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Climate Regulation

Practitioner Insights: California Tackles Climate Change

Almost immediately after President Trump announced his decision to withdraw the U.S. from the Paris climate agreement, states and localities launched their own independent initiatives to meet the Obama administration's commitment to reducing greenhouse gas emissions. Businesses also chimed in, with leaders of several U.S. corporations announcing their intent to collaborate in furthering the spirit—if not the letter—of the Paris agreement.

California, a state that prides itself on pioneering efforts in regulating air emissions, has naturally taken a leadership role in this emerging coalition. California's ramped up effort to address climate change raises several interesting legal questions concerning the extent to which sub-national entities may play a role in meeting the objectives of the Paris agreement, namely: What exactly did the Paris agreement require of signatory nations? How might California play a role in furthering the agreement's objectives—even in the face of President Trump's decision to withdraw? What are the legal and practical limitations on California's ability to ''abide by'' the Paris agreement in the absence of a national commitment to do so?

What Does the Paris Agreement Require? As a threshold matter, the Paris agreement does not prescribe emissions goals or limits to be achieved by each nation. Rather, it establishes a *framework* for a multinational coordinated effort to address climate change, establishing a goal to hold the increase in global average temperature to ''well below'' 2 degrees Celsius above pre-industrial levels and to limit the global temperature increase to 1.5 degrees Celsius.

Beyond that, the agreement leaves it up to each of its signatory nations to set *voluntary* targets for reducing their carbon emissions, expressed as ''nationally determined contributions'' or NDCs. The agreement contemplates that the NDCs will be revised at least every five years, with each revision representing a progression beyond the last NDC. While the agreement sets forth binding procedural rules for the preparation and assessment of NDCs, there is no mechanism for enforcing them. All parties are, however, required to ''account for'' their NDCs, to provide supporting technical information ''necessary for clarity, transparency, and understanding,'' and to regularly communicate NDCs for recording in a public registry maintained by the United Nations Climate Change Secretariat. Further, developed countries are obligated to take the lead ''by undertaking economy-wide absolute emission reduction targets.''

Given these non-enforceable targets, it has been somewhat surprising to many stakeholders as to why the agreement was lauded as such a remarkable step forward and why its detractors were so vehement in their opposition. It is true that the Paris agreement represents a symbolic commitment and that surely is more than existed previously. At the same time, many have questioned why that commitment is such a significant accomplishment if it cannot be enforced. Perhaps the answer lies partially in the fact that a country that treats its commitments seriously, like the United States does, should be concerned with the apparent lack of consequences to other countries that fail to fulfill their voluntary targets.

In the end, the most prevalent explanation for the ''importance'' of the Paris agreement has been that it creates momentum for reduction in greenhouse gas emissions and provides a framework for measuring progress toward an agreed-upon goal. Thus, while not approaching everything the proponents of global commitments to address climate change would like, it put climate change front and center in a global conversation with at least voluntary commitments by countries to address the problem. Just as signing onto the Paris agreement was symbolic, stakeholders have noted that withdrawing from the agreement also sends a signal that domestic, national efforts to address climate change by EPA are unlikely to occur in the current administration.

California's Framework for Addressing Climate Change Over the past several years, consistent with its history of pioneering environmental efforts, California has adopted several statutory and regulatory mecha-

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nisms for reducing greenhouse gas emissions from both stationary sources (*e.g.*, manufacturing facilities, utilities) and mobile sources (*e.g.*, motor vehicles, trucks, off-road vehicles and equipment). In addition to this, California Gov. Jerry Brown (D) has proactively engaged other domestic and foreign entities on climate issues, and the state and local governments have recently taken several steps in furtherance of their commitment to greenhouse gas reductions. The current legal and political framework, and the status of these efforts, is described briefly below.

■ **Statutory and Regulatory Framework**

With the passage of the California Global Warming Solutions Act of 2006 (commonly referred to as AB 32), California set ambitious goals for reducing greenhouse emissions to 1990 levels by 2020. These goals were enhanced with the passage of SB 32 in 2016, which codifies a 2030 greenhouse emissions reduction target of 40 percent below 1990 levels. California set forth its strategy for achieving these goals in a ''Scoping Plan'' initially developed by the California Air Resources Board, which is updated every five years. The initial Scoping Plan set forth a range of greenhouse gas reduction actions including direct regulation, market-based mechanisms, and incentive programs. Highlights of the current framework include:

■ **Direct Regulation**

California has a robust greenhouse emission regulatory program that covers a variety of sources and sectors. One of the most controversial elements of California's program is its regulation of greenhouse gas tailpipe emissions from passenger vehicles. As a general rule, tailpipe emission limitations are established at the national level; state and local standards are preempted, meaning they cannot be adopted or enforced. Congress established this national program to ensure that auto manufacturers would not face a patchwork of regulation across the states, which would have placed undue burdens on manufacturers. At the same time, however, Congress recognized the challenge that California's unique geography posed for achieving ambient air quality standards for ozone, given the topography of the Los Angeles basin. This is why Congress established a limited exception for the Environmental Protection Agency to allow California to adopt its own emissions limitations provided certain stringent conditions were met, including that ''extraordinary and compelling'' circumstances warranted the adoption of separate standards for California.

While the EPA granted numerous waivers under this provision for California's motor vehicle emissions standards over several decades for non-greenhouse gas pollutants, in 2008, the EPA denied the state's waiver request for its greenhouse gas emissions standards for motor vehicles for model years 2009-2016. The denial occurred in the final year of the George W. Bush administration, but with the election of President Obama, California sought reconsideration of the denial in early 2009. President Obama directed the EPA to reassess the denial, and the waiver was ultimately granted on July 8, 2009. This led to a series of negotiations among automakers and regulators (both state and federal) in order to achieve ''one national program'' of greenhouse gas standards for model years 2009-2016, and a similar agreement for model years 2017-2025. In addition to regulation of greenhouse gas tailpipe emissions from passenger vehicles, California has undertaken stringent direct regulation of greenhouse gas emissions from other sources, including medium- and heavy-duty vehicles and major industrial facilities, among other things.

■ **Cap-and-Trade**

Targeting stationary sources of greenhouse gas emissions, California's legislature recently approved a 10-year extension of California's cap-and-trade program with the July 25 enactment of AB 398, which continues the current program until 2030. California's cap-and-trade program, which CARB implements under its view of its AB 32 authority, establishes a hard and declining cap on emissions from identified sectors, totaling approximately 85 percent of total statewide greenhouse gas emissions. The currently regulated sectors include various types of production facilities (cement, glass, hydrogen, iron and steel, petroleum refining, etc.), electricity generating facilities and importers, suppliers of natural gas and other fuels, and suppliers of carbon dioxide. At a high level, the program works as follows: CARB issues allowances equal to the total amount of allowable emissions over a given compliance period and distributes these to regulated entities, who must either reduce emissions below a threshold amount or obtain allowances or offset credits equal to their emissions, either from CARB or the open market.

■ **Renewables Portfolio Standard**

California's current Renewables Portfolio Standard requires utilities in the state to produce 50 percent of their retail electricity from renewable sources by December 31, 2030. These standards are implemented jointly by the California Energy Commission and California Public Utilities Commission. The public utilities commission is charged with adopting a process for electric service providers to file an integrated resource plan to ensure each entity meets the CARB greenhouse gas emission reduction targets for the electricity sector reflecting that sector's percentage in achieving the economy-wide greenhouse gas emissions reductions of 40 percent from 1990 levels by 2030.

■ **Low Carbon Fuel Standard**

As required under Executive Order S-01-07, CARB has developed a Low Carbon Fuel Standard, which requires the carbon intensity of California's transportation fuels to be reduced by at least 10 percent by 2020. CARB's fuel standard regulations establish annual declining carbon intensity targets for regulated parties to meet based on the production and use of transportation fuel in the state of California. The targets continually decline from 2010 to 2020, after which the carbon intensity stabilizes. Under the low carbon fuel standard, regulated entities meet their annual compliance obligation by retiring a number of credits from their credit account that is equal to their compliance obligation for that year. The reporting of higher carbon intensity fuel produced and used as a transportation fuel in California results in the assignment of deficits against the average carbon intensity required for a given year. Regulated parties are required to offset any assigned deficits by producing/selling lower carbon intensity fuel or purchasing credits.

■ **Governmental Efforts**

In tandem with the state's regulatory efforts, several notable developments in California reflect state and local

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governments' increased emphasis on pursuing climate change initiatives. Brown made international headlines in June when he took a five-day tour of China to speak publicly on California's continued commitment to addressing climate change, meeting with Chinese President Xi Jinping and entering agreements on behalf of California with China's Ministry of Science and Technology, as well as with leaders in two Chinese provinces, Jiangsu and Sichuan. There has been some criticism that Brown's actions run afoul of separation of powers principles because the president has the responsibility over foreign relations. Like the Paris agreement, these agreements are non-binding and do not establish new emission reduction goals, but they nevertheless call for strengthening cooperation in advancing innovation and development of low-carbon technologies, climate research, and the commercialization of cleaner technologies.

Additionally, in February, Democratic leaders of the California legislature hired Eric Holder, former U.S. attorney general under President Obama, to serve as outside counsel and to provide advice on the state's legal strategy against the Trump administrative initiatives, including climate change. While the California Assembly decided in June not to continue its contract with Holder, the state Senate did extend its contract beyond the initial short-term engagement.

Lastly, Brown—along with the governors of Washington and New York—formed the United States Climate Change Alliance in the wake of the Trump administration's announcement concerning withdrawal from the Paris agreement. The Alliance is a coalition of states committed to promoting ''coordinated state action'' on climate change in response to the federal government's decision to withdraw from the agreement. Since its initial formation in June, 13 states and Puerto Rico have joined the Alliance, which emphasizes among its ''principles'' the role of state-level climate action in supporting the Paris agreement and ''pursuing aggressive climate action to make progress towards its goals.'' It is reported that Brown—speaking at a climate change event in New York City—recently doubled down on his position in opposition to the current administration on climate change, calling it (as well as other Trump administration policies) ''stupid and dangerous and silly'' and suggesting that supporters of these policies are ''people who dwell in deep, dark caves.''

Cities and counties have followed the state governments' lead in responding to Trump's decision to walk away from the Paris agreement. The Mayors National Climate Action Agenda formed in June as a network of cities across the country who have committed to intensifying local government efforts to invest in renewable energy and to meet each individual city's current climate goals.

Shortly thereafter, in July, two counties and a city in California each filed lawsuits against a group of energy companies alleging a variety of common law claims—including public and private nuisance, strict products liability (based on both design defect and failure to warn), and negligence—related to the defendants' roles in emitting producing fossil fuels and contributing to global GHG emissions. *See, e.g., San Mateo v. Chevron Corp.,* No. 17-cv-03222; *Marin v. Chevron Corp.,* No. 17-cv-02586; and *Imperial Beach v. Chevron Corp.*, No. 17-cv-01227, in the Superior Court of California. The cities of Oakland and San Francisco followed suit, filing complaints alleging similar claims on Sept. 19. *See, e.g., People of the State of California v. BP P.L.C.,* No. 17-cv-561370; *People of the State of California v. BP P.L.C.,* No. RG-17875889, in the Superior Court of California.

Legal and Practical Limitations on the State's Efforts to Address Climate Change From a policy perspective, the wisdom of states developing individual positions and measures that are at odds with the federal government's positions on climate change has been questioned from several sectors, even those generally supportive of addressing climate change. These stakeholders are concerned with the potential for a patchwork of regulation and note that, given the global nature of the pollutant, individual state efforts may be more symbolic than effective holding the global temperature increase to below 2 degrees Celsius in accordance with the Paris agreement. From a legal perspective, stakeholders also express concern with the lack of specific extraordinary and compelling circumstances, or even state-specific effects, that would justify a state regulating a pollutant like GHGs that admittedly has global, not local effects, beyond a generalized desire by the state to drive national policy. In addition to these policy concerns, and perhaps reflecting them, significant legal and practical limitations need to be considered when contemplating such action by sub-national entities, such as the State of California.

Legal Limitations

■ **Exclusive Power of Federal Government Over Foreign Affairs**

It is well-established that the Constitution gives the federal government the exclusive authority administer foreign affairs. *See, e.g., Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012)*. This principle stems from the fact that under the Supremacy Clause of the United States Constitution, the ''Constitution, and the Laws of the United States...and all Treaties made...under the Authority of the United States [are] the supreme Law of the Land.'' U.S. Const. art. VI, cl. 2. Any state laws that intrude on the exclusive federal power to conduct foreign affairs has been held, by virtue of the Supremacy Clause, to be preempted. *Movsesian*, 670 F. 3d at 1072 (explaining the concept of ''dormant foreign affairs preemption'').

California laws have in the past been struck down due to preemption where they impermissibly intruded into the sphere of the federal government's authority over foreign affairs. Under these precedents, it is clear that any climate change legislation enacted by a state government in an attempt to ''abide by'' previous commitments made—and subsequently withdrawn—by the U.S. under the Paris agreement is vulnerable to preemption claims if it intrudes on the federal government's exclusive authority over foreign affairs. To date, there have been no challenges to California laws raising foreign affairs preemption claims to defeat state climate change legislation under the theory that they contravene federal policy under the Trump administration.

Proponents of state action would likely point to *Movsesian,* in which a federal district court rejected claims by automobile industry defendants that CARB regulation of greenhouse gas emissions from motor vehicles were preempted by federal climate change foreign policy. That particular court rejected the notion that Califor-

nia's GHG regulations conflicted with any discernible ''policy'' position of the U.S. with respect to climate change and opined that ''in order to prove conflict in the instant case, Plaintiffs must make a showing that California's efforts to implement regulations limiting the emission of [greenhouse gases] from automobiles will interfere with the efforts of this government or a foreign government to reduce the intensity of their [greenhouse gas] emissions pursuant to a negotiated agreement, treaty, partnership or the like.'' 670 F. 3d at 1187. It remains to be seen whether such an argument might have more traction now given recent developments with respect to the United States' commitment to—and subsequent withdrawal from—the Paris agreement.

■ **Ability of States to Form Agreements with Foreign Nations**

As a further limitation on states' authority to participate in foreign policy, Article I, Section 10 of the Constitution prohibits states from entering pacts with foreign nations. Clause 1 provides that ''No State shall enter into any Treaty, Alliance, or Confederation'' and Clause 3 provides that ''No State shall, without the Consent of Congress...enter into any Agreement or Compact with...a foreign Power.'' While case law interpreting these clauses is scarce, they have generally been construed to restrict states only from entering *legally binding* agreements with foreign entities. California would likely argue that because of the non-binding nature of the recent climate change ''cooperation'' agreements (between it and China and other foreign entities), its actions do not run afoul of the provisions of the Article I, Section 10. Opponents might pursue such arguments, however, given that the law is fairly unsettled as to the reach of these clauses.

■ **Dormant Commerce Clause**

The dormant commerce clause prohibits state regulations that improperly discriminate against out-of-state commercial interests or unduly burden interstate commerce. California's greenhouse gas regulations and other climate change mitigation measures have on occasion been challenged on the grounds that they constitute an impermissible burden on interstate commerce in violation of the dormant commerce clause. These challenges have met with varying degrees of success. In *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), for example, the Ninth Circuit held in a 2-1 decision that California's low carbon fuel standard was not facially discriminatory, but could potentially be discriminatory in purpose or practical effect, such that the court remanded the case to the district court with directions to conduct balancing between the benefits gained by the standards and the burdens imposed on interstate commerce as set forth by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Supreme Court denied petitions for certiorari in the case so has not spoken to the facial challenge questions presented in the case. This and other dormant commerce clause jurisprudence are cited as suggesting that dormant commerce clause challenges, either claiming facial discrimination or discrimination in purpose and effect, may gain traction where such discrimination can be shown.

Practical Limitations There are also practical limitations on a state's ability to stake out policy positions on climate change contradictory to those of the federal government. As an initial matter, given that climate change is a global phenomenon caused by the contribution of a variety of sources world-wide, the efficacy of state-level actions with respect to altering greenhouse gas emission levels has been questioned. Further, state and local initiatives to address climate change—when conducted separate from concerted national/international action—seem paradoxical given the disproportionate costs of such initiatives in relation to their benefits (*e.g.*, by dramatically increasing the cost of vehicles, fuel, or other commodities). These considerations are cited by those who oppose state action as supporting their position that climate change regulation is best left to the national government, which has the resources and authority to prescribe national policy, to make binding agreements with other nations, and—through the supremacy of federal law—to ensure a uniform approach among the states.

Conclusion The United States' withdrawal from the Paris agreement has given new life to the efforts of states and localities—such as California and its cities and counties—to address climate change via direct regulation, incentives, cooperation agreements with other entities, and the like. Many would argue that it is appropriate for sub-national entities to play a role in climate mitigation efforts, pointing out that the Paris agreement itself placed state and local governments at the front lines of climate change regulation, as the entities ultimately responsible for implementation of the nationally determined contribution. Certainly, opportunities exist within the bounds of current law for states and localities to work in partnership with the federal government on environmental policy and regulation. In fact, most modern environmental laws are premised upon this very model of cooperative federalism. Nevertheless, states and local governments must ultimately be mindful of the legal and practical limitations on their ability to regulate and prescribe policy in a manner impinging upon the role reserved for the federal government.

Shannon S. Broome is the managing partner of Hunton & Williams LLP's San Francisco office. Her practice focuses on Clean Air Act and climate change law, and she represents companies in numerous industries including oil and gas, chemical manufacturing, and general manufacturing.

Clare Ellis is an attorney in Hunton & Williams LLP's environmental practice where she focuses on issues facing the oil and gas industry, pipeline environmental and safety issues, refinery emissions compliance, and climate change.

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