

Carbon Trading and Energy Finance Committee Newsletter

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MESSAGE FROM THE CO-CHAIRS

Roger D. Feldman and Lyle D. Larson
Co-Chairs, Carbon Trading and
Energy Finance Committee

The Carbon Trading and Energy Finance Committee (CTEF) thanks Kimberly E. Diamond, its vice chair for Publications and Communications, for assembling and editing this first ever CTEF Newsletter. It reflects, in the diversity of its content, the innovative Focus Group Subcommittees which CTEF has formed in areas of commodities and derivative regulation, international, load serving entities, project finance transactions, and climate change remediation. The inclusion of newsletter articles by contributors from three different countries highlights the international scope of the Committee's interests. Several upcoming committee-sponsored teleconferences and other ABA events focus on the key roles of federalism and of load serving entities in effecting climate change relate to newsletter topics.

The combination of Kim's leadership with the resources base of the Focus Group Subcommittees, and the experience, talent, and cooperation of our Program and Outreach Subcommittees, not only provides the foundation for this vibrant publication, but also many opportunities for those becoming CTEF members.

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INTERNATIONAL OFFSETS IN THE CONTEXT OF U.S. CLIMATE LEGISLATION

Thiago Chagas, Charlotte Streck, and
Moritz von Unger

International offsets define an important cost containment strategy in the context of emissions trading schemes. Various bills proposing comprehensive global warming regulation in the United States contain provisions allowing covered sources to use international offsets as a supplementary method of complying with emission reduction obligations. International offsetting mechanisms can replace or complement other mechanisms that act as a safety valve on carbon prices in cap-and-trade schemes, such as price floors or caps and reserve auctions.

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Kimberly E. Diamond, Editor**

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Under a cap-and-trade scheme, greenhouse gas (GHG) emitting installations falling under the cap need to submit a GHG permit (either an emission allowance or an offset credit) for every tonne of carbon dioxide equivalent (CO₂e) emitted over a specific compliance period. (One tonne of CO₂e is the metrics commonly used to measure global warming potential of the different GHGs. Each GHG can be expressed in tonnes of CO₂ (therefore: CO₂ equivalent).) If a certain covered entity emits more than its assigned GHG permits allow, it may compensate for its emissions by acquiring offset credits. An offset credit originates in a GHG emission reduction project occurring in sectors of the economy that are not subject to an emissions cap. Like emission allowances, offset credits are equally measured in carbon dioxide equivalents (CO₂e), where one offset credit equals one tonne of CO₂e reduction, or avoidance. However, an offset credit is essentially different from an emission allowance for being climate neutral, insofar as each tonne of reduction used as an offset creates a corresponding permit to emit within the GHG trading system.

Offset credits hence do not add to or subtract from the amount of absolute emissions reductions; GHG reductions are achieved through a cap. Rather, offset credits are measured by the reduction of compliance costs through the extension of the low carbon regime to non-capped environments (within the same country as well as in foreign countries). This facilitates independent climate change mitigation action in these environments, triggers technology investment that otherwise would not occur and, last but not least, finds the cheapest emission reduction possible.

While the atmosphere is ignorant to the actual source of emissions, the economy is not. The admission of offsets in a cap-and-trade scheme is an important tool to lower the price of allowances and to lessen the pressure for a capped economy to produce high-cost emission reductions.

In the following, we summarize the offset provisions in the two most prominent U.S. climate bills Congress is considering currently. We give particular attention to the international offset provisions and compare those

with the Clean Development Mechanism, one of the existing offsetting mechanisms of the Kyoto Protocol. The article concludes by arguing in favor of a harmonized, credible standard for international offsets.

I. U.S. Legislation: Waxman-Markey and Kerry-Boxer

Among the several bills proposing to regulate GHG emissions in the U.S. Congress, two in particular have gained traction in the past six months: the American Clean Energy and Security Act (also known as Waxman-Markey or ACESA), initially proposed by Henry A. Waxman (chairman of the House Energy and Commerce Committee) and Edward J. Markey (chairman of the House Select Committee on Energy Independence and Global Warming), and passed in the House of Representatives on June 26, 2009; and its counterpart in the Senate, the Clean Energy Jobs and American Power Act (also known as Kerry-Boxer or CEJAPA, and together with ACESA, the bills), introduced by Senators John Kerry and Barbara Boxer on September 30, 2009 (and still being debated at Senate Committee level). Although beyond the scope of this analysis, it is noteworthy that a new bill is being drafted by Senators John Kerry, Joe Lieberman, and Lindsey Graham. This new bill intends to keep the key elements contained in ACESA and CEJAPA, and also includes a range of more popular and additional features, such as increased incentives for nuclear power, renewable fuels, and perhaps for domestic offshore drilling, enabling it to draw more support from moderate Democrats and some Republicans.

Although it is expected that the Senate will eventually pass climate change legislation, the specific contents of such legislation are still obscure. Since the current congressional session seems unlikely to result in decisions on this legislation, the climate issue will probably be pushed to the next legislative session in early 2010. Given that congressional sessions in the first quarter of the 2010 have very little debating time, and given that mid-2010 elections will consume a lot of attention, it is possible that priority to climate bills will first occur in Fall 2010.

Both ACESA and CEJAPA impose annual tonnage limits on GHG emissions from covered sources for the time frame 2012–2050. They create an emissions trading scheme by defining an absolute target—17 percent below 2005 levels in the case of ACESA, and 20 percent below the 2005 levels in the case of CEJAPA—and by allocating regulated entities a gradually declining number of tradable allowances in order to achieve this target. In a first phase (beginning in 2012), mainly electric power generators, fuel producers, and importers that emit more than 25,000 CO₂e emissions annually are regulated. In a second and third phase (beginning in 2014 and 2016, respectively), other industries and sectors follow suit up until 85 percent of total GHG emissions are covered. At the beginning of each year, regulated entities are required to retire as many emission allowances as necessary to cover their verified emissions in the previous year.

Both bills allow regulated entities to use domestic and international offsets from GHG abatement projects undertaken in uncapped sectors. Under the proposed U.S. trading program, the aggregate offset limit allowed will equal 2 billion metric tons per year.

While the overall offset cap is the same, CEJAPA differs from ACESA with respect to the number of international offsets allowed into the scheme. While ACESA allows for 50 percent of the offset credits to come from international sources, CEJAPA allows for only 25 percent.

If the number of available domestic offsets is deemed insufficient in a given year, the amount of emissions that can be offset through the use of international offsets can be increased up to a maximum of 1.25 billion tons under CEJAPA and 1.5 billion under ACESA. Regulated entities can demonstrate compliance by using one domestic or one international offset credit in lieu of an emission allowance. However, starting in 2018, the ratio for one offset credit to one emissions allowance becomes 5 to 4, or, rather, 1.25 international offset credits must be surrendered for each emissions allowance (*see Figure 1*).

II. Domestic Offsetting

Domestic offsetting occurs where an activity implemented in a domestic sector not subject to an emissions cap produces emission reductions that can be used for compliance purposes by the capped sectors. In the U.S. context, the agriculture and forestry sectors are likely to be among the main sources for offsets. A qualifying forestry activity in Louisiana may generate “x” offset credits, which may be used to offset emissions from a coal-fired power plant in Texas. This process can thus increase the ceiling for its GHG emissions by x tonnes of CO₂ equivalent.

Both ACESA and CEJAPA establish an offset program to authorize approval of projects and issuance of offset credits. The bills have similar rules regarding requirements and protocols for ensuring that GHG reductions from qualifying projects are auditable, permanent, and additional (i.e., would not occur in the absence of the offset program). An independent third party verification process is required before credits can be issued. The administrator of the offset program is responsible for approving and revoking accreditation of verifiers.

III. International Offsets

International offsets come from an environment to which the national regulatory system does not apply. A domestic GHG trading scheme will often formulate qualitative requirements that must be met before emission reductions taking place in other countries can be used as offsets in the national system. In the case of both ACESA and CEJAPA, only offset credits from countries that have a bilateral agreement with the United States in place, or that are party to a multilateral agreement to which the United States is also a party, are acceptable. As to substance, the underlying structure is one of equal standards, i.e., the stringent rules on auditing (validation and/or verification in the carbon terminology), permanence, and additionality that apply to domestic offset credits need to be mirrored in the generation of any international credit for which transfer into the U.S. scheme is requested.

The bills state the relevant administrative authority of the offset program will consider international offsets from (i) projects meeting the same criteria as apply to qualifying domestic offset projects; (ii) sector-based initiatives; (iii) reduced deforestation and forest degradation; and (iv) credits issued by an international body. While the scope or effect of the first two offset types still lacks detail, the other two are more palpable.

Figure 1

	<i>Per 1 billion emissions allowances under ACESA</i>	<i>Per 1 billion emissions allowances under CEJAPA</i>
<i>Number of Domestic Offsets</i>	<i>Up to 1 billion</i>	<i>Up to 1.5 billion</i>
<i>Number of International Offsets</i>	<i>1 billion to 1.5 billion if insufficient domestic offsets</i>	<i>0.5 billion to 1.25 billion if insufficient domestic offsets</i>

Quantitative limits on domestic and international offsets

Credits issued by an international body allow the establishment of a direct link to the United Nations Framework Convention on Climate Change (UNFCCC) and, potentially, to the existing offsetting mechanism of the Kyoto Protocol. The other project type, reduced deforestation in developing countries, refers to international strategies of Reducing Emissions from Deforestation and Degradation (REDD). The prominent consideration of REDD is largely the result of significant efforts by a unique coalition of diverse U.S. non-government organizations (NGOs) and U.S. industry to lobby for the inclusion of REDD in the offset mechanism. Prior to this effort, different NGOs held and lobbied for different positions on REDD, resulting in skepticism and concern over the legitimacy of REDD among the handful of legislators that had heard of the concept. For a country's emission reductions from REDD to be eligible in the United States, that country must have technical and institutional capacity to participate in deforestation reduction activities at the national level.

IV. UNFCCC-Defined Offsets

Regarding the offset type of internationally recognized credits, it seems the easiest for U.S. climate legislation to follow the European model and recognize credits issued by the established international project based mechanisms: the Clean Development Mechanism (CDM) and Joint Implementation (JI). Both mechanisms are, however, defined under the Kyoto Protocol to which the United States is not a party. In order to be able to recognize CDM or JI credits, the United States would have to accede to the Kyoto Protocol or its successor agreement, the mechanisms would have to be decoupled from the Kyoto Protocol to allow access to UNFCCC as well as to Kyoto Protocol parties, or it must conclude bilateral agreements on the bilateral validity of the Kyoto credit.

A. The Clean Development Mechanism

The CDM has been heavily criticized in recent years over perceived deficiencies in the environmental integrity of the mechanisms that it uses and the its impact on governance architecture. Critics of the CDM also point out the dangers of creating market distortions in favor of certain industries in major

developing economies that could heavily benefit from CDM credits.

While far from perfect, there are still many arguments in favor of the CDM. First, it is currently the only functioning instrument under the UNFCCC that induces GHG mitigation activities in developing countries. Second, the CDM has been able to gather broad participation by the private sector, both in developed as well as developing countries, and to produce valuable experience in the generation and trade of carbon units at the international level. In fact, there is a whole set of technical protocols (such as baseline and monitoring methodologies) and administrative infrastructure (including an executive board and several supporting panels) already in place for the operation of the CDM. Their abandonment altogether would be counterproductive. Third, the definition of a new international offset mechanism backed by the United States may well go through the same teething problems as the CDM while requiring the establishment of a new infrastructure to approve projects. The reform of the existing mechanism may thus be more effective than the creation of a new one. Finally, referring to an internationally defined mechanism ensures coherence among various trading schemes. If the United States participated actively in the use of internationally defined mechanisms, such use may well achieve the highest levels of acceptance while ensuring environmental integrity. It is noteworthy in this context that both ACESA and CEJAPA include a security layer under which further restrictions on the use of UNFCCC-approved credits can be imposed, in the event that credit standards are found insufficient.

B. Foreign Allowances and Joint Implementation

Both ACESA and CEJAPA allow the use of foreign allowances from qualifying international cap-and-trade systems, provided certain conditions are met. With the foreign allowances clauses, both bills aim at considering the option of linking a U.S. cap-and-trade system to similar international schemes. Foreign trading programs exporting allowances to the United States must (i) be established by a national or supranational foreign government; (ii) set a compulsory tonnage limit on GHG emissions; and (iii) be at least as stringent as

the U.S. trading program (including rules to ensure comparable monitoring and compliance requirements, quality, and restrictions on the use of offsets). Under either bill, the Environmental Protection Agency (EPA), in consultation with the Secretary of State, must authorize the use of any external allowances under the U.S. program.

The bills set no quantitative limits on the amount of foreign allowances that a regulated entity may hold and use for compliance, although EPA may in the future decide to restrict such use. The owner or operator of a regulated entity that wishes to make use of a foreign allowance must first certify to EPA that such allowance has not been previously used to comply with any other domestic, regional, or international GHG control program. Once used for purposes of compliance under the U.S. trading program, the foreign allowance is immediately disqualified from further use.

What is less clear is how the foreign allowance provision relates to the other project-based offset credit type under the Kyoto Protocol: Emission Reduction Units (ERUs) generated from JI projects. These are emission reduction projects that are developed and performed within countries that have taken up a cap under the Kyoto Protocol (Annex I parties). The particularity here is that for each ERU that is issued, a country needs to cancel a unit (a so-called Assigned Amount Unit (AAU)) from its overall quantity of emissions (the cap). Thus, the generation and trade with ERUs do not increase the total number of allowances and credits under the Kyoto Protocol cap. In this sense, ERUs could fulfill the U.S. offsetting requirements. They can be regarded as an “international emission allowance,” a term defined under ACESA as “a tradable authorization to emit 1 ton of carbon dioxide equivalent of greenhouse gas that is issued by a national or supranational foreign government” (ACESA, Section 700(32)). Then, an ERU has the functional “purpose of meeting [a party’s] commitments” under the Kyoto Protocol (Article 6(1)) and it is transferable. ERUs may hence be seen as tradable authorizations falling under the meaning of the proposed U.S. legislation. A national foreign government issues ERU units for both the national

issuance track (Track 1) and the international issuance track (Track 2).

However, the environmental integrity of ERUs may be an issue for accepting ERUs in the United States. Foreign credits need to come from cap-and-trade programs that are, according to the bills, at least as stringent as the U.S. system, including comparable monitoring, compliance, enforcement, quality, and restrictions of offsets. EPA, in consultation with the Secretary of State, will make a case-by-case assessment of whether or not a particular cap-and-trade program meets the requirement. There are some countries with ambitious emissions limits, but others where the limits are more generous. In particular, Russia and Eastern European countries have undergone a major economic transition between 1990 and today. Russia and Ukraine, for example, emit far less than they did in 1990 (1990 usually being the reference year under the Kyoto Protocol) with the consequence that they have vast quantities of unused AAUs. Thus, their current cap is arguably not as stringent as the U.S. one. However, there is a difference between the AAU target and the JI mechanism. JI, if its current high standards continue to apply, is a stringent mechanism in which emission reductions prove real, measurable, and additional. No Russian project has yet been approved, but the way the global JI practice organizes itself around the ambitious standard of the international issuance (Track 2) governance body (the Joint Implementation Supervisory Committee), there is a legitimate expectation that JI credits are stringent and reliable credits. It should also be noted that under the current architecture, a country cannot approve a JI project in its sole discretion, if the trade of ERUs in another country is intended. Then, the receiving country needs to approve the project as well, and can thus formulate additional conditions that need to be met to obtain approval.

V. Conclusion

The figures for international offsets allowed into the U.S. scheme vary according to the proposed bills. Numbers will be large, ranging from 0.5 billion to 1.5 billion in annual international credits. It is not yet clear,

however, how the demand for these credits will be satisfied on the supply side. The current CDM is a market that has potential and the future U.S. cap-and-trade system would benefit from accepting CDM credits into the domestic scheme, while at the international level would help overcome the CDM's governance challenges and reform the instrument. The CDM ultimately offers the prospect to be expanded in scope and size. Programmatic approaches and the expansion of allowable project categories to allow broader forest and land-use activities have the potential to scale-up the CDM. As a separate credit type, the proposed legislation envisages credits generated under sectoral approaches. Nevertheless, the rules for sectoral crediting are not yet established, and a stable supply forecast cannot be made. REDD as a mechanism will probably be either incorporated in UNFCCC or it will be operationalized via bilateral agreements between the United States and REDD countries. However, when credits will be generated on a large scale and from which countries they will be allowed into the U.S. scheme are less than clear.

Finally, the linking of cap-and-trade schemes worldwide is an ambitious goal, but implementation will take time. What the international climate change regime with its JI instrument offers today is a credit device that may pioneer the way into the early stages of global cap-and-trade interconnectivity. ERUs as offsetting units from within capped environments guarantee stringency of mitigation action, reliability and transparency of credit generation, and a standardized format that may serve as a nucleus for the globally linked cap-and-trade scheme of the future.

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CLIMATE CHANGE AND COOPERATIVE FEDERALISM: FEDERAL PREEMPTION OF STATE CAP-AND-TRADE PROGRAMS

Keith M. Casto

In grappling with the challenges of global warming and the accompanying enormously complicated transitional energy choices that any solutions must necessarily entail, Congress is currently considering two of the most comprehensive pieces of legislation in U.S. history: the so-called Waxman-Markey bill passed by the House of Representatives, American Clean Energy and Security Act of 2009, H.R. 2454, 111th Congress (2009), and the companion Kerry-Boxer bill reported out of committee in the Senate, Clean Energy Jobs and American Power Act, S. 1733, 111th Congress (2009). One of the central issues to address these challenges is the national debate regarding the relationship between the federal government and the states in implementing procedures to reduce greenhouse gas (GHG) emissions. In particular, at stake is the continuing vitality of certain experimental state initiatives like California's Kyoto Treaty-based cap-and-trade system, which still is years from implementation. Three years ago, California enacted the Global Warming Solutions Act of 2006, also known as AB 32, which specifically delineated the establishment of a cap-and-trade approach. Under AB 32, the California Air Resources Board must promulgate regulations implementing such an approach by January 1, 2011, for this approach to become effective the following year. Any resulting program will necessarily be the product of intensive deliberation, extensive and protracted public debates, comments, and hearings.

I. The History of Cooperative Federalism and Floor Preemption in Federal Environmental Regulation

Prior to 1970, environmental regulation in the United States was generally characterized by two interacting phenomena. First, state and local governments retained almost exclusive responsibility for environmental regulation, with the federal government functioning primarily (through numerous, widely distributed, and

uncoordinated agencies) as a scientific research resource to the frontline state and local environmental regulatory agencies. As a result of fragmented state and local regulatory requirements and an accompanying lack of enforcement authority and capability, regulated businesses were incentivized to locate manufacturing operations in states with the least stringent environmental regulations and least effective enforcement mechanisms. Second, during the 1950s and 1960s, the accelerating deterioration of air and water quality began to transcend state (and even national) boundaries and thereby outpace the capability of individual state agencies to regulate effectively even where there was the political will to do so.

These two phenomena, bolstered by a burgeoning public ecological awareness, propelled the legislative development of a somewhat unified national environmental strategy accompanied by overarching uniformity and increasing stringency in federal regulation. Within a relatively brief time span, Congress, using the authority of the Commerce Clause and under the rubric of “cooperative federalism,” created a centralized Environmental Protection Agency (EPA) and enacted the following series of comprehensive environmental statutes that created a fairly effective federal/state partnership that persists today: the National Environmental Policy Act of 1969, the Clean Air Act (CAA) of 1970, the Federal Water Pollution Control Act, the Solid Waste Disposal Act (including the Resource Conservation and Recovery Act), the Toxic Substances Control Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Safe Drinking Water Act. Inherent in this cooperative federalism approach is the notion that the federal government should allow some latitude to state and local environmental programs.

Under cooperative federalism, states are not fully preempted from action. Instead, the states play a joint role with the federal government in achieving particularized legislative goals. Almost uniformly, the approach requires states to adhere to, implement, and administer federal programs at the state level. One consistent component of this cooperative federalism model is the concept of “floor preemption.” Under floor preemption, federal laws serve as the regulatory

minimum to which all states must adhere. While no state may enact a law or regulatory scheme less stringent than the federal standard, states are free to pass more restrictive laws. To one extent or another, floor preemption is seen throughout all major federal environmental legislation and, to date, has been widely acknowledged to be a generally effective approach.

Section 116 of the 1970 version of the CAA led the way by retaining state authority to adopt or enforce emissions standards and limitations more stringent than the federal standards outlined in the CAA. This provision has remained essentially intact through two significant revisions of the CAA in 1977 and 1990. Subject to EPA approval for consistency with the National Ambient Air Quality Standards (NAAQS), the CAA gave state and local governments primary authority to set emissions limitations for so-called criteria pollutants for existing stationary sources of air pollution. While the federal government was granted exclusive power to set NAAQS, national mobile source emissions standards, and national standards for hazardous air pollutants and new stationary sources, the states retained the authority within their respective political jurisdictions over the precise mix of source-specific emissions limits necessary to meet the national standards. Inherent within this allocation of political responsibility was the authority of the states to adopt more stringent emission limitations on both new and existing sources of criteria pollutants. California responded by promulgating more stringent ambient air quality standards and, derivatively, more stringent source-specific emission limitations for stationary sources.

The CAA also permitted California to promulgate through a complex approval process emissions standards for California automobiles that were more stringent than the federal tailpipe standards. These standards were based on a long-established regulatory regime to reduce air pollution in the smog-ridden Los Angeles Basin. In 1961, well before the enactment of the 1970 version of the CAA, California enacted legislation establishing air quality standards and controls for motor vehicle emissions in the state. Emissions standards went into effect on domestic passenger vehicles for sale in California in 1963. The

CAA accommodated California's innovation by waiver, permitting the state to continue regulation under such state's more stringent emission standard. Under later amendments, the Act also allowed other states to adopt either federal or California emissions standards.

The unique status conferred on California for automobile standards generated unanticipated emissions reductions outside of California. Automobile manufacturers were forced to meet the more stringent California requirements, or withdraw from the California market. As a result, many manufacturers began to make all of their cars compliant with the more stringent California standards. Other states pushed toward adoption of the more stringent standards, even in the face of resistance from the automobile industry. To effect compromise between industry and the states, EPA promulgated voluntary national emissions standards more stringent than the national uniform standards, but less stringent than the California standards. The net effect was that the inclusion of the waiver in the CAA for California prompted the development of stricter emissions control nationwide.

While the CAA approach thus precipitated technological innovation in the industry, it also allowed the state of California to gain independent expertise in the development of complex environmental regulations. It also spurred the development of ancillary businesses in California.

Following the CAA's lead, the Federal Water Pollution Control Act of 1972, later renamed the Clean Water Act (CWA) in 1977, preempted state programs only to the extent their effluent limitations and standards were less stringent than the CWA's provisions. Under the National Pollution Discharge Elimination System (NPDES), states also administer the NPDES permitting program and dictate permissible source-specific discharge limits, subject to consistency with national effluent guidelines based on best available technology. However, states are always free to set discharge limits more stringent than the national effluent standards based on stricter water quality standards. Again, California law preceded the federal legislation and influenced its terms. In 1949, California pioneered clean water legislation by enacting the Dickey Act,

followed in 1969 by the Porter-Cologne Water Quality Control Act (Porter-Cologne), the latter recognized as one of the nation's strongest pieces of pollution control legislation at that time. The law's influence was so widespread that drafters of the CWA borrowed concepts and text from Porter-Cologne in drafting the CWA. The provisions of the CWA allowed states like California to continue on their unique paths, by authorizing states to set stricter standards for surface water quality, sewage treatment, and waste water discharges, and even for regulation of groundwater (which is regulated in California, but not directly under the CWA).

Cooperative federalism and floor preemption are also seen in other major environmental legislation. In the area of hazardous waste, California began regulating hazardous waste under the predecessor to the current Hazardous Waste Control Act as early as 1973, long before EPA promulgated regulations under the federal Resource Conservation and Recovery Act (RCRA), which regulates solid waste and hazardous waste. Section 3009 of RCRA specifically allows the states to impose more stringent hazardous waste management requirements than RCRA requires. In fact, California has many more stringent requirements than RCRA and has a much larger universe of regulated hazardous waste.

Additionally, the Federal Insecticide, Fungicide, and Rodenticide Act allows states to regulate the sale and use of federally registered pesticides and devices so long as the regulation does not permit any sale or use this Act prohibits. Also, the federal Toxic Substances Control Act, while preempting control over manufacturing, permits states to regulate the sale and use of chemical substances when state regulations, rather than the provisions of this Act, provide a higher degree of protection from risk of injury to health or the environment.

II. Waxman-Markey and Kerry-Boxer Approaches to Preemption

Against this backdrop, the Waxman-Markey bill constitutes a significant departure from the cooperative federalism approach standard in environmental

legislation. Under Waxman-Markey, “no State or political subdivision thereof shall implement or enforce a cap that covers any capped emissions emitted during the years 2012 through 2017.” H.R. 2454, 111th Congress, Title VIII: Additional Greenhouse Gas Standards, Part F: Miscellaneous, Section 861: State Programs (2009). Therefore, the bill prohibits all domestic, state- or regionally run cap-and-trade programs from operating for five years. Existing cap-and-trade programs such as California’s AB 32 (which will be proposed by year-end 2009), the Regional Greenhouse Gas Initiative (RGGI) for 10 states in the Northeastern United States, and any future state programs, are fully preempted by the federal legislation for that five-year period.

The Boxer-Kerry bill also departs from the standard cooperative federalism approach. The bill adopts an approach similar to Waxman-Markey, stating “no State or political subdivision thereof shall implement or enforce a comprehensive GHG emission limitation program that covers any capped emissions emitted during the years 2012 through 2017.” S. 1733, 111th Congress, Title VIII: Additional Greenhouse Gas Standards, Part F: Miscellaneous, Section 861(a) (2009). However, if the scheduled federal auction does not take place by March 31, 2011, no federal GHG limitation program “that covers any capped emissions emitted during the period that commences at least 9 months after the date of the first auction . . . through 2017” can be implemented or enforced. *Id.* § 861(a)-(b). A comprehensive GHG emission limitation program is defined as “a system of GHG regulation under which a State or political subdivision issues a limited number of tradable instruments in the nature of emission allowances and requires that sources within its jurisdiction surrender such tradable instruments for each unit of GHGs emitted during a compliance period.” *Id.* § 861(c). While the bill’s language is undergoing substantial markup, it presently preempts state cap-and-trade programs, at least initially. However, in a backhanded manner, Boxer-Kerry does state that federal preemption will be delayed if the program does not take effect by the scheduled 2012 start date.

III. Benefits and Costs of Permitting State Cap-and-Trade Programs

In the absence of federal legislation addressing climate change to date, many states have taken independent action. Of the 32 states that have completed action plans for reducing GHG emissions, 17 have set emission reduction targets. Similar action has occurred at local levels throughout the country. Considering the cap-and-trade programs Waxman-Markey and Boxer-Kerry each propose, will absolute federal preemption of existing state and regional programs best achieve climate change objectives? Or, is some form of floor preemption more in line with the tradition of predecessor federal environmental legislation?

Proponents of the cooperative federalism approach point to the notion that states have traditionally retained authority to act for the public health and safety of their citizens under a theory of *parens patriae*. They contend that state and local governments have historically led the way in these areas and should be free to experiment and, if necessary, act more rigorously to protect unique state interests. This argument was at the heart of the states’ standing arguments in the cases of *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *Connecticut v. AEP*, — F.3d — (2d Cir. Sept. 21, 2009), available at http://www.ca2.uscourts.gov/decisions/isysquery/1a580d01-bf9e-4645-a1c1-ec33b1f349fa/12/doc/05-5104-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/1a580d01-bf9e-4645-a1c1-ec33b1f349fa/12/hilite/. As seen through the CAA and the CWA, state programs arguably have advanced federal goals as well as aided the creation of effective federal policies. It could also be argued that restricting more advanced state programs will potentially stifle federal progress, as state programs could serve as models for federal action.

Some assert that, in the context of climate change and a cap-and-trade program, the influence of experimental state programs can already be seen. RGGI serves as a regional template for federal legislation through a cap-and-trade program in one significant sector: electric power generation. If RGGI were suddenly preempted by federal legislation, it could not serve as an advance

prototype for addressing such controversial concepts as allowance auctions and offsets from uncapped sectors. The same could be true for the innovative programs being developed under California's AB 32.

Proponents contend the need for such experimental programs under RGGI and AB 32 will not evaporate with the enactment of a federal cap-and-trade program. For example, these programs might enable the federal government to avoid significant pitfalls already experienced at the state and regional levels. Thus, the state's role as a testing ground can minimize the risk of federal regulatory failure. Given the smaller scale of state programs, states may be able to adopt innovative and experimental approaches without being exposed to the more devastating scope of risk associated with a national program.

Defenders of state programs suggest that state and local governments can also adapt more quickly to scientific and technological changes and developments; their more nimble responses could save considerable federal resources and reduce the time frame for implementation. Thus, retention of state programs could also reduce the administrative costs of complying with a federal cap. Moreover, stricter state programs could also lead the way in technology-forcing in the same way California set the pace for tailpipe emission controls under the CAA. State program-induced technological advancements could make the costs of reducing carbon emissions cheaper than buying allowances, thus reducing federal program costs overall.

Further, state cap-and-trade programs arguably allow for tailored responses to geographically specific variations in GHG emissions patterns and heavily impacted industries. For example, while transportation may constitute a higher proportion of California's CO₂ emissions than does electric power generation, Midwestern states, which experience much more extreme cold in the winter or extreme heat in the summer or which depend on a primarily coal-based electric power-generating capacity, may have the reverse emissions proportionality than does California. This difference in the type of emissions each state produces suggests the need for state variability in the

establishment of emissions caps for various sectors (i.e., transportation, electric power generation, energy, industrial, and agriculture) and diverse allocation of allowances and offsets within those sectors. A similar recognition of state and local variations resulted in the incorporation of the flexible and relatively workable concept of state implementation plans for existing stationary sources into the 1970 CAA.

On the other hand, there are countervailing considerations why cooperative federalism may not work for climate change legislation. It can be argued that a uniform national approach may be necessary to enhance the nation's bargaining position in the international arena. Also, implementing one universal cap-and-trade system may reduce the regulatory compliance transaction costs for regulated entities. Advocates of preemption also point to the global impact of GHG emissions, stating that state experimentation may have little value in this arena. (Proponents of state programs contend this runs counter to the traditional notion of "think globally, act locally." That is, all GHG emissions controls are essentially local, irrespective of impact.) Further, from a purely commercial viewpoint, a uniform preemptive national regulatory program is thought to be necessary to prevent market speculation in emissions trading and uneven regulation of derivative products. From a macroeconomic standpoint, a uniformly predictable and centrally controlled market for emissions credits will contribute to greater commercial viability in technological innovation and related emissions trading.

Additionally, there is the problem of leakage. Variable state cap-and-trade programs could promote the export of GHG emissions from well-controlled states to less-controlled ones. This is a widely debated issue in California.

Finally, there is the problem of additionality. Essentially, additionality is the concept that encompasses those emissions-reducing controls implemented beyond what the law already requires or, in the absence of legal limits, business as usual. Uniform federal emissions allowances and commensurate emissions limitations create a level playing field of legal limits for quantifying, verifying, and registering emissions credits.

IV. EPA's Mandatory Reporting Rule

While Waxman-Markey and Kerry-Boxer continue to wade through the legislative process, EPA has taken independent action to expedite federal GHG regulation. On September 22, 2009, EPA promulgated a mandatory GHG monitoring rule under the authority of the CAA. Under the rule, entities that emit 25,000 metric tons or more of CO₂ equivalent per year, subject to certain exceptions, will be required to report GHG emissions data to EPA annually. The rule takes effect in January 2010, with the first annual reports for the largest emitting facilities submitted to EPA in 2011.

In accordance with the cooperative federalism tradition, EPA's monitoring rule does not preempt states from regulating or requiring reporting of GHG emissions. EPA has acknowledged the narrow focus of the rule, and has encouraged the continuation of broader state programs that couple reporting with reduction programs. Further, EPA has committed to work with state and regional programs to provide timely access to verified emissions data, establish mechanisms to share data efficiently, and harmonize data systems. EPA's cooperative federalism approach in the monitoring rule demonstrates the administration's desire to encourage the subsistence of state programs and provides yet another example of the tradition of retaining state programs in conjunction with federal oversight.

V. Political Comment

National climate change regulation, including the implementation of a national cap-and-trade system, has become a hot political topic. As a result, politicians and state regulators have spoken out regarding preemption of state programs. In 2008, both Barbara Boxer and Nancy Pelosi publicly supported California's ability to adopt more stringent state standards, and later Barbara Boxer outlined the importance of supporting efforts by state and local government to deal with climate change in her pledge to drive climate change legislation. More recently, in January 2009, President Obama stated that the government must work with, not against, states to reduce GHG emissions.

Not surprisingly, Mary Nichols, chief of the California Air Resources Board, has expressed concern that Waxman-Markey's and Kerry-Boxer's preemption provisions will interfere with already established state environmental programs and will jeopardize the benefits of a cooperative federal-state partnership. The Environmental Council of the States, a national nonprofit, nonpartisan association of state and territorial environmental agency leaders, has also spoken out against Waxman-Markey's preemption provision. The Council emphasized the importance of a climate change strategy that includes a state and federal partnership that benefits from the states' experience, regulatory infrastructure, and programs in place. On the other hand, RGGI chair Peter Iwanowicz has expressed a willingness to accept federal preemption if the program includes stringent emissions caps.

VI. Conclusion

A nationally uniform federal GHG program has strong domestic and international support. However, strict preemption of state GHG emissions regulatory programs, as embodied in the Waxman-Markey bill, is a significant departure from a long-standing tradition of federal-state partnership in environmental regulation popularly conceived in the term "cooperative federalism." While the Kerry-Boxer bill deviates from this approach and allows the potential suspension of strict federal preemption in the event of the absence of a federally viable program, both bills have the potential for blunting the initiative of bold and vigorous state and regional efforts. The policy arguments are strong on both sides thus leaving the question of federal preemption in climate change regulation as a controversial issue for Congress to resolve in the coming months.

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EMISSIONS TRADING AND CLIMATE CHANGE: REPORTING OBLIGATIONS

Jeffrey Elliott

Canadian companies are increasingly becoming engaged in business issues surrounding climate change as government regulators are beginning to step up national, regional, and local responses to these issues. Against this backdrop, many Canadian companies are, or soon will be, required to report greenhouse gas (GHG) emissions and should consider whether they are adequately preparing themselves to comply with this requirement and other foreseeable climate change obligations. Additionally, statements and guidelines issued by securities regulators and the accounting profession reflect the significance for Canadian reporting issuers of providing adequate disclosure to investors about environmental matters that may have a material impact on them.

I. Emissions Reporting—Regulatory and Regional Frameworks

In 2008, the Canadian federal government established a regulatory framework that requires businesses in a number of industries to reduce their GHG emission intensities by 18 percent from 2006 levels by the end of 2010. Regional organizations such as the Western Climate Initiative (WCI) and the Regional Greenhouse

Gas Initiative (RGGI), which count many U.S. states and Canadian provinces in their membership, are increasingly setting reporting requirements for businesses within their scope of influence. The provincial members of these initiatives have adopted, or are anticipating adopting, similar reporting requirements.

A. Federal Requirements

Under the Canadian federal regulatory regime, Environment Canada, the Canadian federal environment ministry, has given notice that Canadian industrial emitters of GHGs have until June 1, 2010, to report their 2009 GHG emissions. The reporting deadline applies to facilities that emit over 50,000 tons of carbon dioxide equivalent (CO₂e) per year. It is expected that Environment Minister Jim Prentice will release more detailed regulations in the near future.

B. Regional and Provincial Requirements— Impact of WCI's Essential Requirements for Mandatory Reporting and Labor- Intensiveness of GHG Measuring and Reporting

The partners of the WCI are comprised of seven U.S. states and four Canadian provinces: British Columbia (B.C.), Manitoba, Ontario, and Quebec. Other U.S. states and Canadian provinces (Saskatchewan and Nova Scotia) are currently WCI observers.

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES Calendar of Section Events

The Copenhagen (De)Brief

January 7, 2010

Teleconference

Sponsor: ABA Section of International Law in cooperation with ABA SEER's Carbon Trading and Energy Finance Committee

Cooperative Federalism and Green Infrastructure Development

January 20, 2010

Quick Teleconference

Sponsored by ABA SEER's Carbon Trading and Energy Finance Committee

28th Annual Water Law Conference

Feb. 17–19, 2010

San Diego

39th Annual Conference on Environmental Law

March 18–21, 2010

Salt Lake City

18th Section Fall Meeting

Sept. 29–Oct. 2, 2010

New Orleans

For more information, visit www.abanet.org/enviro/calendar/

The WCI has recently released its final version of the first group of Essential Requirements for Mandatory Reporting (ERMR). The ERMR requires owners and operators that are subject to the mandatory reporting requirements to submit annual GHG emission reports by April 1 of each year for emissions in the previous calendar year. The initial reporting requirements will apply to the owner or operator of a facility that emits 10,000 metric tons of CO₂e or more per year in combined emissions, from one or more of the listed source categories, in any calendar year starting in 2010. Accordingly, companies subject to the ERMR that commenced operations prior to 2010 will be required to report their 2010 GHG emissions by April 1, 2011. It is anticipated that WCI jurisdictions will have rules implementing these essential requirements in place for the 2010 reporting year or as soon thereafter as possible.

Subsequent to 2010, the ERMR contemplates that the reporting requirements will also apply to (1) all importers of electricity (both retail providers and marketers) that import electricity into the WCI region, (2) any supplier that within the WCI region distributes transportation fuels in quantities that when combusted would emit 10,000 metric tons of CO₂e per year or more, in any calendar year starting in 2010, and (3) any supplier that distributes within the WCI region residential, commercial, and industrial fuels in quantities that when combusted would emit 10,000 metric tons of CO₂e per year or more, in any calendar year starting in 2010.

To comply with the WCI-imposed obligations, the B.C., Manitoba, Ontario, and Quebec provincial governments are each moving forward with legislation designed to implement the ERMR regime. For example, the B.C. government has announced its intention to introduce a mandatory GHG-emissions reporting regulation during the fall of 2009. The Ontario government has published a draft GHG emissions reporting regulation that proposes reporting for all regulated sources emitting more than 25,000 tons of CO₂e per year beginning in 2011 for 2010 emissions. The province recently stated that its intention is to harmonize Ontario reporting requirements with those of the WCI (as well as with

any U.S. federal trading system). Quebec has passed Bill 42 (“An Act to amend the Environment Quality Act and other legislative provisions in relation to climate change”), which establishes the reporting of GHG emissions by certain categories of emitters to be determined by regulation.

Other Canadian provinces have also taken legislative action to mandate GHG emission reporting. For example, in 2004, Alberta passed the *Specified Gas Reporting Regulation*, which continues to require industrial facilities that emit more than 100,000 tons of CO₂e in a calendar year to submit annual emission reports. Additionally, on August 14, 2009, the government of Nova Scotia released the *Greenhouse Gas Emission and Air Pollutant Regulation*. This regulation requires facilities located in Nova Scotia that emit more than 10,000 metric tons of CO₂e in a calendar year to submit annual emission reports.

To comply with the provincial and/or federal legislation that may apply to them, companies will need to determine whether or not they emit the quantity of GHGs that triggers the various legislative reporting requirements. In order to do so, companies will need to measure their GHG emissions in accordance with the prescribed methods set out in applicable legislation. Measuring GHG emissions will be labor-intensive and will require that a detailed and mapped-out process be followed. Additionally, while governments have generally recognized the importance of standardized measuring methods (so as to help ensure the fair operation of multi-jurisdictional carbon cap-and-trade programs), there is no certainty that all legislation will contain common measuring techniques.

In the event a company is subject to GHG reporting requirements, the applicable legislation will also detail other related obligations the company must consider. Typically, these obligations will include monitoring, record keeping, and retention requirements, as well as data-verification requirements. It can also be expected that GHG legislation will increasingly require emitters to reduce their GHG emissions in effort to establish targets and/or to cover their GHG emissions with prescribed emission allowances, units, or credits.

II. Continuous Disclosure Obligations

In the last few years, climate change considerations have begun to figure more prominently in Canadians' investment decisions. This, along with the complexities of complying with existing and forthcoming regulations designed to reduce GHG emissions, has led the Ontario Securities Commission (OSC) and the accounting profession to focus on the disclosure of climate change issues by Canadian reporting issuers to ensure that investors are fully informed. Two recent initiatives highlight this trend.

As climate change concerns continue to escalate and, as a result, increasingly stringent GHG legislation is enacted, regulatory authorities may in the future require Canadian reporting issuers (i.e., generally those companies listed on a stock exchange in Canada) to provide more prominent and expansive disclosure with respect to the impact that climate change will have on their business. Companies will also face increased disclosure requirements in their financial statements when they are exposed to new liabilities, assets, expenses, and revenues associated with climate change regimes. Alberta regulations that involve emission intensity reduction targets that companies cannot exceed without penalty illustrate this point. Compliance with these regulations will lead to liabilities and expenses that will require recognition in financial statements.

III. OSC Staff Notice 51-716— Environmental Reporting

In February 2008, the OSC issued Staff Notice 51-716, *Environmental Reporting* (Staff Notice). This Staff Notice outlines the results of OCS staff's targeted review of the degree to which reporting issuers were adequately disclosing information about so-called environmental matters in their annual financial statements, related management's discussion and analysis (MD&A), and annual information forms (AIF), all of which are filed with the Canadian securities regulators and are publicly available under the reporting issuer's profile on the System for Electronic Document Analysis and Retrieval (SEDAR) (www.sedar.com). The review focused on industries

that were considered most likely to require environmental disclosure—mining, oil and gas, environmental services, steel, transportation services, and utilities.

While Canadian securities regulators have not specifically mandated the disclosure of climate change issues in a reporting issuer's public disclosure record, the requirements of National Instrument 51-102, *Continuous Disclosure Obligations* (NI 51-102), are sufficiently broad so as to capture such issues. A reporting issuer's MD&A, for example, is required to discuss the effect of "known trends, demands, commitments, events or uncertainties" on the reporting issuer's "financial condition, results of operations and cash flows." Moreover, a reporting issuer's AIF is required to disclose such things as the "financial and operational effects of environmental protection requirements" on its financial position, including capital expenditures. An AIF is also required to detail "social or environmental policies" that are fundamental to the reporting issuer, as well as risk factors such as environmental risks, "regulatory constraints . . . and any other matter that would be most likely to influence an investor's decision to purchase" the securities of the reporting issuer.

The OSC noted that the standard (as outlined in NI 51-102) to be met by reporting issuers in determining if environmental matters must be disclosed is whether or not the matter is "material." Building on the guidance given in NI 51-102 as to the meaning of "material" in the context of disclosure documents, the OSC stated that information relating to environmental matters is likely material if a reasonable investor's decision whether or not to buy, sell, or hold securities of a reporting issuer would likely be influenced or changed if the information was omitted or misstated. (This concept of materiality is consistent with that contained in the *Canadian Institute of Chartered Accountants Handbook*.)

The Staff Notice provides little in the way of detailed guidance as to (a) the "environmental matters" that should be disclosed in a reporting issuer's MD&A and AIF, (b) the way in such matters should be teased out of a reporting issuer's self-appraisal of its business, or

(c) the way in which such matters should be framed in disclosure documents. That said, some hints are given by the types of disclosure issues on which the OSC focused, which can be summarized as follows:

1. **Environmental Liabilities.** Detailed analysis (beyond boilerplate language) of the cost estimates of environmental contingencies should be contained in the reporting issuer’s MD&A. Moreover, a discussion of “material contingent environmental liabilities” should form part of a reporting issuer’s MD&A and/or AIF regardless of whether the liability has accrued in the issuer’s financial statements or has been disclosed in the notes to the financial statements.

2. **Financial and Operational Effects of Environmental Protection Requirements.** A qualitative discussion in a reporting issuer’s AIF of the effect on the issuer of environmental protection requirements (e.g., such things as GHG regulations and carbon taxes) should be accompanied by a quantitative assessment of the costs associated with compliance with such requirements.

3. **Environmental Policies Fundamental to Operations.** A reporting issuer should discuss in its AIF the environmental policies fundamental to its operations, including the impact or potential impact these policies may have on its operations. Where a quantification of costs is available, it should also be disclosed.

4. **Environmental Risks.** Included among the risks to be disclosed in an AIF are environmental risks that would be most likely to influence an investor’s decision to buy a reporting issuer’s securities. The review focused on environmental laws material to an issuer’s operations as being “environmental risks” generally necessitating disclosure. Discussion of such risks should include whether or not the reporting issuer is in compliance with such laws, penalties for noncompliance and the cost of compliance. While detailed guidance from the OSC may be lacking, the very existence of the review signals to reporting issuers that it is necessary to seriously consider the effect of environmental matters and climate change on their business and to ensure that such matters are adequately disclosed. The Staff Notice should continue to serve as a signal to Canadian reporting issuers that,

regardless of whether or not they are subject to specific GHG emission or other environmental reporting requirements, it is necessary for them to seriously consider the effect of environmental matters and climate change on their business and to ensure that such matters are adequately disclosed to investors.

IV. Canadian Institute of Chartered Accountants—MD&A Climate Change Disclosure

As was stated by the Canadian Institute of Chartered Accountants (CICA) in a November 2008 MD&A disclosure guide (the Guide), whose stated purpose is “intended to assist MD&A preparers in making decisions about the nature of annual MD&A disclosures regarding the business and financial impacts of climate change issues,” investors are increasingly seeking more detailed and nuanced information about how reporting issuers view the impact of climate change, in order to assess its effect on a company’s current and future financial conditions, results of operations and cash flows. The CICA noted that the business impact of climate change will require reporting issuers—even those that do not directly produce GHG—to implement strategies, both to adapt to the effects of climate change on the reporting issuer’s business and, in other cases, to take action to mitigate the extent of its GHG emissions.

A. “Orientation to Business Issues of Climate Change”

The first of the Guide’s five sections, entitled “Orientation to Business Issues of Climate Change,” is an attempt to enable reporting issuers to see their business through the climate change lens—something that many, other than those in industries with obvious environmental impacts such as those studied by the OSC in its review, have had little reason to do. The Guide’s other four sections are as follows: “What Investors Want to Know About Climate Change”; “Developing MD&A Disclosures About Climate Change”; “Organizing and Presenting Disclosures”; and, “Overseeing the Integrity of MD&A Disclosures About Climate Change.” The Guide notes that while climate change is, by its nature, an environmental issue, it is one that also has wide-ranging economic and

social effects. The business impacts of climate change will require reporting issuers—even those that do not directly produce GHG—to implement strategies to both adapt to the effects of climate change on the reporting issuer’s business and, in other cases, to take action to mitigate the extent to which it produces GHG.

While the disclosure of such business impacts will be required only when the securities law threshold of “materiality” has been crossed, as the Guide illustrates, such impacts will likely go beyond the obvious responses to new or existing environmental legislation. For example, access to capital may be restricted for companies with high climate change risks. In some cases, business may be interrupted, operations may have to be modified or relocated, additional capital expenditures may be necessary (with little or no return) and some reporting issuers will be forced to respond to “inter-jurisdictional operating complexities” brought about by operating in jurisdictions with varying GHG emissions rules, offset trading systems, taxes, and their attendant risks and opportunities.

B. “What Investors Want to Know About Climate Change”

It is presumed that quantifiable climate change business impacts characterized by discreet transactions or obligations (e.g., such as those stemming from carbon taxes or carbon offset trades) will be recognized and disclosed in a reporting issuer’s financial statements. However, as the Guide indicates, investors are increasingly seeking more detailed and nuanced disclosure in the reporting issuer’s MD&A to understand how a reporting issuer assesses the impact of climate change on current and future financial conditions, results of operations, and cash flows. Again, while only “material” issues need be disclosed, reporting issuers are cautioned that boilerplate disclosure is not useful to investors deciding whether to invest or to continue investing in an issuer.

The Guide outlines five categories of information that should be presented in a reporting issuer’s MD&A to address climate change issues:

1. **Business Strategy.** Investors should be presented with an overview of what aspects of climate change the

reporting issuer has factored into its business strategy, including how climate change will affect the issuer’s competitiveness, will present a threat or opportunity for the issuer’s business, or will impact strategy for reducing GHG emissions or other strategies for noncapital resources like the development of operating technologies, brand value, and reputation.

2. **Risks.** A reporting issuer should describe the risks presented by climate change, including the physical risks (e.g., changes to weather patterns), regulatory risks (e.g., heightened regulatory oversight and scrutiny), reputational risks (e.g., negative customer perceptions of reporting issuers failing to address climate change issues), and litigation risks (e.g., lawsuits against heavy GHG emitters). Such climate change risks should be spelled out along with related mitigation strategies.

3. **GHG Emissions.** To the extent that it is material to evaluating a reporting issuer’s performance and future prospects, that issuer’s direct and indirect GHG emissions and related intensity data should be discussed in its MD&A.

4. **Financial Impacts.** The impact of climate change on financial operations, cash flows, and the financial condition of the reporting issuer should be discussed along with the future financial implications.

5. **Governance Processes.** The governance and organizational processes used by the reporting issuer in identifying and managing climate change issues should be described.

C. “Developing MD&A Disclosures About Climate Change; Organizing and Presenting Disclosures”

The Guide recommends that, in general, it is sufficient for a reporting issuer to provide MD&A disclosures about climate change annually. Interim MD&A disclosures regarding climate change can be limited to material changes to information reported previously in annual MD&A. Three possible options for the placement of climate change information within MD&A: (i) in a separate climate change section; (ii) in a subheading within the risk section; or (iii)

interspersed within the various sections of the MD&A “to reflect the linkages between climate change and other aspects of the company’s business, such as corporate strategy, capital resources, liquidity, key performance drivers and outlook.”

D. “Overseeing the Integrity of MD&A Disclosures About Climate Change”

According to the Guide, a reporting issuer’s management and the board of directors have responsibilities for the reliability and timeliness of corporate disclosures such as MD&A. The Guide suggests that management should establish and maintain appropriate information systems to ensure that the effects of climate change issues on the reporting issuer are readily discernable. Moreover, management should also be tasked with ensuring that a rigorous and thoughtful analysis of the reporting issuer’s business is regularly conducted to reveal all material climate change issues.

V. Conclusion

Although governmental regulation to mitigate climate change will impact the operations of some companies more than others, it is likely that all reporting issuers will need to assess the nature and magnitude of existing and anticipated reporting requirements. Investors and regulators alike will require that reporting issuers ensure that climate change issues feature prominently in continuous disclosure. Reporting issuers should immediately start taking steps to analyze the effect of environmental matters and climate change on their business and to ensure that such matters are adequately disclosed.

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FERC’S UNIQUE ABILITY TO OVERSEE THE URGENTLY NEEDED EXPANSION OF THE ELECTRIC TRANSMISSION GRID

James H. McGrew

Our nation’s electric transmission grid will require significant expansion and upgrading to accommodate 21st-century economic demand and current environmental policy. All proposed expansion of the electric transmission grid will in turn require permitting of the construction and siting of the transmission lines by a regulatory authority. The current regulatory system, in which each state makes permitting and siting decisions for electric transmission facilities within its boundaries, does not lend itself to meeting the urgent need for a high quality interstate grid. As this article discusses, the Federal Energy Regulatory Commission (FERC) is ideally suited to provide the regulatory oversight and permitting decisions needed for the required development of the interstate grid.

I. The Current State of the Electric Transmission Grid

Some commenters describe the electric grid in the United States as the world’s most complex machine. There are more than 3,000 electric utilities in the country, including investor-owned and government-owned utilities as well as cooperatives. The bulk power system itself consists of three independent networks: the Eastern Interconnection, the Western Interconnection, and the Texas Interconnection. Overall reliability planning and coordination are provided by the North American Reliability Council (NERC) under the regulatory umbrella of FERC.

The grid in the United States evolved on mostly an ad hoc basis over the last century, primarily to serve the needs of individual utilities as opposed to serving national needs. Most of the grid was developed before the digital age. There are approximately 157,000 miles of high-voltage (greater than 230 kV) electric transmission lines. U.S. Department of Energy, Office of Electricity Delivery & Energy Reliability, <http://www.energetics.com/gridworks/grid.html>. The North

American grid represents approximately \$1 trillion in assets. Renewable Energy World.com, <http://www.renewableenergyworld.com/rea/news/article/2009/04/green-superhighway-overhauling-the-grid-to-accommodate-renewables>.

II. Needs of the 21st Century

Electricity demand will increase by as much as 36 percent in 2030 as compared to 2007 levels. Energy Information Administration, Annual Energy Outlook 2009 with Projections to 2030, <http://www.eia.doe.gov/oiaf/aeo/electricity.html>. Moreover, some members of Congress are now discussing the imposition of a nationwide requirement that as much as 25 percent of electric generation must come from renewable sources by 2025. Also, there is ongoing discussion of constructing a “smart grid,” i.e., a power system from generation to end user that integrates two-way flows of communications and energy as new technologies enable new forms of supply, delivery, and consumption.

All these societal demands will require both additions to and enhancement of the electric grid. The renewable energy sources most likely to meet the “25 percent by 2025” target would be predominantly wind and solar generation. Wind and solar generation resources are typically located long distances away from load centers. For this reason, the nation will need many thousands of miles of new transmission facilities that traverse several states. The American Society of Civil Engineers has projected that electric utility investment needs, particularly for transmission facilities, could be as much as \$1.5 trillion by 2030. American Society of Civil Engineers, Report Card for America’s Infrastructure, <http://www.infrastructurereportcard.org/fact-sheet/energy>.

III. The Current Regulatory Structure

FERC only has the limited jurisdiction over the energy industry that Congress grants to it. At present, FERC has very little jurisdiction over the permitting (certification) and siting of electric transmission facilities. Such permitting authority belongs mostly to individual states to the extent a utility proposes to build

transmission facilities within or through a particular state. On the other hand, FERC does have jurisdiction to regulate the rates, terms, and conditions of electric transmission in interstate commerce. This patchwork quilt of jurisdictional authority over electric transmission does not lend itself to the development of the national grid that is required by the 21st-century economy and environmental goals.

The Energy Policy Act of 2005 (EPACT 2005) added Section 216 to the Federal Power Act (FPA), originally enacted in 1935, 16 U.S.C. §§ 791a *et seq.*, to provide FERC with backstop siting authority if (a) the Department of Energy (DOE) has designated a certain geographic area as a national interest electric transmission corridor, and (b) a state does not have authority to approve siting or has withheld approval of siting for more than one year. A recent judicial opinion effectively gutted the limited usefulness of Section 216 by holding that Section 216 does not apply to cases in which a state actively denies an application for siting authority. *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

Applications for permits to site and construct long-distance high-voltage transmission facilities almost always raise sensitive environmental and not in my backyard (NIMBY) issues. Even when a proposed transmission line is entirely within one state, the utility’s permitting application creates a battlefield of opposing viewpoints and interests. *See, e.g., CPUC Decision 08-12-058 issued on December 24, 2008 in the matter of San Diego Gas & Electric Company’s application to construct its Sunrise Powerlink Transmission Project*. Any applicant seeking to construct a transmission line crossing several states faces substantial litigation in each state and has to prevail in litigation in each state to obtain authorization for the proposed project.

IV. FERC Can Play an Important Role

The question of who (the states or the federal government) should have siting authority for interstate transmission facilities is clearly a political question. The answer to that question will be worked out through the political processes of this country. This article does not

take a position on this controversial political issue. However, there are two proposals presently under discussion that implicate FERC, and this article explains why FERC is institutionally well suited to assume more jurisdiction over the siting of transmission facilities.

One idea under consideration is simply to preempt state permitting authority by replacing it with federal authority to be exercised by FERC. In other words, Congress could amend the FPA to provide that public utilities, i.e., investor-owned utilities regulated by FERC, must apply to FERC for a certificate of public convenience and necessity, i.e., a permit to construct and operate transmission facilities in interstate commerce. FERC's permitting authority would then replace that of the states. Such a concept has ample precedent at FERC itself.

Since 1920, FERC and its predecessor, the Federal Power Commission, have reviewed applications and issued licenses for hydroelectric projects that are not owned and operated by the federal government. These nonfederal hydroelectric projects require transmission facilities to enable the electricity generated by the project to reach the electric grid. FERC is responsible for authorizing the construction and operation of those facilities, including authorization for the siting of those facilities.

Since 1938, FERC and its predecessor have also reviewed applications and issued certificates of public convenience and necessity for the construction and operation of natural gas pipelines in interstate commerce, including siting authorization. Thus FERC already has the experience, the institutional structure, and the expertise to take on the added responsibility of authorizing the siting of non-hydroelectric transmission facilities.

Members of Congress are keenly aware that states jealously guard their jurisdiction over transmission siting and are often loath to surrender that jurisdictional authority to the federal government. Thus, option 1 (giving FERC plenary jurisdiction over the siting of interstate transmission facilities) may be politically unworkable. In that event, Congress may turn to a less

problematic alternative. Under option 2, FERC would have significant backstop jurisdiction (rather than primary jurisdiction) over the siting of transmission facilities. Such backstop authority would be more extensive than the current backstop authority under EPACT 2005, which, as explained above, the Fourth Circuit has effectively gutted. Option 2 would give FERC siting jurisdiction if the states, either working individually or cooperatively (perhaps through an Independent System Operator or a Regional Transmission Organization), are unwilling or unable to authorize siting of proposed transmission facilities after a specified time period, for example, one year. No designation of "national interest corridors" by the DOE would be required, and FERC's authority would apply even if one state expressly denied an application for transmission siting.

If Congress does amend the FPA to provide for either option 1 or option 2, we must consider how such expanded FERC authority would work in practice and how specifically such expanded jurisdiction would allow for complete and detailed consideration of the environmental issues related to electric transmission.

V. How Would FERC's Expanded Jurisdiction Actually Work?

First, for reasons of practicality and efficiency, FERC should be the lead agency in conducting all reviews, including the rate, engineering, and environmental aspects implicated by the utility's application to construct and operate interstate electric transmission facilities. As the lead agency, FERC would cooperate with and be informed by all other agencies having expertise and relevant jurisdiction, including federal agencies, such as the EPA, and state environmental agencies, such as fish and wildlife agencies. FERC currently acts as the lead agency for reviewing applications to construct hydroelectric facilities, interstate natural gas pipelines, and liquefied natural gas import facilities.

Second, FERC should allow a "prefiling" process. The prefiling process would allow for environmental and logistical review of a proposed application before the formal filing of the application itself. The formal filing of

an application at FERC often triggers rules, procedures, and deadlines that make it difficult for FERC to offer an open and transparent forum for the consideration of all the issues related to a proposed project. In the prefiling process, by contrast, FERC can issue notices to affected landowners, public interest groups, and federal and state agencies with appropriate jurisdiction. During the prefiling period, FERC staff members can sponsor, or require the applicant to sponsor, open houses or town hall meetings in which representatives of the applicant can meet with citizens, members of the press, government officials, members of the business community, and anyone else affected by the application for construction of transmission lines. This prefiling process allows for a full and frank exchange of views and allows both FERC staff members and the applicant to become aware of significant or unique problems raised by the proposed application. Often, the applicant will have a chance to amend its draft application during the prefiling process to cure any problems created by the initial proposal. The prefiling process usually produces a better product when the formal application is actually filed at FERC, and the prefiling process usually reduces the time needed to review the application.

Third, the FERC procedures should allow for the due process the application requires. FERC would provide formal notice of the application with an opportunity to intervene in the proceeding and to comment on the application. FERC will sponsor public “scoping meetings” to allow the public to discuss the environmental and engineering aspects of the application. FERC would issue a Draft Environmental Impact Statement with full opportunity to comment, and FERC would issue a Final Environmental Impact Statement, again with full opportunity to comment for affected parties and agencies.

Fourth, FERC would assemble a unified record regarding the application because FERC is the lead agency reviewing the application, including its environmental aspects. FERC would then issue an order on the application, together with any conditions requiring mitigation of significant environmental impacts. Because the FPA requires a party to request rehearing of a FERC order as a condition of appealing

any FERC order, there would likely be requests for rehearing of FERC orders and subsequent orders on rehearing issued by FERC.

Fifth, the FPA provides for appeals of FERC orders to the United States Court of Appeals. Thus, allowing FERC to have siting authority, or more correctly, certificate authority for transmission facilities, will provide for orderly appeals. A unified appeal based on a unified record seems to be preferable to piecemeal appeals from each state siting decision that may pertain to a proposed transmission project. Any amendment of the FPA could and should allow for an expedited hearing on transmission projects that significantly affect the public interest.

Sixth, FERC would have to be given authority to award eminent domain powers to successful applicants. FERC grants eminent domain powers to successful applicants for interstate natural gas pipelines as provided by the Natural Gas Act, originally enacted in 1938, 15 U.S.C. §§ 717 *et seq.*

VI. Conclusion

To meet this nation’s increased demand for electricity and modern environmental goals, we will need to make significant improvements to the interstate electric transmission grid. That expansion in turn will require permitting and siting authorization. FERC is ideally suited to exercise increased jurisdictional authority over such permitting and siting decisions. Expanded FERC jurisdiction would permit “one-stop shopping” in which one agency decides the rate, public need, siting, and environmental issues raised by a new application. FERC already has the institutional structure and expertise to handle the challenge if Congress chooses to expand FERC’s authority in this vital area.

James H. McGrew is a partner at *Bruder, Gentile & Marcoux, L.L.P.*, in Washington, D.C., and has specialized in practice before FERC for over 29 years. He is the author of *Basic Practice Series: FERC*, 2nd edition, published by the ABA in 2009.

HIGHLIGHTS FROM THE SEMINAR ECONOMIC STIMULUS: THE NEXT FISCAL YEAR FOR RENEWABLES

Brandon N. Robinson

On October 21, 2009, the American Council on Renewable Energy, the American Bar Association Section of Environment, Energy, and Resources (ABA SEER), and the Energy Bar Association cosponsored a seminar entitled “Economic Stimulus: The Next Fiscal Year for Renewables.” Moderated by Michael J. Zimmer of Thompson Hine and Robert F. Riley of Williams Mullen, the panel of speakers included: Peter Maloney, chief editor of *Platts Global Energy Report*, New York; Thomas O. Mason of Williams Mullen; Michael Zimmer; and Scott Miller, director of the Energy and Environmental Programs for the Consortium for Energy, Economics and the Environment at Ohio University. Robert Riley, who co-moderated but did not speak, included a legislative update on the latest climate change legislation, regulations, and court decisions. The main headings below are the titles of each presentation within the seminar.

I. “The Obama Stimulus Record: This Year and Looking to FY 2010”

Peter Maloney outlined the allocation of funding for energy projects within the American Recovery and Reinvestment Act of 2009 (ARRA). Maloney noted that, whereas approximately \$65 billion was allocated for energy-related agencies, there was close to \$80-81 billion allocated for energy-related projects, as some energy-related projects were allocated to nonenergy-related agencies. ARRA funding for research and development included, among other things, \$1 billion allocated toward FutureGen, a government/industry-driven partnership to create a coal-fueled, near-zero emissions power plant. Maloney said, however, that the fate of FutureGen is still unclear given its history and its relatively few remaining participants. The ARRA also allocated \$800 million to the Clean Coal Power Initiative Round 3; specifically, two awards totaling \$408 million were made in July 2009 to Basin Electric Power Cooperative and approximately \$400 million was allocated to Hydrogen Energy International, a joint

venture between British Petroleum (BP) and Rio Tinto, for carbon capture demonstration projects.

Maloney indicated that ARRA revisions to the Department of Energy (DOE) Loan Guarantee (LG) program—originally established under Section 1703 of the Energy Policy Act of 2005 (Section 1703)—have hopefully alleviated its initial problems. The DOE issued five solicitations, but did not make a single award until 2009. Under Section 1703 of the old LG program, applicants had to come up with the credit subsidy cost to be eligible. When that proved to be a barrier to entry, Section 1705, inserted by the ARRA, set aside \$6 billion to cover the credit subsidy costs (Section 1705). The ARRA also substituted the “innovative” technology eligibility requirement with “commercially deployable” to expedite the prompt implementation of projects. Two conditional awards were made in July 2009 to Nordic Windpower and Beacon Power. Solyndra, whose award for \$535 million was finalized in September 2009, originally applied under Section 1703. After reviewing its application, DOE found that Solyndra met the new Section 1705 requirements, such that Solyndra could also receive money for its credit subsidy costs. DOE says it expects to see more Section 1703/Section 1705 arrangements, whereby recipients may receive loan guarantees under old Section 1703 and additionally recover credit subsidy costs under new Section 1705.

The ARRA also extended the production tax credit for wind farms until 2012, and for geothermal/biomass/landfill gas projects until 2013. One may choose the investment tax credit in lieu of the production tax credit, or, thanks to a new Treasury program enacted by the ARRA, select cash grants in lieu of the investment tax credit or the production tax credit. Projects must be in construction by December 31, 2010.

Finally, Maloney saw several upcoming challenges. First, the pace of loan guarantee approvals and disbursements is still an issue. The financial community also has been unhappy with the requirement limiting governmental support to 80 percent of the project costs, thus requiring the 20 percent balance of the project costs to be provided by either equity or

subordinated debt. Second, there are issues with the Treasury cash grant rules—the Treasury tried to exclude tax-exempt entities from receiving these grants. This bars state pension funds, which, in turn, bars many private equity funds that receive money from pension funds from participating in the grant program. Third, Wall Street is trying to figure out how to monetize the depreciation as well as the tax incentive in these cash grant structures. Finally, it is unclear whether Congress will act on its promise to replenish the \$2 billion that was taken from the original \$6 billion in the DOE Loan Guarantee program for purposes of funding the Cash for Clunkers program.

II. “Economic Stimulus: Impacts on Breaking the Financing Log Jam for Projects and Companies”

Thomas Mason described the various funding opportunities available, in the form of grants, contracts, cooperative agreements, and loan guarantees. As of October 10, 2009, \$16 billion in federal contracts had been awarded, and federal contractors under the ARRA had received \$2 billion. With respect to DOE funding under the ARRA, \$18.6 billion in federal funds were available, with only \$1.02 billion being paid. As these figures show, the vast majority of energy-related funding has yet to be awarded or distributed. Mason emphasized, as had Peter Maloney, that there are several energy-related ARRA funding opportunities outside the traditionally energy-related agencies, and that opportunities come not only in the form of grants, but also as contracts and loan guarantees.

Mason noted, however, there are strings attached to ARRA funds. Receipt of federal funds is accompanied by legal issues that can be traps for the unwary, including greater record-keeping requirements, government audits, ethics and compliance mandates, Davis-Bacon prevailing wage requirements, collective bargaining agreement requirements, and increased civil and criminal penalties. Unlike other contracting and funding opportunities, government contracts are highly regulated. Those unaccustomed to receiving federal funds could face criminal penalties, civil fraud proceedings, suspension, or disbarment as federal contractors if violations occur. Procurement is regulated by the Federal Acquisition Regulations

(FAR), and contractors must be very familiar with these regulatory terms as well as laws and regulations addressing reporting requirements, kickbacks, “Buy American” requirements, assignment of claims conditions, international contracting requirements, billing/accounting cost principles, and employment laws.

Mason concluded that the ARRA brings several great opportunities for federal contracting, but is also accompanied by added responsibilities. He warned potential recipients not to be “over-committed and under-responsible,” as high quality and transparency are expected. Mason added that changing the landscape with respect to government contracts creates opportunities for leadership to shape proposals, and to provide government with ideas on how to solve problems.

III. “Renewables Jobs: Current Trends, Future Forecasts on Jobs for Main Street: The Forecast for Renewables in Ohio and Beyond”

Scott Miller discussed the state of Ohio’s experience with adapting to a renewable economy. According to him, Ohio is the seventh largest economy in the nation, with the third largest manufacturing sector. Over the past two years, however, Ohio has lost 1,198 (6%) of its manufacturers and has shed 106,629 jobs, with unemployment rates rising to 10.1 percent in September 2009. Therefore, Ohio has made a concentrated effort to develop advanced energy initiatives within the state. As the seventh largest energy consuming state, Ohio has committed investments to energy, including the Third Frontier Program (a program dedicated to promoting commercial research and development) and the state Advanced Energy Job Stimulus Fund (a three-year-long \$150 million advanced energy funding initiative first released in 2009). The Governor has made advanced energy a major economic driver, resulting in Ohio placing fourth in clean energy jobs, third in energy efficiency, fourth in environmentally friendly production, and seventh in conservation and pollution mitigation jobs. Ohio’s commitment to renewable energy is evidenced by its ARRA-funded state energy programs and by the renewable energy employers based in that state. For

instance, ARRA-funded energy programs in Ohio include the Advanced Vehicles Pilot Program, Brownfield Cleanup, the State Energy and Energy Efficiency and Conservation Block Grant Programs, the Energy Star Rebate Program, and the Home Weatherization Program. Ohio has risen to become the second largest state behind California in wind component manufacturing, as ranked by the Great Lakes Wind Network and the Renewable Energy Policy Project. One manufacturer of bolts for wind turbines in Bedford Heights, Ohio, manufactured more than half a million parts for the wind industry. A solar installation company in Athens, Ohio, went from three employees in 2001 to being listed as one of the fastest growing companies in America in 2009, thanks to more than \$400,000 in ARRA funding.

In sum, Miller points to Ohio as a state that has taken significant steps toward developing a skilled work force capable of building, manufacturing, installing, operating, and maintaining new energy technologies. Moving forward, Ohio and other states must accelerate private investment and increase state and federal low-interest loan guarantees, focus efforts on building the export market for these technologies, and build stronger connections between universities and the private sector to identify and accelerate the pace of innovation. Companies that are ahead of this “adoption curve” will be better positioned to meet the coming challenges related to energy supply, carbon restraints, and the “triple bottom line,” which, according to Miller, consists of economic, environmental, and social value. Miller predicted that entrepreneurial development will be critical as financing and business models change along with public acceptance and, consequently, corporate culture. Miller encouraged what he called a “cathedral-builder’s mentality”—the idea of working toward a lasting legacy for future generations, even if completion may not be seen in this generation.

IV. “Renewable Energy Infrastructure: What Is Needed to Make the Stimulus Work?”

Michael Zimmer emphasized that although \$13 trillion in private capital is planned to be invested in traditional energy technologies by 2020, the development of

renewable energy has been focused on the supply and generation attributes of projects, without paying enough attention to the renewal and expansion of infrastructure critical for successful project development for wind, solar, biomass, hydro, biofuels, geothermal, and waste management projects. He emphasized that renewable infrastructure investment is essential for ARRA renewable energy incentives to succeed. Of the billions of dollars set aside for transmission and smart grid development, much of this money has yet to be spent. This is critical, according to Zimmer, because transmission is the next major cleantech investment of the upcoming decade. Because the ARRA granted \$3.25 billion each in additional borrowing authority to the Bonneville Power Administration and the Western Area Power Administration, Zimmer noted that “key states to watch” for transmission program development should include the states within those territories.

Zimmer explained that, as the funding to states and localities runs out, as the grant in lieu of tax credit program expires, and as the current tax credits program expires, there will be a great need for public/private partnership and private lending by the end of the 2010 calendar year. He also stated that relying on continuing government investment on a long-term basis is not an option. Zimmer concluded with several goals for the upcoming year, as follows: (a) review and preserve the importance of infrastructure development for successful renewable energy projects; (b) understand that achievement of our national renewable goals will require integrated support for infrastructure among federal, state, Wall Street, and main street interests; (c) realize that high quality educational exchange is required among stakeholders; (d) understand that standardization benefits need to be promoted for the purposes of interconnection, transmission, loans, equity, investments to support merger and acquisition (M&A) deals, and loan securitizations; and (e) work towards building an entire industry, and not just a mere collection or portfolio of projects. Finally, he stressed that we must use energy, economics, and environment in an integrated manner, together with Internet technology and access to capital, to develop 21st-century infrastructure to achieve renewable energy goals.

V. Question-and-Answer Session

One questioner asked whether a developer who receives a loan guarantee is considered a contractor subject to the FAR. The panel speakers answered yes, that generally, the loan guarantee will contain obligations, or “strings” of assurances that must be fulfilled. For an applicant to receive a loan guarantee, money goes through executive channels. However, details and technical requirements for the loan guarantee will go through other agencies. Therefore, a loan guarantee recipient not only has an agreement with DOE, but it also has agreements with other agencies with respect to obtaining money.

VII. Conclusion

As the above presentations indicate, billions of dollars in ARRA opportunities still remain under various federal agencies through the next fiscal year to assist in making renewable projects economically viable through grants, contracts, and loan guarantees. Realization of the ARRA’s goal of shifting America’s reliance from fossil fuels to renewable generation will require continued public and private efforts to finance and promote major investments in the transmission infrastructure. Applicants for ARRA-funded opportunities should, however, be cognizant of the many legal obligations and conditions that accompany receipt of money from federal agencies under the ARRA. In this regard, ARRA participants and potential applicants should closely monitor federal agencies as they continue to provide clarification and seek input with respect to the solicitation and implementation of current and future funding opportunities.

Brandon N. Robinson is an attorney at *Balch & Bingham LLP* in the firm’s Birmingham, Alabama, office, who advises clients on opportunities and obligations under the ARRA. He also serves as Vice-Chair of Membership for the ABA SEER Carbon Trading and Energy Finance Committee.

Cooperative Federalism and Green Infrastructure Development

Quick Teleconference

**Wednesday, January 20, 2010
12:00 p.m. – 1:30 p.m. Eastern Time**

Carbon Trading and Energy Finance Committee

The success of recent federal initiatives associated with “green infrastructure” likely will depend on their harmonization with existing state and regional programs, particularly in the areas of (1) climate change legislation and carbon cap and trade, (2) renewable portfolio standards and renewable energy credits, (3) transmission investment and expansion, and (4) smart grid and demand response.

As part of the process of balancing competing interests, legal questions have arisen concerning “federalism” and doctrines such as “preemption,” “supremacy,” and “states rights.”

Please join our CETF Committee Co-Chair and two Vice Chairs as they moderate a distinguished panel of experts who will discuss the federalism issues associated with the development of a national green infrastructure.

There are two ways to participate in this program either: attending a host site location or individual dial-in. Host site locations are available in Los Angeles, Chicago, and New York.

**For more information, visit
[www.abanet.org/enviro/committees/
carbonenergytradfin/](http://www.abanet.org/enviro/committees/carbonenergytradfin/)**

NOTES FROM THE EDITOR: THE SUCCESSFUL LAUNCH OF FIVE NEW FOCUS AREA SUBCOMMITTEES

Kimberly E. Diamond

The Carbon Trading and Energy Finance Committee (CTEF Committee) proudly launched five new focus area subcommittees (Subcommittees) this year as an innovative approach to allow CTEF Committee members to explore new areas and become more involved in various Committee activities. Each Subcommittee welcomes your participation, and there is no limit on the number of Subcommittees you may join. If you would like to become involved in one or more Subcommittees, you may follow up directly with the corresponding Vice Chair for each Subcommittee in which you are interested (*see Figure 2*). Please visit the CTEF Committee home page at <http://www.abanet.org/environ/committees/carbonenergytradfin/> for each Vice Chair’s contact details, as well as other information regarding upcoming events and activities. A brief description of each Subcommittee follows.

I. Climate Change Mitigation Subcommittee

The emergence of carbon offset markets and recent congressional activity relating to cap-and-trade regulation make the formation of this Subcommittee quite timely. This Subcommittee focuses on domestic and international offsets, allowances, carbon capture and other innovative climate mitigation technologies.

The Climate Change Mitigation Subcommittee has had two productive, energetic meetings since its inception, wherein members have formulated ideas and plans relating to speaking opportunities, writing opportunities, and synergistic opportunities with other outside committees. At the most recent meeting, members discussed potential panelist opportunities at the ABA SEER’s Eighteenth Annual Meeting next year in New Orleans, ideas for *The Year in Review* contributions. They also had a lively discussion about the recent climate change decisions in the Fifth Circuit (*Comer v. Murphy Oil USA, Inc.*, No. 07-60756, 2009 WL 3321493, at *1 (5th Cir. Oct. 16, 2009)) and Second Circuit (*Connecticut v. American Electric Power Company, Inc.*, Nos. 05-5104-cv; 05-5119-cv, 2009 WL 2996729, at *1 (2d Cir. Sept. 21, 2009)), wherein each reversed the respective district court’s dismissals of the underlying complaint on the grounds that the claims were not justiciable.

II. Commodities and Derivative Risk Subcommittee

This Subcommittee investigates the differing regulatory needs of environmental finance and commodities markets versus the needs of traditional energy commodities markets and derivatives markets. Goals of this Subcommittee include, among other things, investigating the roles of over-the-counter (OTC)—generally, non-exchange-traded stocks—products, the current state of availability of hedging instruments in the energy and environmental markets, and the interaction between the regulation of the financial/derivatives market and the regulation of the physical commodities market.

Figure 2

Focus Area Subcommittee	Vice Chair
Climate Change Mitigation	Laurie Ristino
Commodities and Derivatives Regulation	Paul B. Turner
International	Dennis Mahony
Load Servicing Entities (LSE)	Jeffrey M. Gray
Project Finance Transactions	Paul Forrester

III. International Subcommittee

The International Subcommittee focuses on the facilitation of regular exchanges of information and insight on relevant international developments. One of the topics this Subcommittee will pursue is the examination of the idea of a North American Cap-and-Trade Regime. During its recent first meeting among members, this Subcommittee resolved to compile a list of groups within and outside the ABA that Subcommittee members would like to explore further, and begin making contact with such groups. To provide leadership in assisting this Subcommittee to achieve its goals of (1) education and (2) outreach—largely through writing and speaking endeavors—members of this Subcommittee appointed two officers: an Education Officer and a CTEF International Subcommittee Publications Coordinator. The Subcommittee plans to hold its next meeting shortly.

IV. Load Serving Entities (LSE) Subcommittee

This Subcommittee investigates issues relating to the impacts of energy and carbon markets on LSEs, including investor-owned utilities, cooperative utilities, and municipally owned utilities. Emerging carbon cap-and-trade regimes have significantly impacted LSEs, resulting in an increased awareness of the interplay between federal and state regulation, a rebalancing of

generation portfolios to increase the proportion of utility-scale wind energy and nature gas-fired generation in the energy mix, a heightened interest in demand response and energy efficiency programs, and other related matters. As stated during its recently held first meeting among members, the LSE Subcommittee is endeavoring to have legal practitioners who service LSE share their knowledge and have Subcommittee members engage in lively debates regarding issues impacting the LSE industry.

V. Project Finance Transactions Subcommittee

The availability of recent federal funding for renewable energy projects, recent congressional activity relating to carbon cap-and-trade initiatives, and substantial state activities in these areas have provided new opportunities in the project finance space. This Subcommittee focuses on both national and international project finance transactions and structures that are desirable for use in the current renewable energy, carbon capture and sequestration, and emissions allowance landscape. This Subcommittee also seeks broad participation from CTEF Committee members, so that these members who may or who may not have prior project finance experience will benefit from the intellectual contributions of all those participating in this Subcommittee.

NR&E ONLINE!



Section members are able to view *Natural Resources & Environment* in the Section Members Only portion of the Section Web site. Issues dating back to 2002 are available. To view *NR&E*, log onto

the Section Web site [www.abanet.org/ environ/](http://www.abanet.org/environ/) with your ABA Member ID number and password.



Carbon Trading and Energy Finance
Committee Newsletter

LIKE TO WRITE?

The Carbon Trading and Energy Finance Committee welcomes the participation of members interested in preparing this newsletter. If you would like to lend a hand by writing, editing, or identifying authors or issues, please contact the newsletter vice chair: Kimberly E. Diamond at kimberlydiamond@hotmail.com

CALL FOR NOMINATIONS

THE SECTION INVITES NOMINATIONS FOR THE FOLLOWING AWARDS:

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.

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 2009 calendar year [consideration may be given to allowing projects that occurred in the 2008-2009 or 2009-2010 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.

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 2009 calendar year. Nominees are likely to be state or local bar sections or committees focused on environmental, energy, and natural resources issues.

Nomination deadlines: April 23, 2010.

These Awards will be presented at the ABA Annual Meeting in San Francisco in August 2010.

2010 ABA AWARD FOR EXCELLENCE IN ENVIRONMENTAL, ENERGY, AND RESOURCES STEWARDSHIP

The *2010 ABA Award for Excellence in Environmental, Energy, and Resources Stewardship* was established in 2002 to recognize and honor the accomplishments of a person, organization, or group that has distinguished itself in environmental, energy, and resources stewardship. Nominees must be people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of sustainable development, energy, environmental, or resources stewardship. This may include a major development in law or policy that serves to enhance conservation, responsible development, prudent resource use, and pollution abatement or mitigation, or it may be a recognition for a sustained period of leadership in the development of law and policy in this area. The Award may also be given for significant achievements in legal practice or in business, including corporate charitable contributions of funds, land, or resources; in written articles; in teaching; in advocacy before courts, agencies, legislators, or other institutions; or for any other significant achievement that evidences excellence in environmental, energy, and resources stewardship.

Nomination deadline: June 11, 2010.

The Award will be presented at the 18th Section Fall Meeting in New Orleans in September 2010.

2010 ABA AWARD FOR DISTINGUISHED ACHIEVEMENT IN ENVIRONMENTAL LAW AND POLICY

The ABA Standing Committee on Environmental Law ("SCEL") and the Section of Environment, Energy, and Resources invite nominations for the *2010 ABA Award for Distinguished Achievement in Environmental Law and Policy*. This award recognizes individuals or organizations who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process or understanding of environmental protection and sustainable development.

Nomination deadline: March 26, 2010.

The Award will be presented at the ABA Annual Meeting in San Francisco in August 2010.