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OVERVIEW: INTERSECTION OF CLIMATE SECURITY WITH ENERGY PRODUCTION AND CONSUMPTION

by Vickie Patton*

Global warming is the most serious and profound impact associated with energy production and consumption. New energy policies may or may not aid in lowering global warming pollution. A rigorous climate security framework is essential to ensure the nation's collective energy investments drive global warming pollution to dramatically lower levels. In the United States, environmental advocates have pressed for a protective, declining national cap on global warming pollution to spur investments in low carbon energy technologies and to inextricably align energy policy with the imperative of science-based greenhouse gas ("GHG") reductions. While comprehensive national legislation to cap and reduce global

warming pollution is essential, existing law should be fully enforced to harmonize today's energy production and consumption practices with climate security.

On April 10, 1998, then U.S. Environmental Protection Agency ("EPA") General Counsel Jonathan Cannon determined the Clean Air Act empowered EPA to regulate carbon dioxide, a principal heat-trapping gas.¹ On April 2, 2007, the United States Supreme Court agreed. In *Massachusetts v. EPA*,² the high Court held the statute's "sweeping" definition of "air pollutant" "embraces all airborne compounds of whatever stripe." "Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons"—all principal GHGs—"are without a doubt 'physical [and] chemical. . . substance[s] which [are] emitted into . . . the ambient air.'"

The case made its way to the Supreme Court because EPA under the Bush administration decidedly reversed the Cannon legal opinion. EPA refused to establish emission limits for GHGs, withdrew the Cannon legal memorandum, and inserted in its place a new legal memo categorically declaring: "the CAA does not authorize EPA to regulate for global climate change purposes."³

The resulting delay in progress comes at a high cost. In the nine years since the April 1998 Cannon memorandum, U.S. sources alone discharged more than 60 billion tons of carbon dioxide into the atmosphere.⁴ The extensive volumes of pollution escaping federal regulation perilously elevate carbon dioxide levels to the highest concentrations in 650,000 years.⁵ The scientific imperative for strict limits on global warming gases has become grim and urgent.

But the Bush administration has staunchly refused to adopt mandatory national pollution limits on carbon dioxide levels or to participate in binding multinational accords. Internationally, the United States has devolved from a principal architect of the world's global warming policy to a marginal participant. Domestically, EPA has stymied rather than enabled state climate initiatives.⁶

The states alone have devised meaningful corrective action. States are adopting science-based timetables and goals to reduce global warming pollution, and the blueprints for achieving these reductions. The California Global Warming Solutions Act of 2006 requires returning GHG emissions—statewide—to 1990 levels by 2020.⁷ California's urgent race to achieve these reductions is buffeted by an array of energy policy measures including laws to limit global warming pollution from motor vehicle tailpipes, expansive requirements for energy efficiency and renewable electricity generating resources, and the nation's first GHG emission limits for power plants.

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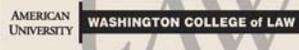
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Numerous states have advanced mandatory limits on global warming pollution while national policy has retreated. A coalition of eastern states crafted a regional cap on carbon dioxide from the power sector. Five western states are now collaborating on a regional global warming pollution abatement program. With California, a dozen states east and west, have adopted programs to curb GHGs from motor vehicle tailpipes. These tailpipe limits now implicate over one-third of the U.S. motor vehicle fleet and two percent of the total GHGs in the Earth's atmosphere.

The diligence observed in the states sharply contrasts with the national political climate on global warming. Some opponents of national action argue the Clean Air Act's muscular power to address global warming should atrophy while Congress considers legislation. But, while Congress deliberates, the world's largest coal company has hired former House Majority Leader Dick Gephardt to fight legislative limits on carbon dioxide.⁸ Notwithstanding the Supreme Court's historic decision, the forces of delay and diminishing returns are circling the beltway.

At the same time, countervailing forces for national leadership could not be more compelling. The science commands a protective, comprehensive solution. The states have incubated new policies and technologies that can be readily scaled up for national application. Major businesses such as Caterpillar and Shell have allied with conservationists in calling for rigorous caps on global warming pollution.⁹

A thorough, rigorous, and swift congressional response is essential for climate security. It is also the case that climate security requires EPA to end the decadal delay since the Cannon opinion and implement existing law now, during the deliberations over national legislation to ensure energy practices and policies are promptly harmonized with greenhouse gas emission reduction imperatives. This two-pronged approach to secure a safe climate is rooted in science, economics, law and politics. Such a two-pronged approach to climate security could capture the following elements:

- The present value of today's reductions. Immediate EPA administrative action during the pendency of congressional debate will help forestall the serious geopolitical consequences of a destabilized climate system. Putting in place a climate policy framework for today's energy investments will blunt the economic impacts of regulatory action that is delayed and will immediately advance innovation. Timely action today will stave off the severe social costs and compliance costs wrought by climate change.
- Informed colloquy between legislative and executive branches. Prompt EPA regulatory action, unbridled by the tightly held political reins of the current Administration, would help engage the valuable expertise of EPA's career technical staff in the national dialogue over climate security policy design and implementation.
- Smooth Transitions. Should executive branch policies leapfrog ahead of congressional action in a race to address climate security, newly adopted administrative policies can be integrated with a legislative response to smooth the transition.
- Limiting global warming pollution from coal plants and industrial activities. The Clean Air Act is expansive in providing for the regulation of global warming from coal

plants and industrial activities - both new and existing. For example, every major new industrial facility is required to maximize the emission reductions of each pollutant subject to regulation under the Clean Air Act including carbon dioxide and other GHGs.¹⁰ Further, the Clean Air Act calls for standards of performance limiting emissions from categories of stationary sources, both new and existing, that are anticipated to endanger public health or welfare.

- Curbing Global Warming Pollution from Engines and Tailpipes. The statute is likewise sweeping in providing for the establishment of GHG emission limits for new motor vehicles, motorcycles, aircraft, and large diesel engines and equipment.¹¹
- A Supreme Constraint on Evading Responsibility. The endangerment test at issue in *Massachusetts v. EPA* is routinely the trigger for regulatory action under the Clean Air Act. The Supreme Court cabined EPA's discretion to avoid responsibility for global warming pollution by rejecting EPA's reliance on a "laundry list" of factors extraneous to the endangerment test. EPA must tightly adhere to the statutory factors. EPA may refuse to regulate only if it finds that GHG emissions do not endanger public health or welfare. EPA does not, according to the Court, have "a roving license to ignore the statutory text." So *Massachusetts v. EPA* not only held that global warming pollution is subject to regulation under the Clean Air Act but it sharply curtailed EPA's latitude to evade remedial action for such pollutants.
- State Sovereignty. The balance of power between state and federal governments under the Clean Air Act has largely equilibrated through some 40 years of implementation experience. The statute pointedly protects states' prerogatives to regulate more rigorously with some very narrowly delineated exceptions. Federal climate policy has much to learn from the Clean Air Act's deeply rooted preservation of state power to exceed minimum federal standards.

In a world where scores of lives and livelihoods are precariously synchronized with current climatic conditions, there is simply no time to waste. An endeavor today to tightly integrate energy practices, investments and policies with climate security through robust implementation of existing law while breathlessly pursuing comprehensive congressional action is a prudent and urgent race against time.

This issue of *Sustainable Development Law & Policy* exploring sustainable energy could not be timelier. Many of the current issues contained within the energy and climate nexus that are essential for the next generation of policy are discussed. Contributors explore the need to develop clean energy projects, discussing sustainable finance, waste to energy projects and experiences with the Clean Development Mechanism under the Kyoto Protocol. Moreover, case studies examine the experience implementing renewable portfolio standards and ethanol policies in U.S. states and transaction costs of emission trading programs in Germany. Additionally, various other critical issues, including the impacts on biofuel development on water scarcity and the need for climate change adaptation and mitigation are explored.



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¹ Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator (Apr. 10, 1998), *available at* <http://elc.law.umaryland.edu/pdf/EPACO2memo1.pdf> (last visited May 5, 2007).

² *Massachusetts v. EPA*, No. 05-1120, WL 957332 (U.S. Apr. 2, 2007).

³ Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator (Aug. 28, 2003), *available at* <http://www.icta.org/doc/FabricantMemoAug282003.pdf> (last visited May 5, 2007).

⁴ U.S. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 - 2005*, EPA 430-R-07-002 (Apr. 15, 2007), *available at* <http://www.epa.gov/climatechange/emissions/usinventoryreport.html> (last visited May 5, 2007).

⁵ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS 2 (2007), *available at* https://www.ipcc.ch/SPM_2feb07.pdf (last visited May 5, 2007) (stating “The global atmospheric concentration of carbon dioxide has increased from a pre-industrial value of about 280 ppm to 379 ppm in 2005. The atmospheric concentration of carbon dioxide in 2005 exceeds by far the natural range over the last 650,000 years (180 to 300 ppm) as determined from ice cores. The annual carbon dioxide concentration growth rate was larger during the last 10 years (1995-2005 average: 1.9 ppm per year), than it has been since the beginning of continuous direct atmospheric measurements (1960-2005 average: 1.4 ppm per year) although there is year-to-year variability in growth rates.”).

⁶ Letter from Arnold Schwarzenegger, Governor of California, to Stephen Johnson, EPA Administrator (Apr. 25, 2007), *available at* <http://gov.ca.gov/index.php?text/press-release/6031/> (last visited May 5, 2007) (notice of intent to sue for EPA’s unreasonable delay in taking action on the federal preemption waiver for California’s motor vehicle greenhouse gas emissions standards).

⁷ CA Assem. B. 32 2006 Cal. ALS 488 (approved by the Governor Sept. 27, 2006).

⁸ *BusinessWeek*, *Coal? Yes, Coal* (May 7, 2007) *available at* http://www.businessweek.com/magazine/content/07_19/b4033075.htm?campaign_id=rss_magzn (last visited May 5, 2007) (stating “Boyce has spent \$5.5 million on Peabody’s Washington lobbying operation in the past two years. His most recent hire: Richard A. Gephardt (D-Mo.), former Majority Leader of the House of Representatives.”).

⁹ The United States Climate Action Partnership is a “group of businesses and leading environmental organizations that have come together to call on the federal government to quickly enact strong national legislation to require significant reductions of greenhouse gas emissions.” U.S. CAP members include: Alcan Inc., Alcoa, American International Group (AIG), Boston Scientific Corporation, BP America Inc., Caterpillar Inc., ConocoPhillips, Deere & Company, The Dow Chemical Company, Duke Energy, DuPont, Environmental Defense, FPL Group, General Electric, General Motors Corp., Johnson & Johnson, Marsh, National Wildlife Federation, Natural Resources Defense Council, The Nature Conservancy, PepsiCo, Pew Center on Global Climate Change, PG&E Corporation, PNM Resources, Shell, Siemens Corporation, and World Resources Institute. *See* U.S. Climate Action Partnership, <http://www.us-cap.org/>

¹⁰ *See* 42 U.S.C. 7475(a)(4) & 7479(3). Long before *Massachusetts v. EPA*, carbon dioxide emissions were subject to regulation under the Clean Air Act. *See, e.g.*, Sec. 821, Pub. L. No. 101-549 (1990) (requiring electric generating units to monitor and report carbon dioxide emissions).

¹¹ *See* 42 U.S.C. 7521(a)(1) (provides for new motor vehicle emission standards applicable to “any air pollutant” reasonably anticipated to endanger public health or welfare); 42 U.S.C. 7521(a)(3)(B) (heavy-duty vehicles or engines); 42 U.S.C. 7521(a)(3)(E) (motorcycles); 42 U.S.C. 7547(a)(4) (nonroad engines and vehicles); 42 U.S.C. 7571(a)(2) (aircraft emission standards).
