

# CLIMATE CHANGE ALONG THE NORTHEAST CORRIDOR: HOW WASHINGTON AND NEW YORK ARE APPROACHING AND PREPARING FOR GREENHOUSE GAS CONTROLS

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## INTRODUCTION

The basic proposition that New Yorkers and Washingtonians look at the world from two widely different lenses is hardly a novel or contested one.

So it should come as no surprise that their respective views on climate change, its perceived threat to the environment, and its impacts on the economy would be as different as Pennsylvania Avenue is from Wall Street. To Washingtonians, addressing climate change is about power—the power to regulate not merely greenhouse gases (GHGs), but, more importantly, to control the energy sources that generate carbon dioxide and other GHGs. To New Yorkers, it’s about the economy—specifically, how functioning in a carbon constrained world will lead to impacts, risks, and opportunities that could fundamentally alter the United States economy.

As with other occasions where public policy intersects with the economy, the path of information along the Northeast corridor

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is not necessarily a free-flowing one. While decision makers in Washington purport to develop climate change laws and regulations with some cognizance of impacts on the economy as well as the environment, they often appear ignorant of the financial impacts that Wall Street is so apt to assess. Meanwhile, New Yorkers confronting billion-dollar investment decisions may have only a speculative understanding of the direction the laws affecting such investments in the future are headed.

But in this tale of two cities, leaders in both Washington and New York share a divided sense of hope and fear that climate change regulation will create either the best or worst of times for the nation. For every Washingtonian who believes climate change controls must be enacted without delay to extinguish a planet on fire, there is another who believes mandatory limits on carbon emissions will only douse the nation's ability to remain the world's superpower. In New York, project financiers scope opportunities to invest in renewable energy facilities while rating agencies try to come to grasps with how GHG limits will hurt the bottom line for the nation's industrial might.

Ultimately, as a general proposition, Washington and New York share the goal of realizing a better environment while protecting the economy. But successfully achieving those mutual goals will require increased consultation, coordination, and cooperation between the two cities. The upcoming carbon controls—the most far-reaching environmental mandate in history—must be made in consideration of the impacts they will have on business to protect the nation's economy, while our economy's leaders must brace for and be prepared to adapt to the unprecedented controls that are headed down the track.

## I. THE WASHINGTON VIEW: COMMANDING AND CONTROLLING CARBON AND ENERGY

Greenhouse gas regulation is now at the forefront of Washington's environmental agenda.<sup>1</sup> The issue has pushed past other environmental issues due to three primary catalysts: first, the

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<sup>1</sup> In addition to the cap-and-trade provisions of the American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (as passed by the House of Representatives, June 26, 2009), the Environmental Protection Agency (EPA) is pursuing multiple regulatory initiatives designed to regulate greenhouse gases under the Clean Air Act. See *infra* Part I.B.2–3.

regulatory mandate resulting from the Supreme Court's 2007 decision in *Massachusetts v. EPA*, which held that GHGs were potentially subject to regulation under the Clean Air Act (CAA);<sup>2</sup> second, the political shift due to the change in partisan control of Congress in 2007 and advent of a new administration in 2009; and third, the impending expiration of the Kyoto Protocol in 2012 and the aggressive timeline for a new international accord.<sup>3</sup> As a result of these three catalysts, climate change is moving forward on three interrelated tracks: regulatory policy, legislative proposals, and international diplomacy.

At the same time, the mandatory control of GHGs, whether by law, regulation, or international agreement, has been perhaps the most controversial environmental issue in the history of environmental law and policy.<sup>4</sup> There are two fundamental reasons for the storm. First, GHGs, unlike traditional air pollutants, presently cannot be effectively captured and controlled.<sup>5</sup> Instead, modern approaches to reducing GHGs focus primarily not on capturing carbon and other heat-trapping emissions from a tailpipe or smokestack, but on controlling the use and combustion of energy at the front end of a process.<sup>6</sup> In other words, controlling GHGs often equates to controlling energy, an issue that many see as inextricably tied to controlling the economy itself. Second, because GHGs have global impacts, reducing their emission in the United States will not solve the overall challenge of global climate change while, in the eyes of some, placing the

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<sup>2</sup> 549 U.S. 497, 528–32 (2007).

<sup>3</sup> See, e.g., *The Roadmap from Poznan to Copenhagen—Preconditions for Success: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. (2009) (statement of Elliot Diringer, Vice President, International Strategies, Pew Center on Global Climate Change), available at <http://globalwarming.house.gov/tools/3q08materials/files/0099.pdf>.

<sup>4</sup> See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1184 (2009) (“[C]limate change law is no less than environmental lawmaking’s worst nightmare . . . . The combination of the science of climate change and human nature perversely triggers obstacle after obstacle.”).

<sup>5</sup> See, e.g., Jeff Johnson, *Capturing Carbon and Saving Coal*, CHEM. & ENGINEERING NEWS, Oct. 29, 2007, at 25 (describing technological obstacles facing large-scale carbon capture and sequestration projects).

<sup>6</sup> The House climate bill does include incentives for carbon capture and sequestration projects at power plants, but such technologies are not yet economically feasible. For more on this subject, see PETER FOLGER, CONG. RESEARCH SERV., CARBON CAPTURE AND SEQUESTRATION (2009), available at [http://assets.opencrs.com/rpts/RL33801\\_20090619.pdf](http://assets.opencrs.com/rpts/RL33801_20090619.pdf).

United States' economy at a disadvantage compared to other nations who refuse to impose GHG controls. Together, these two concerns have sustained twenty years of debate on whether to address GHG emissions at all, a debate that is headed to be definitely resolved in the near future.

A. *The Judiciary Branch Resolves the Question of Whether*

The watershed event that directed momentum in Washington toward the inevitable era of carbon controls was the Supreme Court's decision in *Massachusetts v. EPA*.<sup>7</sup> The 5–4 decision on April 2, 2007 authorized EPA to regulate GHGs under the Clean Air Act, effectively putting to rest the debate about *whether* the government would address GHGs and shifting the focus to *when*.

The landmark case, cited by many as the most significant environmental decision of our time,<sup>8</sup> arose from states' and environmental groups' appeal of the Bush-era EPA's denial of a petition to regulate new motor vehicles' GHG emissions as air pollutants under Section 202(a) of the Clean Air Act.<sup>9</sup> In the decision, the majority rejected the argument that "air pollutant" as defined in the Clean Air Act applied only to conventional air pollutants, and not GHGs.<sup>10</sup> As a result, the Court held that the EPA Administrator ultimately had to make a determination under Section 202 as to whether GHG emissions endangered public health or welfare, known as an endangerment finding.<sup>11</sup> The Court stopped short of actually requiring EPA to regulate GHGs and also provided EPA with significant flexibility regarding the timing of its endangerment determination. However, the Court made it clear that if the EPA found that such emissions do endanger public health and/or welfare, Section 202 would require the EPA Administrator to issue regulations covering motor vehicle

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<sup>7</sup> 549 U.S. 497 (2007).

<sup>8</sup> See, e.g., Jonathan H. Adler, *Massachusetts v. EPA Heats Up Climate Policy No Less Than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NW. U. L. REV. COLLOQUY 32, 32 (2007); James Saltzman & J.B. Ruhl, *Who's Number One?*, ENVTL. FORUM, Nov.–Dec. 2009, at 36, 37; Tiffany L. Taylor, Note, *From Georgia v. Tennessee Copper Co. to Massachusetts v. EPA: An Overview of America's History of Air Pollution Regulation and Its Effect on Future Remedies to Climate Change*, 38 U. MEM. L. REV. 763, 780 (2008).

<sup>9</sup> *Massachusetts*, 549 U.S. at 510–11.

<sup>10</sup> *Id.* at 528–29.

<sup>11</sup> *Id.* at 532–33.

emissions that cause or contribute to that endangerment.<sup>12</sup>

## B. *The Executive Branch Prepares for Economy-Wide Climate Controls*

The debate regarding whether to regulate GHGs under the existing Clean Air Act dates to the waning days of the Clinton administration,<sup>13</sup> and has since become one of the most hotly contested environmental policy disputes in Washington. After nearly twenty years of back and forth decisions, the question appears on track to be definitively resolved in the spring of 2010, when the first GHG regulations are expected to be finalized by the Obama administration.<sup>14</sup>

### 1. *The Bush Administration Sets the Stage*

Within weeks of the *Massachusetts v. EPA* decision, President Bush signaled in the Rose Garden that his administration would respond by finalizing the first mandatory GHG regulations prior to the end of his term.<sup>15</sup> The proposed regulations would compel GHG reductions from cars and light-duty trucks. Around the same time as that announcement, states and environmental groups began petitioning EPA to regulate GHGs from a broad range of sources other than new motor vehicles.<sup>16</sup>

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<sup>12</sup> 42 U.S.C. § 7521(a) (2006).

<sup>13</sup> See Memorandum from Jonathan Z. Cannon, General Counsel, EPA, to Carol M. Browner, Administrator, EPA (Apr. 10, 1998) (finding that GHGs could be regulated under the CAA), available at <http://www.law.umaryland.edu/faculty/bpercival/casebook/documents/EPACO2memo1.pdf>.

<sup>14</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed. Reg. 55,292, 55,295 (Oct. 27, 2009) (referencing March 2010 goal for finalizing vehicle GHG regulations).

<sup>15</sup> President George W. Bush, Remarks on Corporate Average Fuel Economy and Alternative Fuel Standards (May 14, 2007) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070514-4.html>).

<sup>16</sup> See, e.g., Earthjustice et al., Petition for Rulemaking Under the Clean Air Act to Reduce the Emission of Air Pollutants from Marine Shipping Vessels that Contribute to Global Climate Change (Oct. 3, 2007), available at [http://www.oceana.org/fileadmin/oceana/uploads/Climate\\_Change/Marine\\_GHG\\_Petition\\_FINAL.pdf](http://www.oceana.org/fileadmin/oceana/uploads/Climate_Change/Marine_GHG_Petition_FINAL.pdf) (petition to the EPA Administrator); Earthjustice et al., Petition for Rulemaking Under the Clean Air Act to Reduce the Emission of Air Pollutants from Aircraft that Contribute to Global Climate Change (Dec. 31, 2007), available at [http://www.earthjustice.org/library/legal\\_docs/petition-to-epa-on-aircraft-global-warming-emissions.pdf](http://www.earthjustice.org/library/legal_docs/petition-to-epa-on-aircraft-global-warming-emissions.pdf) (petition to the EPA Administrator).

Some eight months after announcing that EPA would propose and finalize GHG regulations, the Bush administration reversed course. Instead of finalizing specific GHG standards, EPA issued an Advanced Notice of Proposed Rulemaking (ANPR) on a comprehensive regulatory framework for GHGs under the Clean Air Act.<sup>17</sup> The July 2008 ANPR provided a roadmap for how GHGs could be controlled and energy efficiency improved for scores of mobile and stationary sources.<sup>18</sup> Stakeholders filed thousands of comments on this document. Meanwhile, large parts of the administration—including the Office of Management and Budget and the Departments of Agriculture, Commerce, Energy, and Transportation—offered critical commentary regarding EPA’s consideration of the CAA as a source of GHG regulations.<sup>19</sup> While largely criticized by environmentalists as a missed opportunity, the extensive work done by EPA in the ANPR, and the comments filed by stakeholders, actually positioned the incoming Obama administration to take quick action on climate change.

## 2. *The Obama Administration Commits to Climate Change Regulations*

The Obama administration signaled even prior to taking office that it would finish what the Bush administration started and finalize GHG regulations for cars and other sectors. Three months after taking office, on April 24, 2009, the new administration proposed an endangerment finding under Section 202 for a group of six GHGs,<sup>20</sup> including four such gases emitted by motor vehicles.<sup>21</sup> The EPA finalized its endangerment finding in December 2009, opening the door to regulation of a wide range of GHG sources under the CAA.<sup>22</sup>

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<sup>17</sup> Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008).

<sup>18</sup> See generally *id.*

<sup>19</sup> *Id.* at 44,356–61.

<sup>20</sup> The six GHGs discussed in the endangerment finding are carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF<sub>6</sub>). Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,886 (Apr. 24, 2009).

<sup>21</sup> They are CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, and HFCs. *Id.*

<sup>22</sup> See generally Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg.

Beyond the endangerment determination, the Obama administration has committed to finalizing the first regulation actually controlling GHGs. This regulation will focus on cars and light-duty trucks, the subject of the petition in *Massachusetts v. EPA*, and will largely conform to new Department of Transportation Corporate Average Fuel Economy (CAFE) standards.<sup>23</sup> Importantly, the Obama EPA has committed to finalizing such regulations in March 2010, setting the date by which the United States officially will become a carbon-constrained society.<sup>24</sup>

### 3. *The Consequences of a Regulatory Approach*

Until recently, the one position virtually all stakeholders shared in Washington—including government, industry, and non-profit officials—was that the CAA's command-and-control methods of GHG regulation were a distant second choice compared to new legislation creating a market-based system such as cap-and-trade. There are four distinct reasons for the concern about reliance on existing statutory authority.

First, the endangerment finding under Section 202 will have repercussions reaching far beyond cars and trucks. Many other provisions of the CAA authorizing regulation of other mobile and stationary sources share identical or nearly identical endangerment language.<sup>25</sup> Thus, finalizing the endangerment determination for cars may automatically satisfy the endangerment determination for airplanes, marine vessels, nonroad vehicles, and scores of industrial source categories such as power plants, oil refineries, cement kilns, and industrial boilers.<sup>26</sup> In short, EPA's endangerment finding could lead to establishing National Ambient Air Quality Standards (NAAQS) for GHGs under Section 108,

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66,496 (Dec. 15, 2009).

<sup>23</sup> See Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions and CAFE Standards, 74 Fed. Reg. 24,007, 24,007 (May 22, 2009).

<sup>24</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed. Reg. 55,292, 55,295 (Oct. 27, 2009).

<sup>25</sup> 42 U.S.C. §§ 7408 (National Ambient Air Quality Standards), 7411 (stationary sources), 7412 (hazardous air pollutants), 7415 (transboundary air pollution), 7545 (fuels), 7547 (nonroad vehicles), 7571 (aircraft), 7671n (stratospheric effects) (2006).

<sup>26</sup> Roger Martella & Matthew Paulson, *Regulation of Greenhouse Gases Under Section 115 of the Clean Air Act*, DAILY ENV'T REP. (BNA) No. 43, at B-1, B-5, B-6 (Mar. 9, 2009).

regulation of other mobile sources such as marine vessels under Section 213 or aircraft under Section 231, or New Source Performance Standards for stationary source categories under Section 111.<sup>27</sup>

Second, once an endangerment determination cascades into other provisions of the CAA, EPA may face a mandatory duty to begin regulating and controlling greenhouse gases from various sectors. This is because several CAA provisions provide that EPA “shall” regulate once the endangerment determination is satisfied.<sup>28</sup> Thus, EPA would confront a binding obligation to regulate GHGs from a wide range of sources simultaneously.

Third, finalizing the GHG regulation for cars will make GHGs “subject to regulation” under the Clean Air Act, triggering Prevention of Significant Deterioration (PSD) requirements.<sup>29</sup> If PSD requirements apply, then any new or modified source that emits more than 100 or 250 tons of GHGs annually could be required by statute to meet permitting and best available control technology requirements.<sup>30</sup> While these threshold levels represent a significant amount of traditional pollutants such as NO<sub>x</sub> or SO<sub>x</sub>, many smaller sources like office buildings emit over 250 tons of carbon dioxide per year. A Chamber of Commerce study estimated that an endangerment finding would subject more than a million entities to PSD regulation.<sup>31</sup>

Fourth, the Clean Air Act’s command-and-control approach for conventional air pollutants does not translate easily into reducing GHGs by controlling energy at the front end of a process. The complexity of the ANPR demonstrated the inefficiency of using the Clean Air Act’s existing provisions to address GHGs. In 1,300 pages, the ANPR and supporting documents outline approaches that the agency could take to regulate the use of energy in everything from lawn mowers to industrial boilers, both by

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<sup>27</sup> *Id.* at B-5, B-6.

<sup>28</sup> *See, e.g.*, 42 U.S.C. §§ 7408, 7415, 7571, 7671n.

<sup>29</sup> *See* 42 U.S.C. § 7475(a)(4); Martella & Paulson, *supra* note 26, at B-5, B-6.

<sup>30</sup> Martella & Paulson, *supra* note 26, at B-5; LARRY PARKER & JAMES E. MCCARTHY, CONG. RESEARCH SERV., CLIMATE CHANGE: POTENTIAL REGULATION OF STATIONARY GREENHOUSE GAS SOURCES UNDER THE CLEAN AIR ACT 22 (2009).

<sup>31</sup> PORTIA M.E. MILLS, U.S. CHAMBER OF COMMERCE, A REGULATORY BURDEN: THE COMPLIANCE DIMENSION OF REGULATING CO<sub>2</sub> AS A POLLUTANT 3 (2008).

requiring new technology and mandating certain workplace standards.<sup>32</sup> Providing EPA this type of control is unwelcomed by industry, which prefers a more flexible market-based approach to controlling carbon such as a cap-and-trade system.

For the four reasons above, until recently it has been hard to find anyone in Washington to advocate for the Clean Air Act as the ultimate method of reducing GHGs. At best, the Clean Air Act has been described as a reluctant second choice, a tool that could be employed only if Congress does not act.<sup>33</sup> Ironically, since the introduction of the House climate bill last May, the momentum of both environmental groups and the administration itself has shifted increasingly towards preserving Clean Air Act authority. Because these groups see some of the mandates in legislation as too lenient, they are advocating for EPA to retain its ability to regulate GHGs from certain major sources, particularly coal-fired power plants, under the Clean Air Act, even after a cap-and-trade program takes effect.<sup>34</sup> As the likelihood of the passage of legislation dims in 2009, the likelihood of comprehensive EPA regulation appears to increase. Once EPA enacts an actual, as opposed to a theoretical, program for directly regulating GHG emissions, Congress will face increasing political pressure to preserve pre-existing EPA authority.

### C. *Congress Advances a Market Based Approach*

When partisan control of Congress shifted in 2007, the new Democratic Party majority made climate change a priority. The House created a Select Committee on Energy Independence and Global Warming to begin the long process of developing climate

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<sup>32</sup> See Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008).

<sup>33</sup> See Posting of John D. Graham to the *New York Times* Room for Debate blog, <http://roomfordebate.blogs.nytimes.com/2009/02/19/the-epa-puts-on-the-heat> (Feb. 19, 2009, 16:35 EST) (describing the Clean Air Act as an “awkward . . . second best” approach); Posting of Jonathan H. Adler to the *New York Times* Room for Debate blog, <http://roomfordebate.blogs.nytimes.com/2009/02/19/the-epa-puts-on-the-heat> (Feb. 19, 2009, 16:35 EST) (Regulation under the Clean Air Act “does not represent a sensible approach to climate change.”).

<sup>34</sup> See, e.g., David Doniger & Bruce Nilles, Remarks on Regulation of Greenhouse Gases Under the Clean Air Act, American Enterprise Institute Center for Regulatory and Market Studies (July 24, 2009) (supporting preservation of CAA regulatory authority under new climate legislation) (audio recording available at <http://www.aei.org/event/100081>).

change legislation.<sup>35</sup> In the Senate, a comprehensive climate change bill passed out of the Environment and Public Works Committee in 2007 and was considered by the full Senate in early 2008.<sup>36</sup> While the Lieberman-Warner Climate Security Act was filibustered on the Senate floor, its consideration was the first time either legislative body as a whole had debated a reported, stand-alone climate change bill.

In 2009, the Obama administration took office and made climate legislation one of its top domestic priorities.<sup>37</sup> Among the administration's early actions was creating the new position of "climate and energy czar" to oversee and coordinate interagency action on climate change.<sup>38</sup> The House of Representatives responded to an enthusiastic president and the looming possibility of regulatory action by passing the American Clean Energy and Security Act (ACESA) of 2009. The legislation would establish a cap-and-trade system so that regulated parties (referred to as "covered entities") would need emissions allowances for all of the greenhouse gases they emit or account for through their imports.<sup>39</sup> However, the amount of available allowances would be capped and lowered over time to reduce the total amount of emissions. The goal is that cap-and-trade, combined with other provisions in the bill, would reduce greenhouse gas emissions by 20 percent from 2005 levels in 2020 and continue decreasing down to an 83 percent reduction below 2005 levels by 2050.<sup>40</sup>

Unlike the Clean Air Act regulatory approaches described above, cap-and-trade is a market-based system, so that a covered

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<sup>35</sup> H.R. Res. 202, 110th Cong. (2007) (enacted) (creating new committee dedicated to energy and global warming).

<sup>36</sup> Lieberman-Warner Climate Security Act, S. 2191, 110th Cong. (2007) (as reported by S. Comm. on Env't and Public Works, Dec. 5, 2007).

<sup>37</sup> President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009) (transcript available at [http://www.whitehouse.gov/the\\_press\\_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress/](http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress/)) ("But to truly transform our economy, protect our security, and save our planet from the ravages of climate change, we need to ultimately make clean, renewable energy the profitable kind of energy. So I ask this Congress to send me legislation that places a market-based cap on carbon pollution and drives the production of more renewable energy in America.").

<sup>38</sup> Frances Romero, *Energy Czar: Carol Browner*, TIME MAG. ONLINE, Dec. 15, 2008, <http://www.time.com/time/politics/article/0,8599,1866567,00.html>.

<sup>39</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., tit. VII (as passed by the House of Representatives, June 26, 2009).

<sup>40</sup> *Id.* §§ 702, 721.

entity with allowances in excess of its emissions could sell those allowances to other emitters at the market rate. This provides flexibility for any covered entity to either reduce their greenhouse gas emissions using whatever processes are feasible, or instead to purchase allowances from other emitters. During the early years of implementation, 85 percent of the allowances would be allocated by the government to an array of interests and emitters and the remainder auctioned off.<sup>41</sup> However, in subsequent years the amount of auctioned allowances would increase.<sup>42</sup>

Climate change legislation now awaits action in the Senate, which reported a new climate bill out of the Environment and Public Works Committee on November 5, 2009.<sup>43</sup> Senate negotiations are ongoing, and delay could affect other policy tracks. Delay could cause EPA to go further in regulating GHGs under the Clean Air Act. Congressional delay could also affect the December climate change conference in Copenhagen, the main driver of the international diplomacy track of climate change policy.

#### D. *International Greenhouse Gas Negotiations*

The Kyoto Protocol, the first international agreement to set binding commitments to reduce GHG emissions, was negotiated under the UN Framework Convention on Climate Change (UNFCCC), and came into force in 2005.<sup>44</sup> One hundred and eighty-four parties have ratified the Kyoto Protocol.<sup>45</sup> Through the Protocol, thirty-seven industrialized countries and the European Community (EC) have agreed to binding targets to reduce their collective GHG emissions 5 percent from 1990 levels over a five-

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<sup>41</sup> Tracey D. Samuelson, *What a National Cap-and-Trade Program Might Look Like*, CHRISTIAN SCI. MONITOR ONLINE, June 22, 2009, <http://www.csmonitor.com/2009/0627/p25s12-wogi.html>.

<sup>42</sup> *The Climate Change & Energy Bill*, HOUSE ACTION REPS. (CONGRESSIONAL Q.), June 25, 2009, at 6, 13.

<sup>43</sup> Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (as reported by S. Comm. on Env't and Public Works, Nov. 5, 2009).

<sup>44</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter "Kyoto Protocol"]. See also United Nations Framework Convention on Climate Change, Kyoto Protocol, [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) (last visited Nov. 11, 2009) (describing development of the Kyoto Protocol and current ratification status).

<sup>45</sup> UNFCCC, *supra* note 44.

year period from 2008–2012.<sup>46</sup>

The first phase of the Kyoto Protocol expires in 2012, but the Conference of the Parties to the UNFCCC launched new negotiations in Bali, Indonesia in 2007 to work toward a successor accord. The resulting Bali Action Plan calls for a finalized agreement by the December 2009 meeting in Copenhagen.<sup>47</sup> The timeline has been referred to as “extraordinarily ambitious” given the large number of countries negotiating towards consensus.<sup>48</sup> Indeed, recent events have only increased the accuracy of that assessment. At a July 2009 G8 meeting, major emitting nations were able to agree that temperatures should not be allowed to rise more than two degrees Celsius and agreed to cut emissions aggressively, but did not offer any framework for how to achieve that goal.<sup>49</sup> A particular area of controversy is the role of major developing countries such as China and India in any global agreement. Those two countries alone are projected to account for the overwhelming majority of the global increase in CO<sub>2</sub> emissions between 2005 and 2030.<sup>50</sup> But both nations have expressed an unwillingness to cap emissions.<sup>51</sup> An additional hurdle to an international agreement would be lack of legislative progress in the United States. Many argued that the United States had to take some independent action before Copenhagen for there to be any

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<sup>46</sup> See *id.*; Kyoto Protocol, art. 3, ¶ 1.

<sup>47</sup> UNFCCC Conference of the Parties, Dec. 3–15, 2007, *Decision 1/CP.13: Bali Action Plan, Report of the Conference of the Parties on Its Thirteenth Session: Addendum* at 3, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).

<sup>48</sup> *International Climate Change Negotiations: Bali and the Path Toward a Post-2012 Climate Treaty: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 44 (2008) (statement of Elliot Diringer, Vice President, International Strategies, Pew Center on Global Climate Change) (“Under the Bali Roadmap, this agreement is to be reached . . . in Copenhagen in late 2009. We believe that, even under the best of circumstances, this is an extraordinarily ambitious timeline.”).

<sup>49</sup> See Declaration of the Leaders: The Major Economies Forum on Energy and Climate, July 9, 2009, available at [http://www.g8italia2009.it/static/G8\\_Allegato/MEF\\_Declaration1.pdf](http://www.g8italia2009.it/static/G8_Allegato/MEF_Declaration1.pdf).

<sup>50</sup> INT’L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2009 FACT SHEET: HAS THE FINANCIAL CRISIS CHANGED THE OUTLOOK FOR CO<sub>2</sub> EMISSIONS AND THE GLOBAL CLIMATE? 5 (2009), available at [http://www.worldenergyoutlook.org/docs/weo2009/fact\\_sheets\\_WEO\\_2009.pdf](http://www.worldenergyoutlook.org/docs/weo2009/fact_sheets_WEO_2009.pdf) (“Of the 11 Gt growth in [projected GHG] emissions between 2007 and 2030, China accounts for 6 Gt, [and] India for 2 Gt . . .”).

<sup>51</sup> Mark Landler, *Meeting Shows US-India Split on Emissions*, N.Y. TIMES, July 20, 2009, at A6.

chance of success.<sup>52</sup>

## II. THE NEW YORK VIEW: FINANCIAL CONSEQUENCES OF A CARBON CONSTRAINED WORLD

As should be apparent, action in Washington is not moving in a vacuum, but is affected by the courts, political change, and international action. The business sector also influences this process, and ultimately will feel the consequences of climate change controls most directly. For example, during the 110th Congress the House Select Committee on Energy Independence and Global Warming held at least twenty hearings with an investment or industry topic, or a witness representing those interests.<sup>53</sup> The various regulatory proposals that have been promulgated have drawn thousands of comments, including from various business interests and trade associations, among other stakeholders.<sup>54</sup> These same interests have also lobbied extensively on climate change legislation working its way through Congress. But despite those interactions, views and effects of climate change regulation are quite different outside of Washington, DC.

### A. *The Cost of Carbon*

The most direct, obvious, and discussed economic impact of carbon regulation will be the “cost of carbon.” The cost of carbon can be thought of as the increase in energy prices and the cost of manufacturing from placing controls on carbon emissions. The cost of carbon involves both direct and indirect components.

The direct cost of carbon is the increased price of energy and

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<sup>52</sup> See, e.g., Michael Northrop & David Sassoon, Opinion, *What Obama Must Do*, ENV'T 360, Feb. 2, 2009, <http://e360.yale.edu/content/feature.msp?id=2116>; Darren Samuelsohn, *Capitol Hill Debate Seen as Key to Copenhagen Success*, GREENWIRE, July 13, 2009, <http://www.eenews.net/public/Greenwire/2009/07/13/2>.

<sup>53</sup> See STAFF OF H. SELECT COMM. ON ENERGY INDEPENDENCE AND GLOBAL WARMING, 110th CONG., FINAL STAFF REPORT, app. A (Comm. Print 2008), available at <http://globalwarming.house.gov/tools/3q08materials/files/0064.pdf>.

<sup>54</sup> See, e.g., EPA, Response to Comments on the Proposed [Greenhouse Gas Reporting] Rule, <http://www.epa.gov/climatechange/emissions/responses.html> (last visited October 13, 2009) (compiling and responding to public comments on GHG reporting rule from business interests and others). In developing that reporting rule, EPA met with over 4,000 people and 135 groups, and received approximately 16,800 written comments. See Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260, 56,264 (Oct. 30, 2009).

manufactured goods associated with the cost of complying with carbon regulations or emission allocations.<sup>55</sup> The cost can be incurred by investing in infrastructure and equipment to reduce GHG emissions, by paying a price for allowances or offsets to comply with emission limits, or by reducing production or energy consumption to curb GHG emissions. The indirect cost of carbon is incurred by downstream users of energy and manufactured goods, who must pay more and in turn pass along such costs to end users.<sup>56</sup>

Given that the vast majority of energy in the United States is generated from carbon fuels and resources, any GHG limitations will impact the nation's ability to produce energy at existing cost curves. This is why GHG regulation, while driven by environmental concerns is, more fundamentally, a regulation of energy. Given the dependence of all economic activity on energy, GHG regulation can plausibly be characterized as regulation of the national economy itself.

Some sectors of the economy will be more affected than others, which will lead to shifts in investment. Investors are already studying the exposure of different sectors of the economy to increased energy prices.<sup>57</sup> Sectors that use significant amounts of energy, or rely upon goods from other sectors that do, will be most affected. As prices rise in those industries, they are likely to see decreased investment, and could potentially move overseas. On the other hand, sectors that are less reliant on energy will be at a relative advantage. And some sectors, like existing energy suppliers with alternative energy portfolios or renewable energy providers, should obviously benefit.

The American Clean Energy and Security Act (ACESA)

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<sup>55</sup> See generally ENERGY INFO. ADMIN., ENERGY MARKET AND ECONOMIC IMPACTS OF H.R. 2454, THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 (2009), available at [http://www.eia.doe.gov/oiaf/servicerpt/hr2454/pdf/sroiaf\(2009\)05.pdf](http://www.eia.doe.gov/oiaf/servicerpt/hr2454/pdf/sroiaf(2009)05.pdf) (projecting impacts of House climate bill on energy prices).

<sup>56</sup> *Auctioning Under Cap and Trade: Design, Participation and Distribution of Revenues: Hearing Before the S. Comm. on Finance, 111th Cong. (2009)* (statement of Douglas W. Elmendorf, Director, Congressional Budget Office) ("Under a cap-and-trade program, consumers would ultimately bear most of the costs of emission reductions."), available at <http://finance.senate.gov/hearings/testimony/2009test/050709detest.pdf>.

<sup>57</sup> See INVESTOR RESPONSIBILITY RESEARCH CTR. INST., CARBON RISKS AND OPPORTUNITIES IN THE S&P 500 at 9 (2009), available at [http://www.irrcinstitute.org/pdf/irrc\\_trucost\\_0906](http://www.irrcinstitute.org/pdf/irrc_trucost_0906).

seeks to address cost concerns in part through a complex allowance scheme. Some of its allowances are given to covered entities such as the utility sector, while others are given to groups that do not emit GHGs, with the intention that they will sell the allowances to raise revenue. If the program went into effect in 2012, as is proposed, 85 percent of allowances would be allocated in that year for free.<sup>58</sup> The percentage of allowances for 2012 would range from 0.45 percent for Department of Energy Innovation Hubs to 43.75 percent for electric distribution companies.<sup>59</sup> Other beneficiaries of allocated allowances would include small petroleum refiners with 2.25 percent of allowances in 2014, carbon capture projects with 1.75 percent in 2014, and industries identified as vulnerable to international competition with 2 percent in 2012, rising to 15 percent in 2014.<sup>60</sup> Over time, ACESA would allocate a smaller share of its allowances and auction more of them.<sup>61</sup>

### B. *Energy Efficiency Requirements*

Beyond reducing energy consumption at industrial sources, ACESA promotes increased energy efficiency for appliances and consumers in order to decrease energy demand and generation. ACESA includes a title dedicated specifically to energy efficiency and product labeling,<sup>62</sup> reflecting the significant role of energy efficiency as a means of addressing climate change. These provisions could impact Department of Energy efficiency standards and test methods for appliances, the marketing, distribution and labeling of consumer appliances, and the Energy Star program.

The energy efficiency provisions of the ACESA are broadly focused, including revisions to building codes,<sup>63</sup> lighting efficiency,<sup>64</sup> and energy efficiency building labeling for residential and commercial buildings.<sup>65</sup> Additionally, this title proposes changes and revisions to the Energy Star Program, which focuses

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<sup>58</sup> H.R. 2454, 111th Cong., § 782 (2009).

<sup>59</sup> *Id.* § 782(a)(1)(A), (h)(1).

<sup>60</sup> *Id.* § 782(e)(1)(A)–(B), (f)(1)(A), (j).

<sup>61</sup> *Id.* § 782.

<sup>62</sup> *Id.* tit. II.

<sup>63</sup> *Id.* §§ 201–09.

<sup>64</sup> *Id.* § 211.

<sup>65</sup> *Id.* § 204.

on providing the customer with cost-effective and high-efficiency products.<sup>66</sup> ACESA proposes changes and revisions to the appliance efficiency standards, determinations, and procedures.<sup>67</sup>

Most notably, the ACESA puts in place a “Best-in-Class Appliances Deployment Program,” which will reward retailers with bonuses for increasing sales of best-in-class high-efficiency installed building equipment, high-efficiency consumer electronics, and high-efficiency household appliance models.<sup>68</sup> The program also will include bonuses to manufacturers for developing new Superefficient Best-in-Class Products.<sup>69</sup>

### C. Reporting Obligations

Both EPA and Congress are currently considering new reporting requirements for greenhouse gas emitters. On October 30, 2009, EPA issued a final rule, “Mandatory Reporting of Greenhouse Gases.”<sup>70</sup> The rule requires entities that emit more than 25,000 tons of carbon dioxide (or its equivalent in other GHGs) to report their emissions annually. EPA estimates that this would cover approximately 10,000 entities accounting for 81–86 percent of United States emissions of GHGs.<sup>71</sup>

ACESA would impose even broader reporting requirements. Section 713 of the bill would impose GHG reporting obligations on entities that emit more than 10,000 tons of carbon dioxide equivalent per year.<sup>72</sup> This is somewhat surprising, because EPA’s reporting rule rejected this very threshold after finding that it would sweep in 6,500 more sources while capturing less than 1 percent more of total United States emissions.<sup>73</sup>

### D. Financial Disclosures and Climate Change Effects on Insurance

Investors and politicians have made innovative use of current regulations to encourage or demand financial disclosure of both

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<sup>66</sup> *Id.* §§ 211–13, 219.

<sup>67</sup> *Id.* §§ 212–13.

<sup>68</sup> *Id.* § 214.

<sup>69</sup> *Id.* § 214(d).

<sup>70</sup> Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. at 52,620.

<sup>71</sup> *Id.* at 56,363, 56,366.

<sup>72</sup> H.R. 2454 § 713.

<sup>73</sup> Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. at 56,272, 56,363.

GHG emissions and the risks that companies face from GHG regulation and climate change. In October 2006, a consortium of investor groups released a report entitled “Global Framework for Climate Risk Disclosure.”<sup>74</sup> The framework recommends that companies report on their GHG emissions and reduction efforts, as well as the risks that companies face from climate change and climate change regulation.

New York’s attorney general, Andrew Cuomo, took this a step farther in September 2007, when he subpoenaed five energy companies in an attempt to force them to disclose their carbon emissions.<sup>75</sup> Cuomo relied upon the theory that the companies should provide the disclosure to fully inform investors about the risks that the companies could face from future climate change regulation or climate change litigation. Xcel Energy has already agreed to extensive carbon disclosures, including its present and projected future emissions and its strategies for reducing emissions.<sup>76</sup> Given the increasing likelihood of the climate change regulation that is the theoretical justification for such disclosure, it is likely that public pressure for disclosure of such information will only increase.

In a related development, on March 17, 2009, the National Association of Insurance Commissioners (NAIC) imposed a new requirement on insurance companies to disclose risks that they face from climate change, and their efforts to mitigate those risks.<sup>77</sup> The requirement forces “[a]ll insurance companies with annual premiums of \$500 million or more . . . to complete an

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<sup>74</sup> CLIMATE RISK DISCLOSURE INITIATIVE STEERING COMMITTEE, GLOBAL FRAMEWORK FOR CLIMATE RISK DISCLOSURE (2006), *available at* [http://www.unepfi.org/fileadmin/documents/global\\_framework.pdf](http://www.unepfi.org/fileadmin/documents/global_framework.pdf).

<sup>75</sup> The five companies were AES Corporation, Dominion Resources, Inc., Dynergy, Inc., Peabody Energy, and Xcel Energy. Felicity Barringer & Danny Hakim, *New York Subpoenas 5 Energy Companies*, N.Y. TIMES, Sept. 16, 2007, at A31. Copies of the subpoena letters are available at the website of the New York Office of Attorney General, [http://www.oag.state.ny.us/media\\_center/2007/sep/sep17a\\_07.html](http://www.oag.state.ny.us/media_center/2007/sep/sep17a_07.html) (last visited Nov. 13, 2009).

<sup>76</sup> Nicholas Confessore, *Energy Firm to Specify Investor Risk*, N.Y. TIMES, Aug. 28, 2008, at C1; Assurance of Discontinuance Pursuant to Executive Law § 63(15), *In re Xcel Energy Inc.*, AOD # 08-012 at 4 (Aug. 26, 2008), *available at* [http://www.oag.state.ny.us/media\\_center/2008/aug/xcel\\_aod.pdf](http://www.oag.state.ny.us/media_center/2008/aug/xcel_aod.pdf).

<sup>77</sup> Press Release, National Association of Insurance Commissioners, Insurance Regulators Adopt Climate Change Risk Disclosure (Mar. 17, 2009), *available at* [http://www.naic.org/Releases/2009\\_docs/climate\\_change\\_risk\\_disclosure\\_adopted.htm](http://www.naic.org/Releases/2009_docs/climate_change_risk_disclosure_adopted.htm).

Insurer Climate Risk Disclosure Survey every year,” beginning in 2010.<sup>78</sup>

### E. *Public Relations: “Green” Marketing*

As policymakers in Washington consider new GHG regulations, business has already leapt forward to make their companies “green” and promote their efforts. Businesses have two major reasons for doing so. First, green sells. The idea of buying green has become popular, and books and magazine articles on going green are everywhere.<sup>79</sup> One poll found that 47 percent of United States voters say they are willing to pay more for green goods and services.<sup>80</sup> In 2007, “green” was the single most trademarked term according to the United States Patent and Trademark Office.<sup>81</sup> Second, many businesses expect GHGs regulation to occur and want to be prepared by adopting practices that limit GHG emissions. Several of the companies that spent the most on advertising worldwide in 2007 have green initiatives, ranging from company-wide programs to specific, targeted green projects.<sup>82</sup> These include Procter and Gamble’s “Green Guarantee,”<sup>83</sup> Toyota’s “Think Green!,”<sup>84</sup> Johnson & Johnson’s role as a founding EPA Green Power Partner,<sup>85</sup> and Coca-Cola’s recycling initiatives and development of a greener vending machine.<sup>86</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> See THOMAS L. FRIEDMAN, *HOT, FLAT AND CROWDED* 203–204 (2008).

<sup>80</sup> *47% Willing to Pay More for ‘Green’ Goods and Services*, RASMUSSEN REPS., Dec. 17, 2008, [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/december\\_2008/47\\_willing\\_to\\_pay\\_more\\_for\\_green\\_goods\\_and\\_services](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/december_2008/47_willing_to_pay_more_for_green_goods_and_services).

<sup>81</sup> FRIEDMAN, *supra* note 79, at 204.

<sup>82</sup> The top global advertisers in 2007 (in descending rank) were Procter & Gamble Co., Unilever, L’Oreal, General Motors Corp., Toyota Motors Corp., Ford Motor Co., Johnson & Johnson, Nestle, Coca-Cola Co., and Honda Motor Co. ADVERTISING AGE, 22ND ANNUAL GLOBAL MARKETERS 4 (2008), available at <http://adage.com/images/random/datacenter/2008/globalmarketing2008.pdf>.

<sup>83</sup> P&G Professional’s Green Guarantee, <http://www.greenguarantee.com/index.htm> (last visited Oct. 4, 2009).

<sup>84</sup> Press Release, Toyota Motor Sales, Toyota Thinking Green: Toyota Motor Sales Announces Zero Waste to Landfill (Jan. 22, 2007), available at <http://www.toyota.com/about/news/environment/2007/01/22-1-zerowaste.html>.

<sup>85</sup> EPA’s Green Power Partnership, Partner Profile: Johnson & Johnson, <http://www.epa.gov/grnpower/partners/partners/johnsonjohnson.htm> (last visited Oct. 4, 2009).

<sup>86</sup> Press Release, Coca-Cola Co., Coca-Cola Launches The Greening Of The

Besides individual corporate initiatives, businesses have established a plethora of voluntary guidelines for entire industries, sometimes working with environmental groups. For example, the Forest Stewardship Council establishes standards for sustainable forest use to minimize the environmental impact of logging.<sup>87</sup> The Green Electronics Council certifies environmentally friendly electronics products. One of its programs is to rate electronics based on fifty-one environmental performance criteria such as longevity, materials selection, and reduced packaging.<sup>88</sup> Other voluntary standards are not industry specific, but many businesses have sought certification by them. For example, the United States Green Building Council's popular Leadership in Energy and Environmental Design program certifies buildings based on different tiers of energy efficiency.<sup>89</sup> Some companies are also including carbon ratings or counts on their products, though determining what to measure in the count due to the many inputs in individual products has been a problem.<sup>90</sup> The House-passed cap-and-trade legislation proposes standardized carbon disclosure through a (voluntary) labeling program administered by EPA.<sup>91</sup>

#### F. "Greenwashing"

Many green initiatives may be well-intentioned and effectively reduce greenhouse gas emissions. But some have expressed concern about "greenwashing," meaning environmental claims that may be false or exaggerated in the search for good publicity or profits. The University of Oregon and EnviroMedia Social Marketing are partners on a "Greenwashing Index," which evaluates environmental claims and scores them based on their

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Nation's Capital (Apr. 29, 2009), available at [http://www.thecocacola.com/presscenter/nr\\_20090429\\_greening\\_capital.html](http://www.thecocacola.com/presscenter/nr_20090429_greening_capital.html).

<sup>87</sup> FOREST STEWARDSHIP COUNCIL, PRINCIPLES AND CRITERIA FOR FOREST STEWARDSHIP 2 (2002), available at [http://www.fscus.org/images/documents/FSC\\_Principles\\_Criteria.pdf](http://www.fscus.org/images/documents/FSC_Principles_Criteria.pdf).

<sup>88</sup> GREEN ELECTRONICS COUNCIL, ENVIRONMENTAL BENEFITS OF 2008 EPEAT PURCHASING 17 (2009), available at [http://www.epeat.net/Docs/Report2008\\_FullReport\\_R5.pdf](http://www.epeat.net/Docs/Report2008_FullReport_R5.pdf).

<sup>89</sup> U.S. Green Building Council, LEED Green Building Certification System FAQ, <http://www.usgbc.org/ShowFile.aspx?DocumentID=3330> (last visited Nov. 13, 2009).

<sup>90</sup> Heather Green & Kerry Capell, *Carbon Confusion*, BUS. WK., March 17, 2008, at 52.

<sup>91</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., § 274 (2009).

accuracy.<sup>92</sup> TerraChoice Environmental Marketing puts out a report on environmental claims in consumer markets, judging the claims based on its “seven sins” of greenwashing.<sup>93</sup> These sins include green claims that are vague, irrelevant, or cannot be corroborated due to a paucity of evidence.<sup>94</sup>

### G. *Litigation Risk*

There is an emerging litigation risk due to GHG emissions, including suits based on green claims. Common law tort claims have been filed based on injuries allegedly arising from climate change, primarily alleging nuisance and negligence claims. In 2004, eight state governments and one city filed a nuisance suit against major electric utilities, alleging threatened injuries due to the impacts of their GHG emissions, including increased heat deaths, higher smog and resulting respiratory conditions, beach erosion, property damage due to shifting weather patterns, and more.<sup>95</sup> In 2009, the Second Circuit Court of Appeals held that the plaintiffs had standing to bring their claims, and that those claims did not present non-justiciable political questions.<sup>96</sup> In Alaska, the Native Village of Kivalina filed suit against multiple oil and energy companies based on nuisance, alleging that global warming is causing sea ice to melt, reducing the village’s historic protection from winter storms. Without that protection, the storms are destroying their ancestral village and forcing relocation.<sup>97</sup> Even more creatively, a Mississippi resident filed a negligence suit against oil, coal, and chemical companies for damage to his property. The plaintiff alleged a chain of causation from GHG emissions, to climate change, to Hurricane Katrina, to the damage to his property caused by the storm.<sup>98</sup> The suit also included

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<sup>92</sup> EnviroMedia Social Marketing & University of Oregon, Greenwashing Index, <http://www.greenwashingindex.com/index.php> (last visited Oct. 4, 2009).

<sup>93</sup> TERRACHOICE ENVIRONMENTAL MARKETING, *THE SEVEN SINS OF GREENWASHING: ENVIRONMENTAL CLAIMS IN CONSUMER MARKETS* 3–5 (2009), available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2009>.

<sup>94</sup> *Id.* at 3.

<sup>95</sup> Complaint at 1–2, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 04-CV-05669).

<sup>96</sup> *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

<sup>97</sup> Complaint at 1, *Kivalina v. Exxon Mobil Corp.*, No. C 08-1138 (N.D. Cal. May 16, 2008).

<sup>98</sup> First Amended Complaint at 11–12, *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007). The Fifth Circuit recently

nuisance, fraud, and breach of duty claims. Thus far, none of these suits has been litigated successfully, though many cases are still working their way through the courts.<sup>99</sup> An early draft of the House cap-and-trade bill included expansive citizen suit provisions that would have defined harm under the Clean Air Act to include:

any effect of air pollution (including climate change), currently occurring or at risk of occurring, and the incremental exacerbation of any such effect or risk that is associated with a small incremental emission of any air pollutant (including any greenhouse gas . . . ), whether or not the effect or risk is widely shared.”<sup>100</sup>

While that provision was subsequently removed, the bill as passed expands the existing CAA citizen suit provision to cover GHG emissions.<sup>101</sup>

Greenwashing suits have also been on the rise.<sup>102</sup> In March of 2009, a class action suit was filed against S.C. Johnson & Son, the manufacturer of Windex, Ziploc, and many other ubiquitous household brands, accusing them of multiple violations of state business law due to its use of a “greenlist” certification. The plaintiff alleged false, deceptive, and misleading conduct and advertising because the mark gave the impression of third-party certification, although it was actually a Windex creation.<sup>103</sup> In 2005, a plaintiff sued Honda for false advertising and breach of contract because the car the plaintiff purchased did not meet the gas mileage standards advertised without him altering his driving habits.<sup>104</sup>

reversed the District Court’s dismissal of this lawsuit, acknowledging the plaintiff’s standing to bring nuisance, trespass, and negligence claims. *Comer v. Murphy Oil USA, Inc.*, No. 06-60756, slip. op. at 2–3 (5th Cir. Oct. 16, 2009).

<sup>99</sup> See ROBERT MELTZ, CONG. RESEARCH SERV., CLIMATE CHANGE LITIGATION 24–26 (2009) (describing pending suits).

<sup>100</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., § 336 (2009) (discussion draft released Mar. 31, 2009).

<sup>101</sup> H.R. 2454 § 337(d) (as passed by the House of Representatives, June 26, 2009).

<sup>102</sup> See Tresa Baldas, *Claims of ‘Greenwashing’ on the Rise*, NAT’L L.J., June 8, 2009, at 6.

<sup>103</sup> See Complaint at 2–3, *Koh v. SC Johnson & Son*, Civ. No. 09-CV-00927 (N.D. Cal. Mar. 2, 2009); Class Action Accuses Classic Cleaner of Greenwash, <http://greenpatentblog.com/2009/04/01/class-action-accuses-classic-cleaner-of-greenwashing> (Apr. 1, 2009, 20:25 EST).

<sup>104</sup> *Paduano v. Am. Honda Motor Co.*, 88 Cal. Rptr. 3d 90 (Ct. App. 2009); see Cheryl Miller, *Hybrid Owner’s Suit Gets Green Light*, LAW.COM, Jan. 13, 2009, <http://www.law.com/jsp/article.jsp?id=1202427401529>.

The cap-and-trade legislation currently moving through Congress could create more opportunities for green litigation. Section 334 of the House-passed legislation would allow states to bring actions against companies for violating energy-efficiency standards.<sup>105</sup> Earlier versions of the legislation would have provided for further litigation, as they included new citizen suit provisions allowing individuals and groups to have standing to bring an action against individuals who violated the act.<sup>106</sup> Even without those provisions, the law does not specify that its penalty provisions are the exclusive remedy for violations of the cap-and-trade law. And Section 337 of the House bill explicitly expands the Clean Air Act citizen suit provision to cover the new GHG provisions of the bill.<sup>107</sup> Thus, the legislation raises a serious risk of climate-related citizen suits.

### CONCLUSION

Despite all the unknowns surrounding climate change and how to address it, there is one near certainty: one way or another, the United States will establish its first carbon constraints in 2010. Yet, in the haste to take action that limits the emission of GHGs, policy makers should not rush to judgment regarding the unintended yet significant impacts on the economy. Industry, in turn, by accepting the inevitability of carbon limits will be better positioned both to advise lawmakers and regulators on the true impacts to their bottom line and to assess risks and opportunities at the earliest moment. The unprecedented nature of carbon controls calls for an unprecedented level of cooperation between Washington and Wall Street both now and into the future.

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<sup>105</sup> H.R. 2454 § 334(b).

<sup>106</sup> H.R. 2454 § 336 (discussion draft released Mar. 31, 2009); Posting of Lucy Wheatley to the Global Climate Law Blog, <http://www.globalclimatelaw.com/2009/06/articles/climate-change-litigation/removal-of-citizen-suit-provisions-eased-passage-of-aces> (June 26, 2009, 19:45 EST).

<sup>107</sup> H.R. 2454 § 337 (as passed by the House of Representatives, June 26, 2009).