012. Although CARB may not have met this deadline for all program elements, a number of essential details have now been largely worked out and could go into effect as the year progresses.

The most significant, and controversial, of CARB's AB 32 implementation program is its now-approved GHG emissions cap-and-trade regulation. Once implemented, the cap-and-trade regulation will provide a fixed limit on sources responsible for approximately 85 percent of the state's total GHG emissions. This is in addition to emissions reductions that may be achievable through further measures and standards adopted by CARB and other state and federal government agencies such as more stringent fuel economy standards for cars and trucks. The cap-and-trade regulation became effective on January 1, 2012, although full compliance with regulatory obligations will not be enforceable until January 2013.

That does not mean CARB is sure to fulfill its mandate to push forward the nation's most ambitious effort to confront the challenges of climate change on a jurisdiction-wide basis. Opponents of AB 32 have vigorously resisted the law's implementation at several levels, and they have achieved some recent successes in at least delaying important elements of CARB's GHG regulatory efforts (including cap-and-trade).

AB 32 Emissions Levels and Reduction Strategies

As a first step toward implementation of AB 32, CARB approved a GHG emissions target for 2020 in December 2007 of 427 million metric tonnes (MMT) of CO_2 and CO_2 equivalents (CO_2e). Meeting this target was expected to require an initial reduction of 169 $MMTCO_2e$, or approximately 30 percent, from the state's projected 2020 baseline emissions level of 596 $MMTCO_2e$ (in the absence of reduction measures adopted under AB 32). Since 2007, CARB has revised its 2020 baseline level downward to 507 $MMTCO_2e$, to reflect lowered projected emissions associated with the state's ongoing economic downturn, consideration of emissions reduction efforts outside the scope of the program, and better information developed in the course of CARB's assessment of potential regulatory strategies.

CARB's AB 32 emissions reduction strategies were first described in a December 2008 climate change scoping plan that included regulatory and nonregulatory components, such as:

- Expanding and strengthening existing energy efficiency programs along with building and appliance standards;
- Achieving a statewide renewable electricity portfolio standard (mandatory purchase obligation for utilities) of 33 percent;
- Developing a California cap-and-trade program that could be integrated with similar market-oriented programs from neighboring jurisdictions on a regional basis;
- Establishing targets for transportation-related GHG emissions;
- Implementing measures under other state laws, including California's clean car and low carbon fuel standards; and
- Creating targeted fees for GHG emissions-related activities.

Almost from the beginning, however, AB 32 and CARB's proposals to carry it out were criticized in some parts of California's business community for their potential costs and possible negative impacts on the state's already depressed economy. In 2010, those criticisms manifested through inclusion on the state's November electoral ballot of Proposition 23, the so-called California Jobs Initiative. If approved, the initiative would have suspended the implementation of AB 32 until California's unemployment rate dropped to 5.5 percent or below for four consecutive quarters. Because the state's unemployment rate then exceeded 12 percent, with no sign of going down in the foreseeable future, Proposition 23 was seen by many as an attempt to forestall implementation of the law indefinitely. It also was viewed by some as an uninvited attempt by business interests outside California (mostly in the oil and gas refining sector) to meddle with the state's long-standing support for progressive environmental policies. For these and other reasons, California voters rejected Proposition 23 by a large (23 percent) margin.

The defeat cleared the way for CARB to take the next steps toward full AB 32 implementation, including adoption of its statewide cap-and-trade regulation. Elements of CARB's regulatory program already have been attacked in court, however, and more litigation is almost certainly yet to come.

Challenging California's Low Carbon Fuel Standard

The most recent court challenge to CARB's efforts involves California's low carbon fuel standard, Cal. Code Regs. tit. 17, §§ 95480–90 (LCFS), which the agency adopted in April 2010 as a result of an executive order (S-01-07) signed in 2007 by then-Governor Arnold Schwarzenegger. The order set a statewide goal to "reduce the carbon intensity of California's transportation fuels by at least 10 percent by 2020," and directed CARB initially to determine where such a standard could be adopted as an "early action measure" to implement AB 32 (which it did). The LCFS focuses on the "carbon intensity" of fuels to estimate GHG emissions related to a given fuel's "life cycle," including GHGs emitted when the fuel is extracted, refined, and transported to California. The LCFS established different standards for gasoline and diesel fuels and provided for gradual implementation of each standard to meet the 2020 goal set by the governor.

A collection of corn growers, corn ethanol industry groups, and associations representing petrochemical refining and transportation interests have challenged the LCFS in two separate federal court actions (subsequently consolidated) brought in the Eastern District of California. Plaintiffs contend, among other things, that the LCFS violates the Commerce Clause of the U.S. Constitution because it discriminates against Midwest producers of corn ethanol sold for use as a fuel in California. (Under the LCFS, ethanol sourced from the Midwest is assigned a higher carbon intensity value because of relatively higher transportation costs, which make it less economically attractive as a fuel feedstock.) Plaintiffs also contend that the LCSF is preempted by the federal Energy Independence and Security Act of 2007 (EISA), which Congress passed to encourage the use of corn ethanol from biofuel refineries outside California, and in existence when the law was enacted.

In December, the court granted plaintiffs' motion for summary adjudication on Commerce Clause grounds, finding that the LCFS does impermissibly discriminate against out-of-state ethanol producers and impermissibly regulates extra-territorial conduct outside CARB's jurisdiction. The court denied on technical grounds a separate motion based on the EISA. Because it found both the Commerce Clause and EISA arguments to have sufficient merit substantively, however, it granted plaintiffs' motion for a preliminary injunction and enjoined enforcement of the LCFS during the pendency of the litigation. See *Rocky Mountain Farmers Union, et al./Nat'l Petrochem. & Refiners Ass'n, et al. v. Goldstene*, Nos. CV-F-09-2234CV-F-10-163 (E.D. Cal., Dec. 29, 2011).

The federal court's reliance on the Commerce Clause to invalidate the LCFS, which is a key component of CARB's overall AB 32 implementation plan, raises questions about whether similar arguments may be asserted to attack other parts of the plan, including the California cap-and-trade regulation that will take effect over the course of 2012. That regulation, which is the

core of CARB's GHG emissions reduction program, already has survived one state court challenge. CARB has filed a notice of appeal to obtain review of the LCFS decision in the Ninth Circuit Court of Appeals. If the appeal is unsuccessful, opponents of AB 32 may be tempted to pursue constitutional law challenges over cap-and-trade in a more receptive federal judicial venue.

Cap-and-Trade—Where Things Stand Currently

CARB adopted its comprehensive regulation to implement California's GHG cap-and-trade program on October 20, 2011. The program establishes a total amount of GHG emissions that covered sources will be allowed to emit in a given year. Under the program, CARB will distribute emission allowances, with the total number of allowances created to be equal to an aggregate cap applied to cumulative emissions from all covered entities. Covered entities will include major GHG emitting sources, such as electricity generation facilities and other sources (refineries, cement production facilities, oil and gas production facilities, glass manufacturing plants, and food processing facilities) that emit more than 25,000 million metric tonnes of CO_2 equivalent ($MMTCO_2e$) per year (along with natural gas, propane, and transportation fuel providers).

CARB's adoption of the October 2011 regulation followed the California Supreme Court September 28 decision allowing the agency to proceed notwithstanding a lower court's ruling earlier in the year to block further development of the rule. On May 20, 2011, a San Francisco superior court judge issued a peremptory writ of mandate sought by an environmental justice group. The group claimed that a market-oriented approach to reducing state GHG emissions would have an adverse impact on poor and minority communities and that CARB had failed to properly consider alternatives to that approach consistent with the California Environmental Quality Act (CEQA). CARB filed an appeal from the superior court's decision and, requested an appellate writ of supersedeas to stay enforcement of the decision while the appeal was pending. That request was granted in late June (see *Ass'n of Irritated Residents v. CARB,* No. A132165 (Cal. Ct. App. 1st Dist., June 24, 2011)). Delays and regulatory uncertainty caused by the litigation, however, prompted CARB to push back the deadline for covered entity compliance with the proposed regulation from January 2012 to January 2013.

As adopted, the regulation requires establishing a GHG compliance cap at a level that will allow California to meet its AB 32 emissions target for 2020. (CARB staff estimated that implementation of the regulation will reduce GHG emissions by 18–27 $MMTCO_2e$ in 2020.) The cap is divided into annual budgets that specify the quantity of emissions allowances available annually from 2013 through 2020, with fewer allowances issued each year beginning in 2014. Importantly, allowances will be distributed under the regulation through a combination of free allocation and sale at auction, with the first auction to be held in August 2012. Proceeds from the sale of allowances in this first year have been estimated to range up to approximately $1 billion, although the actual amount will depend on market demand and supply and will not be known until after the auctions are completed. In addition to allowances, the regulation will allow covered entities to meet their GHG compliance obligations through use of offset credits representing measured, quantified, and verified reductions or removal of GHGs as a result of an activity not covered by the overall emissions cap. Offset credits could be created using CARB-approved offset protocols, e.g., for livestock manure (digester) projects, ozone-depleting projects, and forestry projects.

The Next Battleground

As noted, the revenue that may be raised by auction sales of GHG emissions allowances under the California cap-and-trade program is expected to be substantial right from the start and could grow significantly over time. Less clear is what the state may do with all that money. According to Governor Jerry Brown's recently released 2012–2013 budget summary, proceeds from the sale of allowances initially would be earmarked "to create jobs and deliver public health, economic and environmental benefits" as part of the state's overall effort to combat climate change under AB 32. A few groups representing business

interests that will be required to purchase allowances at auction, however, say that the money will simply go into the state's general fund and be used to help address California's larger budget deficit problems.

Some have suggested that if payments for allowances are treated as a general revenue source the effect would be equivalent to a tax which, under the California Constitution, can only be imposed by two-thirds supermajority vote by the combined houses of the California legislature (not by an administrative agency under earlier legislation that did not actually mandate—but only encouraged—adoption of CARB's cap-and-trade program). The issue is complicated by California voters' approval in 2010 of Proposition 26, the so-called Stop Hidden Taxes Initiative. Proposition 26 provides that fees and levies that are assessed for specific governmental services, and that previously were not considered taxes under the two-thirds majority approval requirement of the constitution, would be treated as such going forward. An argument could be made that payments for allowances made under the cap-and-trade program are exactly the kind of fees/taxes to which Proposition 26 was intended to apply. (The counterargument is that even if that were true, Proposition 26 was not intended to be retroactive and apply to fees assessed under legislation—in this case AB 32—adopted years before the initiative was approved.)

In sum, interests opposed to cap-and-trade, and to AB 32 generally, already are lining up for more litigation challenging California's climate change program. For that reason, despite the very considerable effort CARB and other agencies have made to implement AB 32 over the last five years, it still is unclear how much of the program will endure. The answer will take still more time and the inevitable involvement of the judicial branch. Stay tuned.

Kevin Haroff *is a San Francisco-based attorney specializing in environmental litigation and climate change issues. He was one of the lawyers filing an amicus brief in Ass'n of Irritated Residents v. Cal. Air Resources Board, opposing efforts to delay the administrative process leading to adoption of California's cap-and-trade regulation.*

CALIFORNIA AIR AGENCY ADOPTS CONTROVERSIAL NEW CAP-AND-TRADE RULES

Robert F. Lawrence and Dustin T. Till

On October 20, 2011, the California Air Resources Board (CARB) approved controversial new "cap-and-trade" regulations on greenhouse gas (GHG) emissions from electric utilities and large industrial sources after more than five years of debate. The new regulations—the most comprehensive climate change limits in the country—are likely to generate significant controversy when implemented. They are being enacted at a time when many other states—and Congress—have turned away from GHG regulations, citing the burden they place on a struggling economy. CARB, however, had little choice but to act, in light of impending deadlines established by AB 32—California's 2006 climate change legislation. AB 32 requires California to reduce its GHG emissions to 1990 levels by 2020. The new CARB rules impose compliance obligations commencing January 1, 2013, although this date may be ambitious in light of the current status of regulatory developments. Cap-and-trade is a market-based framework under which aggregate emissions are capped and regulated businesses must obtain (through government allocations, auctions, or secondary trades) an allowance for each ton of GHGs they emit. In theory, the opportunity for trading reduces total compliance costs and the cost of allowances incentivizes businesses to adopt more efficient methods of production or find alternative technologies for resource use.

Cap-and-trade regulations have been successfully implemented before, but only in limited programs that regulate either one pollutant or one economic sector. EPA implemented a cap-and-trade program for sulfur dioxide (SO_2) created by the 1990 Clean Air Act amendments. Several Northeastern states have adopted cap-and-trade regulations limiting carbon dioxide emissions from power plants (that system is known as the Regional Greenhouse Gas Initiative or RGGI). Each famously achieved its objectives before statutory deadlines.

California's program reaches much further than any market-based emissions program ever tried before. It attempts to regulate nearly all economic sectors in California, and applies not just to carbon dioxide emissions but to emissions of methane and other heat-trapping gases. In 2015, the program will expand to include producers and distributors of fossil fuels. California's approach creates enormous complexity, as CARB must attempt to equalize economic impacts across diverse economic sectors. The program pits investor-owned utilities (IOUs) against industrial sources, as they both must bid for the same limited emission allowances. While IOUs can pass the costs through to ratepayers, industries compete in international markets where cost pass-through is by no means assured.

Perhaps the most difficult problem California faces in enacting emissions limitations alone, without a federal program, is that at least some industrial users may shift production to out-of-state facilities to minimize compliance costs. The migration of GHG emissions sources from one state to another is known as "leakage." CARB has attempted to combat leakage by imposing allowance surrender obligations on imported electricity. Publicly owned utilities will receive free allocations of allowances for electricity they distribute, while investor-owned utilities and importers will have to bid for the allowances assigned to imported electricity.

CARB's anti-leakage approach for industries involves free allocations of allowances to a limited group of industries in the first compliance period (2013–2014). Beginning in 2015, the program will expand to include many new industries and will be modified to require bidding for some of the allowances allocated to industry. The number of allowances distributed will be based on CARB's view of what the level those industries' emissions should be, based on their operations during the 2008–2010 recession, not what they are or would be under normal circumstances. To keep operating at historical levels, the affected industries may need to modify their operations to match governmentally mandated "benchmarks" for GHG emissions per unit of output. Some industries, most notably petroleum refining, will receive fewer

allowances than they need to operate—even at recent recessionary levels.

There are likely to be many other provisions of the CARB rules that could come under attack, either politically or in the courts:

- **Cap:** CARB established the cap at emissions levels that are consistent with recessionary emissions rates and are a few percent below emissions in California in 2008. CARB's cap will enforce limits that do not permit California's economy to recover to pre-recession levels.
- **Phase-In:** Other successful cap-and-trade programs established their caps up to five years in advance of enforcing them, so regulated entities had sufficient time to make investments in alternative compliance strategies. But CARB's program begins in less than one year, so business must either close, move, or reduce operations rather than achieve compliance by investment.
- **Resource Shuffling:** The regulations include a requirement that regulated parties avoid "resource shuffling." The CARB staff has explained that resource shuffling occurs when a regulated person switches from a high GHG-emitting source to a low-emitting source (like from coal-fired power to wind energy), but is not effective in shutting down the source from which it is switching. To comply with the resource shuffling prohibition, an electricity purchaser that switches from a high- to a low-emitting electricity source must ensure that the former source does not find new customers or continue emitting at prior rates.
- **Allowances Auctions:** The theory of auctioning allowances is that an auction "recovers the value of emissions rights" for the benefit of the public. This concept overlooks the problems that arise when companies need to invest to reduce emissions. In an auction situation, regulated entities pay for allowances to continue operating, and then must find additional sources of capital to make emission-reduction upgrades or operational changes. With free distribution of allowances, capital that would otherwise be spent on allowances can be directed to achieving the environmental goal of reducing emissions.
- ***Rebate of Auction Proceeds*:** The auction of allowances will raise an estimated minimum of $650 million in revenues. CARB originally stated that these revenues would be rebated to investor-owned utility ratepayers who had paid the fees. Since then, the California Public Utilities Commission has been working on a rebate program that would partially accomplish that objective. In the interim, Governor Brown has earmarked the majority of the estimate revenues for the general state fund to cover climate change-related costs to the state and reserved the remainder for rebates and other programs designed to benefit ratepayers. The plan raises the question of whether the auction is really a tax, and whether it was imposed without complying with California law (including Proposition 26) governing the imposition of taxes. In addition, there are considerable political uncertainties associated with plans to spend or rebate the proceeds of the auctions that are far from being resolved.

At its final hearing on the regulations, CARB members expressed confusion about two fundamental concepts. One is the disruption of existing energy contracts. CARB stated that they had not taken any action to address sales of electricity by independent electricity generators under pre-AB 32 contracts. Some of those contracts do not allow generators to pass through to the utilities the costs of GHG allowances. The result is that independent generators must purchase allowances at auction or from other regulated entities, but cannot recover the cost of such purchases in the electricity sold to the utilities. CARB has indicated that it hopes this issue can be worked out voluntarily between the parties to those agreements. The California Public Utilities Commission has also indicated it is reviewing this issue but has not issued a decision or rules resolving it.

CARB identified a host of other major issues that it agreed in its approving resolution required revisions to the just-approved regulations. One example is the

possibility of offsetting the compliance obligations of the University of California by its investment in research or alternative energy facilities. Another example was an agreement to study whether there is an inequitable transfer of funds from certain state water authorities, which will pay significant GHG costs, to utility ratepayers under the rebate program. CARB also agreed that its resolution of issues relating to waste-derived fuels may need additional work.

All of this adds up to a cap-and-trade program that is very much a "work in progress" subject to ongoing modifications and considerable additional thought and discussion. Cap-and-trade programs do not work well under such circumstances. Regulated entities need to know what the future holds in order to react rationally. Rapid changes in direction simply mean that any investment in California is at risk.

Because the rules are still unsettled—and some would say, flawed—there are likely to be political, legislative, and judicial attacks in the coming months. Given the stakes, it will be important for affected industrial and power-generating entities to keep a close eye on these developments.

Robert F. Lawrence *is a partner in the San Francisco office of Marten Law, and* **Dustin T. Till** *is an associate in the firm's Portland, Oregon, office.*

ABA Section of Environment, Energy, and Resources

Call for Nominations

Environment, Energy, and Resources Government Attorney of the Year Award

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources law and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The Award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.
Nomination deadlines: May 14, 2012

Law Student Environment, Energy, and Resources Program of the Year Award

The Law Student Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best student-organized educational program or public service project of the year addressing on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2011 calendar year [consideration may be given to allowing projects that occurred in the 2010-2011 or 2011-2012 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.
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State or Local Bar Environment, Energy, and Resources Program of the Year Award

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2011 calendar year. Nominees are likely to be state or local bar sections or committees focused on environmental, energy, and natural resources issues.
Nomination deadlines: May 14, 2012

These Awards will be presented at the ABA Annual Meeting in Chicago in August 2012.

For further details, please visit the Section's website:
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CANADA EXERCISES LEGAL RIGHT TO WITHDRAW FROM KYOTO PROTOCOL

Josephine Yam

Introduction

On December 12, 2011, Canadian Environment Minister Peter Kent announced: "Kyoto, for Canada, is in the past. As such, we are invoking our legal right to withdraw from Kyoto." Kent had just arrived in Ottawa, Canada, from the United Nations climate conference that concluded the day before in Durban, South Africa.

This makes Canada the first of 191 signatories to the Kyoto Protocol to annul its emissions-reduction obligation. By formally withdrawing from this climate accord, Canada will no longer have an enforceable greenhouse gas (GHG) emissions-reduction obligation of 6 percent below 1990 levels by 2012. Nevertheless, Canada still remains a party to the United Nations Framework Convention on Climate Change (UNFCCC) and thus, will continue to participate in negotiations under that international treaty to collaboratively discuss the impacts of global climate change.

This article reviews the background and implications of this decision.

Canada's Emissions Profile

The evolution of Canada's GHG emissions profile reflects its emerging stature as a global producer and consumer of carbon-concentrated fossil fuels. Although its GHG emissions only contribute about 2 percent of annual global emissions, Canada's total emissions on a per-capita basis have consistently ranked among the world's top 10 emitters over the past 10 years.

In 1990, Canada's total GHG emissions were about 592 megatonnes (Mt) of carbon dioxide equivalent. In 2000, its GHG emissions increased to 717 Mt, due in part to the rapid growth of the domestic oil and gas industry—Canada has the world's third-largest proven crude oil reserves. In 2004, its GHG emissions increased further to 741 Mt, more than 20 percent above 1990 levels. Canada's emissions continued growing and reached 747 Mt, more than 26 percent above 1990 levels in 2007.

This significant growth in GHG emissions from 1990 to 2007 is attributable mainly to the 217 percent growth in emissions from the mining sector, which, in turn, was principally due to the rapid development of the oil sands in Alberta. By 2012, Environment Canada forecasts that GHG emissions will increase to between 770 Mt and 790 Mt due to increased emissions from the oil and gas and transportation sectors—an increase of about 30 percent above the country's Kyoto commitment.

Canada's History with the Kyoto Protocol

The Kyoto Protocol is a 1997 international agreement made in Kyoto, Japan, that amends the UNFCCC. It obligates developed countries, such as Canada, to cut GHG emissions by an average of 5.2 percent below 1990 levels. The first commitment period of the Kyoto Protocol began on January 1, 2008, and ends on December 31, 2012. Developing countries, including China, India, Brazil, and South Africa, were asked to set only voluntary GHG reduction targets. The United States is not a party to the Kyoto Protocol, having refused to ratify it because of the asymmetrical obligations between industrialized and developing countries.

In 1990, prior to the Kyoto Protocol, Conservative Prime Minister Brian Mulroney's government issued Canada's *Green Plan for a Healthy Environment* (the Green Plan). The Green Plan was intended to serve as the grand scheme of Canada's environmental policy over the next five years. Although its target was to stabilize Canada's total GHG emissions at 1990 levels by 2000, the Green Plan provided very little guidance on the specific measures Canada should take to attain this target. In 1993, Liberal Prime Minister Jean Chrétien jettisoned the Green Plan. Instead, his government launched various voluntary emission reduction initiatives with private industry, particularly large industrial emitters, though with limited success.

In 1997, Chrétien announced that Canada would commit to stabilizing its total emissions at 1990 levels by 2012 at the upcoming Kyoto climate conference. However, a day before departing for Kyoto, Chrétien surprisingly announced that Canada would commit itself to an emissions reduction target of 3 percent below 1990 levels by 2010. This shocked the Canadian provinces because the federal government made the announcement without consulting them. Moreover, it was unlikely that, given the expected growth in the energy sector, Canada would even stabilize its emissions at 1990 levels by 2010, much less reduce them by 3 percent below 1990 levels.

At Kyoto, Chrétien's delegation eventually committed Canada to reduce its GHG emissions by 6 percent below 1990 levels by the five-year commitment period of 2008–2012. Thereafter, Canada signed the Kyoto Protocol in 1998 and formally ratified it in 2002. During that period, the federal government released its *Climate Change Plan for Canada* (the Climate Change Plan), which aimed to meet only 180 Mt total emissions reduction out of Canada's 280 Mt Kyoto obligation. The Climate Change Plan sought to achieve this by introducing an emissions trading system for large industrial emitters in Canada for the very first time.

In 2005, under the leadership of Liberal Prime Minister Paul Martin, the federal government issued *Project Green: Moving Forward on Climate Change* (Project Green), which introduced an emissions intensity cap-and-trade system for large industrial emitters. Like the Climate Change Plan, Project Green severely fell short of achieving Canada's Kyoto obligations, targeting a mere 13 percent of Canada's required emissions reduction obligation.

Upon taking office in 2006, Conservative Prime Minister Stephen Harper stated unequivocally that he would not implement the Kyoto Protocol. He argued that Canada's targets, which were established by the previous Liberal government, were unrealistic and unachievable. Instead, the federal government issued the *Regulatory Framework for Air Emissions* in 2006 and the *Turning the Corner* strategy in 2008 with more modest aims for controlling industrial emissions.

In 2009, the Harper government agreed to a nonbinding commitment at the United Nations talks in Copenhagen, Denmark, to reduce its emissions by 17 percent by 2020 from 2005 levels. This commitment is in lockstep with the pledge of the United States, Canada's largest trading partner, which it also made in Copenhagen. Canada's commitment was formally reiterated in the Cancun Agreement adopted in 2010. In 2011, Canada officially withdrew from the Kyoto Protocol at the most recent meetings of the parties to the UNFCCC in Durban, South Africa.

Reasons for Canada's Withdrawal

Minister Kent justified Canada's withdrawal from the Kyoto Protocol because it did not cover the world's largest emitters, China and the United States. Thus, even if Canada took action to comply with its Kyoto commitment, global emissions were still expected to rise due to growth in these two countries. Because Canada only produces 2 percent of overall global GHG emissions, any efforts on its part to reduce emissions would contribute very little to stem the rise of global emissions.

Moreover, if Canada tried to comply with its Kyoto commitment, it would be obligated to purchase large quantities of emission reduction permits through the trading mechanism authorized by the protocol, estimated to cost about $14 billion. This would detrimentally affect its economic competitiveness.

Kent described this "Kyoto cost to Canadians" as the equivalent of the "transfer of $14 billion from Canadian taxpayers to other countries" or "the equivalent of $1,600 from every Canadian family, with no impact on emissions or the environment." It would also be analogous to either "removing every vehicle of every kind from Canadian roads," or "closing down the entire farming and agricultural sector and cutting heat to every home, office, hospital, factory and building in Canada."

By withdrawing from the Kyoto Protocol, Canada also avoided being officially declared as noncompliant under the climate accord and thus, being subjected to potential penalties for noncompliance.

Legal Basis for Canada's Withdrawal

Canada exercised its legal right to formally withdraw from the Kyoto Protocol as specifically embodied in Article 27 (http://unfccc.int/essential_background/kyoto_Protocol/items/1678.php), which provides that:

1. At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Protocol.

This means that a country can withdraw after three years from the date the Kyoto Protocol came into force, which is February 2005. A country that wants to withdraw from the Kyoto Protocol has to provide one-year prior written notice before such withdrawal is effective.

Canada's Kyoto obligations span the first commitment period of 2008–2012. Thus, to avoid being declared as noncompliant with the Kyoto Protocol, Canada needed to provide its withdrawal notice before December 31, 2011, in time to be officially out of the Kyoto Protocol before December 31, 2012. Although Canada has withdrawn from the Kyoto Protocol, it still remains a party to the UNFCCC.

Global Reaction to Canada's Withdrawal

International censure of Canada's withdrawal was strong and vehement at the Durban negotiations. Chinese media called Canada's decision as "preposterous and irresponsible action that will scar global climate-change efforts." India's representatives warned that such decision would "jeopardize any gains that might flow from the talks in Durban, South Africa toward a new agreement." Tuvalu, a low-lying island nation that is most vulnerable to rising sea levels, labeled Canada's withdrawal "a reckless and totally irresponsible act" that has become "an act of sabotage on our future."

Christiana Figueres, executive secretary of the UNFCCC, called Canada's withdrawal "regrettable" and "surprising." She added, "Whether or not Canada is a Party to the Kyoto Protocol, it has a legal obligation under the Convention to reduce its emissions, and a moral obligation to itself and future generations to lead in the global effort."

There was also vigorous disapproval from Harper's political opposition and various environmental organizations within Canada. The Green Party of Canada said that Canada's withdrawal "would hurt the new agreements from Durban before the ink is dry."

On the other hand, there was also strong international support for Canada's withdrawal from some quarters. Australian representatives to Durban said that the withdrawal "should not be used to suggest Canada does not intend to play its part in global efforts to tackle climate change." Likewise, some German media said that Canada's withdrawal "represents a victory of reason. It shows that protecting the environment produces costs that, given concern over jobs, not everyone is willing to pay, particularly when important countries refuse to be pressured into joining environmental protection treaties. The government in Ottawa thus deserves our praise."
As was expected, many Canadian corporations, especially those in the oil and gas sector, expressed solid support for Canada's withdrawal. Commentators noted that "technology improvements will have a bigger impact on Canada's greenhouse gas input than an international climate change treaty" especially because "Kyoto hasn't been a strong treaty."

Canada Looks Ahead

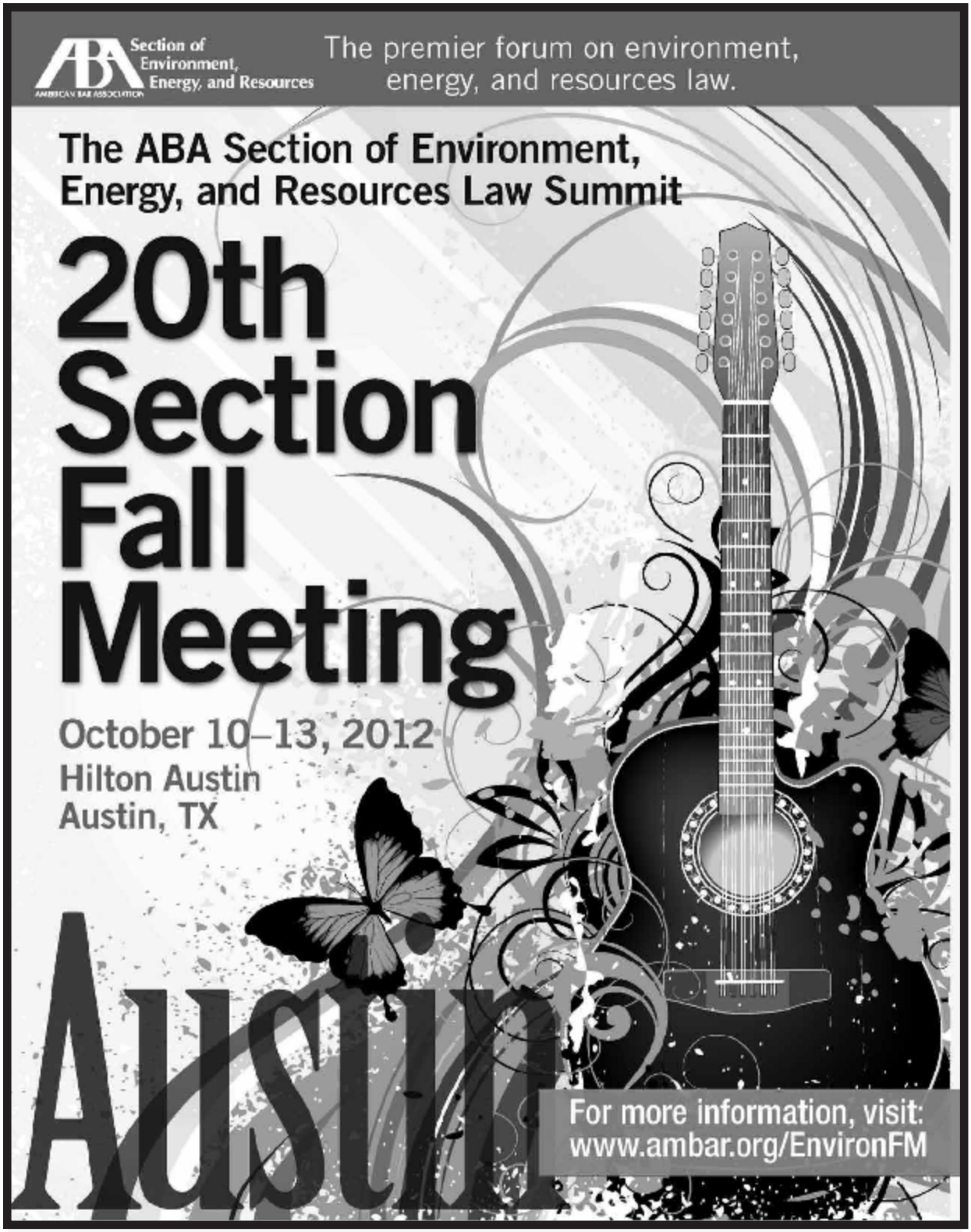
At the recent climate conference in Durban, South Africa, delegates from 194 countries reached an

agreement entitled "Durban Platform for Enhanced Action" (the Durban Platform). It commits all UNFCCC parties, including China, the United States, Brazil and India, to establish a process to negotiate a new climate change treaty by 2015 that would come into force in 2020. Also, thirty-five countries have committed to taking on binding emissions-reduction obligations after the Kyoto Protocol expires in December 2012. This second commitment period, which will begin on January 1, 2013, will have an expiration date of either December 31, 2017, or December 31, 2020.

"The Durban Platform is a way forward that builds on our work at Copenhagen and Cancun," Kent said, "Although these negotiations will be difficult, we are cautiously optimistic that we will reach a new agreement by 2015."

Whether or not Canada has paved the way for other countries to exit the Kyoto Protocol remains to be seen.

Josephine Yam *is senior legal counsel at the Alberta government's Department of Energy in Canada. She practices in the areas of energy, climate change, carbon finance, and project finance. She can be reached at Josephine.Yam@gov.ab.ca. The views expressed in this article are solely those of the author.*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