

The Emerging Law of Sustainability: Legislation and Cases



C L A R I O N

March
2010



PRESENTATION OUTLINE

Overview

Legislative/Administrative Developments

- Federal
 - Energy Efficiency and Conservation Strategies
 - Cap and Trade
 - Other
- State
 - Executive Orders
 - Mandatory/optional plan elements
 - Preemption/accelerated permitting
 - Little NEPA's and developments of regional impact

Case Law

- Federal
- State
- Local



OVERVIEW

- AN ENTIRELY NEW “GREEN” BODY OF LAW EMERGING RAPIDLY AT STATE AND FEDERAL LEVELS
- FEDERAL/STATE CLIMATE CHANGE/GHG LEGISLATION EXPLODING
- CASE LAW BEGINNING TO DEVELOP AT ALL LEVELS—FEDERAL/STATE/LOCAL
- PROFOUND IMPACTS ON LOCAL GOVERNMENTS AND PLANNING



I WANT YOU
To Address Climate Change

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FEDERAL LEGISLATIVE DEVELOPMENTS

CAP AND TRADE LEGISLATION

- Early legislation focused on research and monitoring GHG emissions and global warming
- American Clean Energy And Security Act of 2009 (ACESA) - approved by House in June 2009 (219-212)
 - Mandatory cap and trade program to regulate GHGs
 - 17% reduction by 2020; 83% by 2050 (from 2005 levels)
 - 20% of electricity production from renewable sources
 - Increased investment in renewable energy
 - Enhance development of carbon capture/sequestration
 - Assistance to affected low-income households and workers
- Several similar bills under consideration in Senate (e.g., Kerry-Boxer Clean Energy Jobs and American Power Act)



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FEDERAL LEGISLATIVE DEVELOPMENTS

CAP AND TRADE LEGISLATION: Basic Steps

- Set the cap (government caps overall GHG emissions at specified level)
- Allocate permits (allowances distributed free or by auction)
- Measure emissions (firms measure emissions)
- Ensure compliance (firms reduce emissions or buy credits from others)
- Provide flexibility (purchase, banking, borrow, etc.)



A LOCAL GOVT. ROLE?

- Can enact stricter policies to gain credits or protect the environment
- Provide assistance/incentives to local industries to meet caps or gain credits (e.g., expedited local permitting for wind/solar facilities)
- Remove code barriers to alternative energy production
- Monitoring role



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FEDERAL LEGISLATIVE DEVELOPMENTS

American Recovery and Reinvestment Act of 2009

- Includes \$16.8 billion for Department of Energy (DOE) Office of Efficiency and Renewable Energy
 - \$3.2 billion for DOE's Energy Efficiency and Conservation Block Grant Program
 - 68% by formula allocation to larger local governments - must prepare EEC strategy
 - 28% to states who pass through 60% of that amount to smaller local governments - competitive basis in some states
- Eligible Local Activities - broadly defined
 - Development of local energy efficiency/conservation strategies
 - Transportation programs to save energy
 - Material reduction/recycling programs
 - Energy efficient building codes
 - Zoning codes that promote energy efficient patterns



<http://www.eecbg.energy.gov/>



Fund Allocation for Energy Efficiency & CDBGs
\$5,051,199 as of 5/28/2009

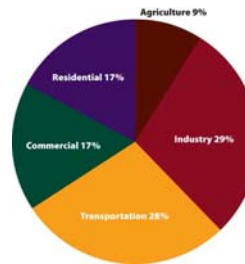
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FEDERAL ADMINISTRATIVE REGULATORY DEVELOPMENTS

U.S. EPA REGULATION OF GREENHOUSE GAS EMISSIONS

- Response to U.S. Supreme Court ruling in *Massachusetts v. EPA* – must regulate GHG as an air pollutant
- EPA determines: "...climate change is an enormous problem. The greenhouse gases that are responsible for it endanger public health and welfare within the meaning of the Clean Air Act."
- EPA makes endangerment finding for GHGs on December 7, 2009. (GHGs endanger the public health, and welfare of the US and EPA has authority to regulate under CAA).
- Endangerment finding challenged by petition filed with U.S. Court of Appeals, D.C. Circuit, by U.S. Chamber of Commerce, State of Texas, and other organizations.



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FEDERAL ADMINISTRATIVE REGULATORY DEVELOPMENTS

U.S. EPA REGULATION OF GREENHOUSE GAS EMISSIONS

- Impact on local governments?
 - Direct review/control of major local developments?
 - Little NEPAs require assessment/mitigation of GHG emissions
 - State implementation plan restrictions on GHG emissions from transportation - must reduce VMTs

EPA SMART GROWTH OFFICE

- Stormwater management scorecard places emphasis on green infrastructure/low-impact development techniques vs. gray infrastructure
- Will be utilized by several states (TN, OR, WV) to review/approve local stormwater management programs
- Likely forerunner of approach to be used by EPA nationwide - would apply to larger local governments

http://www.epa.gov/npdes/pubs/gi_municipal_scorecard.pdf



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STATE LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS: EXECUTIVE ORDERS

MAJORITY OF GOVERNORS ARE ISSUING EXECUTIVE ORDERS RELATING TO SUSTAINABILITY, CLIMATE CHANGE, AND GHG EMISSIONS (FL, NY, VA, CA, WA, etc.)

- 25 states have climate action plans
- 16 states have established statewide GHG reduction targets (5 mandatory)



FLORIDA - GOV. CRIST HAS ISSUED 2 MAJOR E.O.'s:

- Executive Orders 07-126 and 127: Immediate Actions to Reduce GHG Emissions TO 1990 LEVELS BY 2025
- Revisions in Florida Code for Building Construction to increase energy performance by at least 15%
- Rules to increase efficiency of consumer products by 15%
- Rules to require utilities to produce 20% of electricity from renewable sources
- Directed state agencies to reduce GHG emissions by 40% by 2025



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STATE LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS: EXECUTIVE ORDERS

NEW YORK - GOV. PATERSON ISSUED E.O. 24

- Reduce GHG emissions from all sources in state to 80% of 1990 levels by 2050
- Prepare Climate Action Plan to achieve goals (prepared by Sept. 2010)
 - Inventory GHG emissions and assess actions to reduce
 - Identify and analyze anticipated reductions
 - Identify legal, regulatory, and policy constraints to reduction
 - Recommend ways to address constraints

WASHINGTON - GOV. GREGOIRE ISSUED E.O. 09-05

- Follow-up to RCW 47.01.440, 70.235.020, and 235.050, which established GHG reduction goals for state of Washington
- Initiates efforts to:
 - Inventory and allocate GHG reductions for stationary sources
 - Develop emission benchmarks, by sector (based on industry best practices)
 - Develop recommendations for forestry offset protocols
 - Evaluate best options for low-carbon fuel standards
 - Work with regional transportation councils to develop and adopt regional transportation plans to reduce GHGs and achieve statutory benchmarks



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STATE LEGISLATIVE DEVELOPMENTS: OPTIONAL/MANDATORY PLAN ELEMENTS

OPTIONAL SUSTAINABLE PLAN ELEMENTS

- NEBRASKA (N.R.S. Sec. 99-913)
 - Local plans/zoning may encourage solar and wind energy use and access
- MAINE
 - Under State Growth Management Act, state planning office reviews and approves all local plans according to specific criteria. However, Act does not specifically mention climate change as mandatory element of local plans - state planning office issues informal guidelines for integrating into local plans.

<http://www.state.me.us/spo/landuse/techassist/climatechange.htm>

MANDATORY PLAN ELEMENTS

- FLORIDA - HB 697 requires local plan elements (land use, transportation, housing, conservation) to address energy and greenhouse gas reduction
 - State DCA rejecting local plans that fail to address
 - Zoning must be in accord with plans
 - State and citizens may enforce consistency requirement



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STATE LEGISLATIVE DEVELOPMENTS: OPTIONAL/MANDATORY PLAN ELEMENTS

MANDATORY PLAN ELEMENTS

- CALIFORNIA – RTPs with Sustainable Community Strategies and Alternative Planning Strategy. SB 375
- VERMONT - Local comprehensive plans must have “energy plan” that includes analysis of energy resources and policies related to energy conservation, development of alternative energy, and density and patterns of land use to promote energy conservation. 24 V.S.A. 4382
- OREGON - Energy conservation is statewide planning goal No. 13. Must manage land use to maximize conservation of all forms of energy.
- MARYLAND - HB 1141 (2006) added water resources planning as a mandatory element - conservation, quality, stormwater management, and wastewater treatment.



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STATE LEGISLATIVE DEVELOPMENTS: STATE ENVIRONMENTAL QUALITY ACTS

LITTLE NEPA'S

- NEW YORK
 - State Environmental Quality Review Act (SEQRA) requires agencies to identify and assess actions for potential adverse environmental impact. Energy use and greenhouse gas emissions must be considered. DEC proposed policy July 15, 2009.
http://www.dec.ny.gov/docs/administration_pdf/eisghgpolicy.pdf
- CALIFORNIA (CEQA)
 - Attorney General Brown has filed numerous suits against state agencies and local governments for failure to analyze increased air pollution/GHG emissions from projects and their impacts and undertake mitigation measures as required by CEQA.

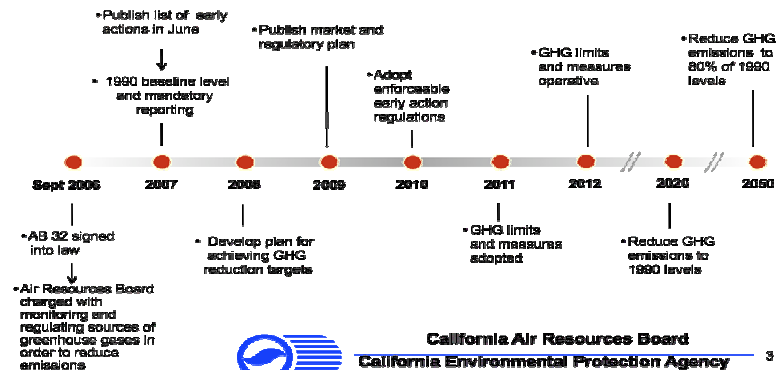


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CALIFORNIA AB 32

Overview of AB 32 California Global Warming Solutions Act



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CALIFORNIA SB-375

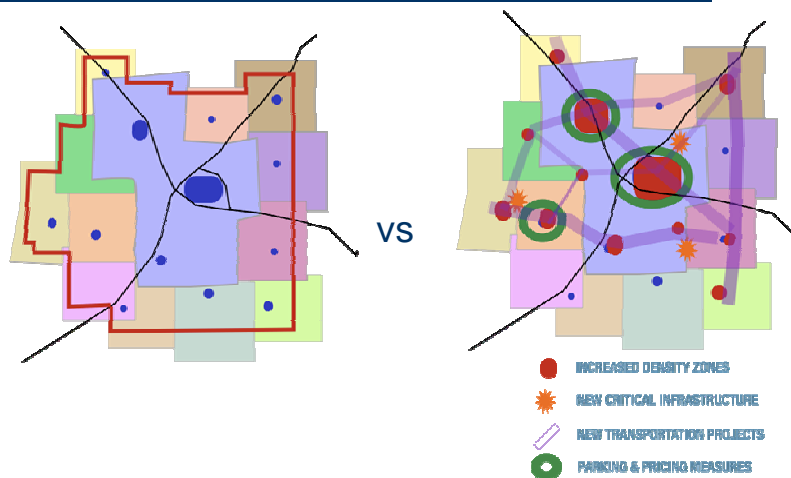
- Connects Housing, Transportation & GHG Planning
- Regional MPOs must develop a plan to reduce GHGs from cars and light trucks in regional transportation plan (RTP)
- Air Resources Board establishes GHG reduction targets for each region in state to achieve AB 32 goals
- RTPs are updated and required to include a Sustainable Communities Strategy, which:
 - Forecasts development patterns, which when integrated into the transportation network, the improvements, and policies, will reduce GHGs from autos and light trucks if there is feasible way to do so;
 - Development patterns must include feasible measures to hit target; and
 - At a minimum quantify reduction in relation to CARB target in AB 32, identifying shortfall, if it exists.



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WHAT DOES AN SCS LOOK LIKE?



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CALIFORNIA SB-375 (cont.)

- If SCS does not achieve GHG emissions target, Alternative Planning Strategy (APS) prepared. It is not included in the RTP. It must:
 - Identify principle impediments to achieving targets
 - Include numerous measures, which when taken together, would achieve regional targets (e.g., alternative development patterns, other transportation measures)
 - Explain why alternatives are most practical choices for achieving goals
- Action and financial elements of RTP must be consistent with SCS, not APS.
- Transportation projects funded by MPO must be consistent with SCS
- SB 375 also includes CEQA exemptions/streamlining (local government discretion) for certain projects, as it relates to GHGs:
 - Total exemption for transportation priority projects
 - Partial exemptions for projects that are consistent (general use and density) with plan (SCS or APS) that achieves the target



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STATE LEGISLATIVE DEVELOPMENTS: PREEMPTION OF ENERGY FACILITY SITING

An increasing number of state legislatures are preempting or eroding local government authority over energy facilities

- **NEVADA** - Restricts local government power to prohibit or "unreasonably" restrict solar and wind energy facilities. "Unreasonably" defined to include significant decrease in efficiency or increase in cost. NRS 278.0208
- **CONNECTICUT/CALIFORNIA** - Partially preempt local authority over energy facilities in historic districts. Conn. Gen. Stat. Sec. 7-147f(a) 2007.
- **WASHINGTON** - State Energy Facility Site Evaluation Council has authority to certify sites for alternative energy facilities over county objection. RCW 80.50.060
- **VERMONT** - Vermont Public Service Board approval of wind generation facility upheld. Board adequately considered visual impacts and orderly land use development in region.
- **COLORADO/CALIFORNIA/ARIZONA** - Preempt private covenants that prohibit solar energy systems (CA AB 1982), clothes lines ("right-to-dry") (CO HB 09-1149).



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STATE LEGISLATION: PROMOTION OF SUSTAINABLE DEVELOPMENTS

Many new state laws promote sustainable development:

- **WYOMING** - Enacted first comprehensive carbon sequestration law. Addresses ownership of underground space to store CO₂ and establishes program in state DEQ. HB 89 (2008)
- **CALIFORNIA** - Solar shade control act protects solar systems from shading by trees or shrubs (AB 2321)
- **10 NORTHEAST STATES** - Regional Greenhouse Gas Initiative is a 10-state regional effort to reduce GHG emissions through multi-state agreement. Establishes nation's first cap and trade law for electric utilities.
- **ARIZONA** - Specifies performance standards to accommodate greywater recycling. Ariz. Admin. Code Sec. R18-9-711 et seq. (2007).
- **MASSACHUSETTS** - State policy to adopt minimum solar power requirements for big box retail buildings.



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CASE LAW: FEDERAL

Massachusetts v. EPA, 549 U.S. 497 (2007)

- In 2003, EPA determines it lacks authority under CAA to regulate CO₂ and GHGs due to “scientific uncertainty.” Even if had authority, would decline to regulate “at this time.”
- 12 states and several cities sue to force EPA to regulate tailpipe emissions of CO₂ and GHG, but DC Ct. of Appeals sides with EPA in split decision.
- Held (5-4) - EPA has authority to regulate CO₂ as an air pollutant and it must so regulate. Court did not examine issue of CO₂ and global warming.
- Current - In April 2009, EPA finds that based on scientific analysis, GHGs are threat to public health and linked to global warming.



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CASE LAW: FEDERAL

Connecticut v. American Electric Power Company, Inc., 582 F.3d 309, Docket Nos. 05-5104-cv, 05-5119-cv (2d Cir Ct. Appeals Sept 2009)

- Eight states (Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin), New York City and three environmental nonprofits sued five power companies that own/operate fossil fuel power plants in 20 states. They are the 5 largest emitters of CO₂ in the US.
- Complaint alleged public nuisance existed because the 650 million tons of CO₂ per year emitted by plants is causing/will cause serious harm to human health and natural resources.
- Plaintiffs sought abatement of plants' contributions to global warming, asking court to cap and require reduction of CO₂ emissions.
- District Court dismissed lawsuit as non-justiciable under the political question doctrine.
- 2d Cir. Ct. App. reversed holding. Recognized federal "public nuisance" can be used to sue power companies based upon injuries from global warming.



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CASE LAW: FEDERAL

Connecticut v. American Electric Power Co. (cont.)

- In holding "public nuisance" law can be used to sue power companies based upon injuries from global warming, court opined:
 - The matter was justiciable (requiring abatement of CO₂ emissions to address global warming does not inappropriately interfere in Congressional business under separation of powers).
 - Plaintiffs stated a claim under federal "public nuisance" law because they alleged an unreasonable interference with a right common to the general public.
 - A public right includes rights to public health, public safety, and the public convenience.
 - Unreasonable interference constitutes continuing conduct that may produce a permanent or long-lasting affect, that Defendants know or have reason to know about.
 - CAA does not preempt/eliminate the federal common law of "public nuisance" because EPA has not ruled that GHGs are a pollutant for stationary sources (reserved decision if EPA made such a determination, which they now have made)
 - Other federal climate change legislation has not preempted application of "public nuisance" in this area.



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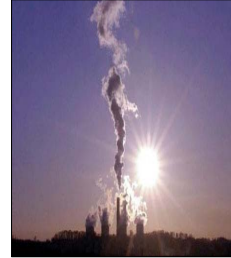
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CASE LAW: FEDERAL

Connecticut v. American Electric Power Co. (cont.)

- “This case is a critical milestone, allowing global warming cases to be decided by the courts...” Its highly significant that the federal court has affirmed the right of states to challenge the greenhouse gas emissions generated by coal-fired plants. The time has come for Congress to enact long overdue climate protection legislation.”

-- Jerry Brown, California Attorney General



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CASE LAW: FEDERAL

Air Conditioning, Heating, and Refrigeration Institute v. City of Albuquerque, U. S. Dist. LEXIS 106706 Civ. No. 08-633 MV/RLP (D. N.M. 2008)

- In 2007, Albuquerque adopted a new Energy Conservation Code, effective June 2008. One key goal was to reduce GHGs. Code applied to new/remodels of commercial and residential buildings.
- Code provided menu options for energy reductions. One option required energy efficiency requirements for air conditioners, furnaces, heat pumps, and water heaters more stringent than the federal Energy Policy and Conservation Act of 1975 (EPCA) (42 U.S.C. 6201, et. seq.).
- “The Air Conditioning, Heating and Refrigeration Institute (AHRI) and other heating/ventilation/air conditioning organizations sued Albuquerque in federal district court to enjoin adoption of code.



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CASE LAW: FEDERAL

AHRI v. City of Albuquerque (cont.)

- AHRI alleged the EPCA preempted the building code's provisions related to energy efficiency of HVAC products.
- EPCA established nationwide standards for HVAC equipment, and included a preemption provision that "prohibits state regulation concerning the energy efficiency, energy use or water use of any covered product with limited exceptions."
- In October 2008, Judge ruled... "There is no doubt that Congress intended to preempt state regulation of the energy efficiency of certain building appliances in order to have uniform, express, national energy efficiency standards."



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CASE LAW: FEDERAL

ENDANGERED SPECIES ACT (7 USC 136;16 USC 1531)

Potential flood of litigation under ESA to list endangered species due to global warming

Center for Biodiversity v. USFWS, 2008 WL 1902703 (ND Cal 2008)

- Suit to force listing of polar bears - iconic symbol of climate change - as endangered species due to global warming.
- USFWS failed to list within 1-year statutory time frame.
- Within 2 weeks of suit, polar bear listed. More suits filed. Implications for other states - species threatened or endangered?
- There could be many implications for western states because coastal and oak savannah habitat used by endangered species.



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CASE LAW: FEDERAL

ENDANGERED SPECIES ACT (cont.)

Animal Welfare Institute v. Beech Ridge Energy, LLC, 2009 U.S. Dist. LEXIS 114267 (S. D. Md.) (Case tried late October, 2009)

- Case posing protection of endangered species against the development of renewable energy resources.
- Challenge to industrial wind energy project proposed in Greenbrier County, WV, on grounds it will result in an unlawful “take” of the endangered Indiana bat. Project included 124 towers, each about 390 feet in height, extending over 23 miles of ridgeline.
- ESA prohibits the “taking” of any endangered species.
- “Take” is defined broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 42 U.S.C Section 1532(19)



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CASE LAW: FEDERAL

Animal Welfare Institute v. Beech Ridge (cont.)

- Plaintiffs alleged Indiana bat population (endangered) lived around and used project area. Wind towers would harm or kill bats, which was violation of ESA.
- Major dispute at trial was whether Indiana bats were present at the site. Many experts testified on the issue. Court concluded a preponderance of the evidence demonstrated they were present.
- Court also determined there was preponderance of evidence some of the bats would likely be killed by the turbines, blades, or by barotrauma, which was caused by turbines, violating ESA.
- Enjoined Beech Ridge from constructing towers (40 were allowed to be completed).
- Held the 40 towers could only be operated when bats were hibernating (November 16-March 31 of each year), but would consider modifying this limitation if FWS determined towers could operate at other times without endangering the bats.
- Court also strongly encouraged Beech Ridge to pursue “incidental take” permit. Court noted it was way to reconcile desire to protect endangered species with goal of developing renewable energy.



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CASE LAW: FEDERAL

MIGRATORY BIRD TREATY ACT (16 USC 703-712)

Potential flood of litigation against wind farms.

- Purpose - Protect migrating birds from hunting/removal. Lists species such as bald eagle, mourning dove, crow, etc.
- Act prohibits killing or incidental "takes."
- Growing controversy about bird kills from wind turbines. 20-30K killed in 2003; ¼ million future estimate; compare to ½ billion from buildings
- *U.S. v. Corbin Farms*, 444 F. Supp. 510 (ED Cal 1978),
 - Improper pesticide application on alfalfa field
 - Held - No intent to kill required - strict liability if could reasonably foresee harm due to activity. Act not limited to controlling hunting.
- *U.S. v. Moon Lake Electric Assn.*, 45 F. Supp. 2d 1070 (D. Col. 1999)
 - Power company liable for electrocution of raptors. Activity was inherently dangerous and harm foreseeable.

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CASE LAW: FEDERAL

MIGRATORY BIRD TREATY ACT (16 USC 703-712) (cont.)

Wind farm operations could be prosecuted for unintentional kills and found liable for damages (and criminal liability?).

In Wyoming, wind power companies paying fines for bird kills/installing inexpensive devices on guy wires to mitigate.

Potential local farming activities

- Preconstruction monitoring to avoid high bird concentrations and migratory routes.
- Post construction monitoring to determine effectiveness of mitigation techniques.
- Mitigation measures based on monitoring (bury powerlines, reduce number of guy wires, seasonal shut down of towers).

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CASE LAW: STATE - CALIFORNIA

State suing local governments to reduce GHG emissions through plans and development regulations.

- ***California v. County of San Bernardino* (Cal Sup. Ct. Case No. CIVSS 700329 San Bernardino 2007)**
 - State through Attorney General initiated petition for writ of mandate seeking to vacate and set aside county's adoption of General Plan update, development regulations, and EIR under CEQA because it did not adequately analyze and mitigate the adverse effects of the plan on GHG emissions.
 - Used CEQA and AB 32 as bases for claim.



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CASE LAW: STATE - CALIFORNIA

***California v. County of San Bernardino* (cont.)**

- County and State reached settlement agreement August 2007.

In settlement, without admitting liability, County agreed to:

- Add General Plan policy describing goal of reducing GHG emissions reasonably attributable to county's discretionary land use decisions and its internal government operations
- Prepare a Greenhouse Gas Emissions Reduction Plan that:
 - Inventories all known/reasonably discoverable sources of GHG emissions.
 - Identifies the baseline of GHG emissions currently being emitted in county.
 - Inventories GHG emissions in 1990
 - Projects new GHG emissions reasonably expected from county's discretionary land use decisions under General Plan update and governmental operations, in 2020
 - Establishes a target for reduction of GHG emissions from those sources
- Conduct environmental review of General Plan and GHGERP pursuant to CEQA.
- Make best efforts to complete by February 2010 (appears now the draft GHG Plan will be completed in spring 2010, the EIR will begin April/May 2010, and will take approximately 9-12 months).
- Adopt feasible measures to control emissions of diesel engine exhaust on projects/facilities under county's discretionary land use jurisdiction.



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CASE LAW: STATE - CALIFORNIA

Citizens suing local governments (cont.)

- ***Sierra Club and State of California v. City of Stockton*** (Cal. Sup. Ct. Case No. CV 034405 January 2008)
 - Sierra Club initiated petition for writ of mandate seeking to vacate and set aside county's adoption of General Plan update, development regulations, and EIR under CEQA because it did not adequately analyze and mitigate the adverse effects of the plan on GHG emissions.
 - Attorney General intervened and joined the Sierra Club in the suit.



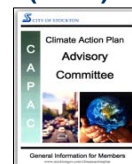
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CASE LAW: STATE - CALIFORNIA

• ***Sierra Club and State of California v. City of Stockton*** (cont.)

- In settlement, City agreed to:
 - Prepare Climate Action Plan within 24 months, which would be incorporated into the General Plan, and include the following related to GHG emissions:
 - Inventory of current GHG emissions
 - Estimated inventory of GHG emissions
 - Specific targets for reductions of current and 2020 GHG emissions from sources reasonably attributable to City's discretionary land use decisions/internal government operations
 - Establish goal to reduce per capita VMT attributable to activities in Stockton so that rate of growth in VMT during plan's time frame does not exceed population growth during that time frame
 - Develop and adopt specific tools and strategies to reduce current and estimated 2020 GHG emissions to meet plan's targets



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CASE LAW: STATE - CALIFORNIA

- ***Sierra Club and State of California v. City of Stockton* (cont.)**
 - Within 12 months, adopt a green building program (e.g., requiring all new nonresidential development over 5,000 sf to attain LEED Silver standards, at a minimum).
 - Within 12 months, amend plan and require specific amount of new housing growth (440 units) occur in downtown and 14,000 units be located with existing city limits.
 - Within 12 months, amend plan to make sure development at City's outskirts does not grow in a way that is out of balance with infill development (using measurable criteria to ensure balance before entitlements granted).
 - Monitor strategies to make sure they are working.
 - Take specific interim measures with respect to land use approvals.



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CASE LAW: STATE - NEW YORK

- ***Indeck Corinth, L.P. v. Paterson, et. al.* No. 000369/2009 N.Y Supreme Court Saratoga (filed January 2009)**
 - Suit by power facility claiming New York's participation in Regional Greenhouse Gas Initiative (RGGI) establishing cap and trade system for electric plants is illegal on multiple grounds.
 - NY RGGI program is *ultra vires* because not authorized by the legislature.
 - It imposes an impermissible agency tax that is not authorized.
 - It is arbitrary because allocation of allowances accomplished by auction.
 - It violates the compact clause of the US Constitution.
 - It violates substantive due process and equal protection rights.
 - No decision. U.S. Chamber/environmental groups filed *amicus* briefs.
 - First year of auction, New York collected \$123 million for allowances. Only spent \$1.7 million, primarily on administrative and start-up costs. Decided to delay spending pending outcome of lawsuit.
 - Money being spent on energy conservation/clean energy programs.
 - New York is projected to receive \$607 million over next three years.



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CASE LAW: LOCAL - NEW YORK

Local governments invoking climate change, GHG, sustainability concerns to deny development.

• ***Matter of Laidlaw Energy and Environmental, Inc. v. Town of Ellicottville*, 59 A.D.3d 1084, 873 N.Y.S. 2d 814 (N.Y. App. Div. 4th Dept. 2009)**

- Appellate court affirmed local Planning Board denial of site plan for new cogeneration (biomass) power plant, based on pollution concerns related to increased GHG emissions.
- Under NY state law, the Planning Board was also the lead agency for review of the application under SEQRA.
- Board made a positive declaration and required preparation of DEIS. Board then issued FEIS and denied site plan. Planning Board calculated the CO₂ emissions from bringing woodchips to the site would result in 1,890,000 pounds of carbon emission per year, plus additional emissions from electrical generation, concluding plant was far from carbon neutral.



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CASE LAW: LOCAL - WASHINGTON

• ***Okeson v. City of Seattle*, 159 Wn. 2d 436, 150 P. 3d 556 (Wash. Sup. Ct. 2007)**

- Seattle City Light, municipally-owned utility, adopted resolution establishing long-term goal of meeting electric energy needs of city with no net new GHG emissions.
- Estimated additional GHG emissions to meet five year electrical demand. To meet GHG goal, concluded would be most cost-effective to "pay others to reduce their emissions."
- Entered into agreements to pay other entities to offset GHG emissions.
- Challenged by local residents on grounds City Light unauthorized to so act and such act constituted illegal gifts of public funds and unconstitutional taxes.
- Trial court granted summary judgment in favor of City Light. Ultimately Washington Supreme Court, in 5-4 decision, reversed trial court.
- Parties agreed City Light authorized to reduce GHG emissions from own facilities. Question: whether it was authorized to pay offsets to be carbon neutral.
- Decision turned on whether City Light had "implied authority" to act. Key was whether offset program was essential to and bore "sufficiently close nexus" to the declared objectives and purposes of city utilities in the state.
- Court held it did not because the declared objectives/purposes of statute was provision of electricity
- Another key factor was that offset program was characterized as "governmental" rather than "proprietary."

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CASE LAW: LOCAL - ARIZONA

Garden Lakes Community Ass'n, Inc. v. Madigan, et. al., 62 P. 3d 983 (Ariz. App. 2003)

- Homeowner challenged HOA architectural restrictions governing the construction and appearance of solar energy devices (SEDs) on grounds they violated Ariz. Rev. Stat. Section 33-439 (A), because they "effectively prohibited" installation of SED in their home. Trial court ruled for homeowners and case was appealed.
- Ariz. Rev. Stat. Section 33-439 (A), states... "Any restriction... contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of, or any interest in, real property which effectively prohibits the installation or use of a solar energy device as defined in section 44-1761 is void and unenforceable."
- HOA argued "effectively prohibit" should be interpreted to mean any restrictions on SEDs had to inevitably preclude SEDs before restrictions deemed unenforceable. At trial HOA suggested several expensive SED alternatives met restrictions.
- In upholding lower court decision in favor of homeowner, Appellate court held whether a restriction "effectively prohibits" SEDs is a question of fact to be decided by the trial court on a case-by-case basis.
- Homeowner met burden of proof. Also held that in making its decision, trial court was entitled to consider increased cost of SEDs, in restrictions.



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CASE LAW: LOCAL - WIND ENERGY SYSTEMS

- Wind energy systems. Fair amount of litigation surrounding local government approval of wind energy systems. Challenges based on:

- Noise impact
- Unsightly light flicker
- Aesthetics
- Safety threats from collapsing turbines
- Ice throw
- Adverse impact on property values



- *Roberts v. Manitowac County BOA*, 721 N.W. 2d 499 (Wisc. App. 2006)

- Citizens challenged BOA approval of a conditional use permit for a 49 turbine wind farm on grounds it would result in adverse noise impacts, ice throw, light flicker, and harm to wildlife. In a review of the record in the case, the court determined there was competent substantial evidence that these concerns were addressed, and the decision of the BOA was upheld. Key that evidence was included in the record that demonstrated compliance with the permit standards.

- *In re Halnon*, 811 A. 2d 161 (Vt. 2002)

- Vermont Supreme Court upheld denial of three 23-ft diameter, 100 ft tall wind turbines on grounds they would have undue adverse impact on aesthetic/visual character. Court found denial reasonable because applicant had not taken significant steps to mitigate visual impacts on neighbor's view.

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CASE LAW: LOCAL - WIND ENERGY SYSTEMS

- ***In re Amended Petition UPC Vermont Wind* 2099 WL 279971 (Vt. 2009)**
 - Vermont Supreme Court rejected citizen group's challenge to Public Service Board's approval of wind farm with 16, 420 foot tall turbines on aesthetic grounds. Developer took steps to mitigate aesthetic impacts like painting turbine to blend with sky and siting near existing transmission lines.
- ***Rose v. Chaikin, 453 A. 2d 1378 (C. Div 1982)***
 - New Jersey court held small wind turbine with noise levels above town's noise limits located 10 feet from adjacent property stated a claim for a private nuisance.



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CASE LAW: LOCAL - WIND ENERGY SYSTEMS

- ***Burch v. Nedpower Mountain Storm, LLC, 647 S.E.2d 879* (W. Va. 2007)**
 - West Virginia Supreme Court recognized common law nuisance against an energy company proposing wind farm approved by the state PSC. Proposed wind farm would occupy a site 14 miles long and one-half mile wide along Alleghany Point in Grant County. The wind farm was to include up to 200 wind turbines with 219 to 450 foot towers and 115 foot blades. Court recognized all of the following as legitimate nuisance claims: the wind turbines would result in negative noise impacts, unsightly flicker from the blades, broken blades, ice throws, falling towers, and a diminution in property values.
- ***Rankin v. FPL Energy, LLC, 266 S.W. 3d 506* (Tex. App. 2008)**
 - Texas appellate court rejected common law nuisance claim against 47,000 acre wind farm with 400 turbines (Horse Hollow wind farm), based on aesthetic impacts. In rejecting claim court recognized, however, that nuisance claim could be based on invasion of property by light, sound, odor, or foreign substance.



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QUESTIONS



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