

## Actions Reduce Climate Change Risks

By Michael J. Mazzone

HOUSTON—The U.S. Congress this summer considered "climate change" legislation. The *Wall Street Journal* described the Lieberman-Warner Climate Security Act as the largest expansion of the federal government since Franklin D. Roosevelt's New Deal legislation and as "easily the largest income redistribution scheme since the income tax."

Numerous regions of the country have undertaken "initiatives" to address climate change. Many states have adopted or are considering regulations and executive orders. In addition, claimants in numerous lawsuits assert that industries—especially the oil and gas industry—are causing global warming.

The U.S. Climate Action Partnership—organized by companies such as Shell, General Electric, Ford and DuPont—is calling for cap-and-trade regulation of greenhouse gases to fight global warming. And many companies are running advertisements and making public statements to tout how "green" they are.

Whatever one's view on anthropogenic global warming, oil and gas companies face real risks from legislation and regulation, whether or not there is any truth to the human-induced global warming theory. Damage to a company's reputation, which could arise out of how a company responds to climate change issues, also is a real risk regardless whether anthropogenic warming is true.

The costs and expenses of litigation (including the possibility of an adverse judgment, however remote), and the costs and expenses of prolonged permit proceedings are real risks.

### Climate Questions

Those who believe humans cause glob-

al warming claim there is a consensus among scientists and that no further debate on the science is necessary. The politicians who propose climate change regulations frequently declare that the "debate is over."

Those who disagree ask, "When did the debate ever really begin?" They frequently cite a petition project by the Oregon Institute of Science and Medicine ([www.petitionproject.org](http://www.petitionproject.org)), which has been signed by more than 31,000 American scientists, including more than 9,000 with doctorates and some of the most distinguished scientists in the United States, including Freeman Dyson and Edward Teller.

They state, "We urge the U.S. government to reject the global warming agreement written in Kyoto, Japan, in December 1997, and any other similar proposals. The proposed limits on greenhouse gases would harm the environment, hinder the advance of science and technology, and damage the health and welfare of mankind.

"There is no convincing scientific evidence that human release of carbon dioxide, methane, or other greenhouse gases is causing or will, in the foreseeable future, cause catastrophic heating of the Earth's atmosphere and disruption of the Earth's climate," the scientists declare.

Interestingly, those who believe that humans cause global warming rarely, if ever, discuss the possible benefits of increased atmospheric CO<sub>2</sub> or a warmer planet; only the downsides of global warming are mentioned. But others have reported on the benefits to humans if warming is occurring. Among them is Arthur B. Robinson in "Environmental Effects of Increased Atmospheric Carbon Dioxide," in the December 2007 issue of the *Journal of American Physicians and Surgeons*.

The Oregon Institute petition statement concludes with this sentence: "Moreover, there is substantial scientific evidence that increases in atmospheric CO<sub>2</sub> produce many beneficial effects on the natural plant and animal environments of the Earth."

Those who believe humans cause global warming rarely, if ever, discuss any solutions other than conservation, government regulation (particularly dramatic reductions in emissions of CO<sub>2</sub> and other greenhouse gases), or government subsidies for alternative energy sources that cannot survive otherwise. Rarely discussed are the temperature reductions—if any—that are supposed to result from legislative attempts to reduce CO<sub>2</sub> emissions because no one knows what temperature reductions would be achieved.

Others have suggested that if the Earth is warming dangerously, there are ways to deal with it that do not require restrictions on energy production and consumption, or dramatic restrictions on CO<sub>2</sub> emissions. These scientists note that although there are ways to cool the planet, there is no way to warm it.

### Risks Of Climate Change

Those who blame humans for causing global warming claim the results will be catastrophic: floods, droughts, more severe hurricanes, rising sea levels, and damage to or loss of species. If such predictions are accurate, obviously some physical risks would arise out of climate change. But these risks would exist whether or not humans had any role in global warming.

Because the energy industry has faced risks from adverse weather since its beginning, it should be well-prepared to deal with the risks that arise from changing weather. The proof is the industry's re-

sponse to Hurricanes Katrina and Rita. Companies should confirm that they are trying to identify any events that might occur as a result of climate change, assess any risks related to those events, and define their responses to deal with these risks.

In addition to the physical risks, there are risks from regulation and litigation as well as risks to reputation that arise out of climate change. Note that each of these is, in fact, a risk companies face whether or not humans cause global warming and whether or not climate change will be catastrophic. Also note that each of these risks is man-made; the only involvement of the weather is that alleged changes to it are motivating people to “do things.”

These risks include sanctions on companies that advertise themselves as green, lawyers suing companies for causing global warming, and activists trying to block permits for power plants or oil and gas development on federal lands.

Judging by the amount of green advertising they are doing, it is clear that some companies are trying to develop reputations for being environmentally sensitive. But companies would be well-advised to coordinate their green advertising and other public statements on climate change with their lawyers. Statements made to tout companies’ environmental sensitivity are being used against them in global warming litigation.

Moreover, advertising agencies are beginning to see a green backlash. Focus group participants are rolling their eyes over “yet another green message.”

Others have suggested that the only way to be a “truly” green company is to go out of business: produce nothing, emit nothing and consume nothing.

### **Virtue Of Integrity**

Companies may not be able to avoid all risk to their reputations no matter what position they take on global warming—even if they take no position. James Hansen with the National Aeronautics and Space Administration has said, “Chief executive officers (of fossil energy companies) should be tried for high crimes against humanity and nature. (They) know what they are doing and are aware of the long-term consequences of continued business as usual.”

The best course may be to pursue the virtue of integrity. If a company believes its CO<sub>2</sub> emissions are impacting the climate, then it should reduce or eliminate them. On the other hand, if a company believes its emissions are not impacting the climate, then it should go about its business, not make public statements to the contrary, and not adopt or advocate policies suggesting that its operations do

in fact impact the climate.

The worst approach would be to:

- Conclude that CO<sub>2</sub> emissions cause climate change, but publicly assert the opposite (as some of the defendants in *Kivalina v. ExxonMobil Corp. et al.* are accused of doing); or

- Conclude that CO<sub>2</sub> emissions do not cause climate change, but publicly assert or suggest by conduct (e.g., adopting CO<sub>2</sub> emission reduction programs), that they do (as many companies pandering to environmentalism appear to be doing).

### **Litigation**

Already a number of lawsuits have arisen out of the belief that humans cause global warming. In some instances, cases have been brought by or against governmental entities in attempts to prevent or require enforcement of regulations that purport to affect global warming. In other cases, private citizens have sued companies for damages, claiming that the companies caused or contributed to global warming.

The most notable case to date is *Massachusetts v. EPA*, in which the U.S. Supreme Court held that the Environmental Protection Agency had jurisdiction to regulate carbon dioxide as a pollutant under the Clean Air Act. The court held that EPA must determine whether CO<sub>2</sub> should be regulated because it caused or contributed to air pollution, “which may reasonably be anticipated to endanger public health or welfare.” That decision has been the center point of many of the debates on global warming legislation and regulation.

In another case, the Center for Biological Diversity sued the U.S. Fish and Wildlife Service under the Marine Mammal Protection Act for authorizing “incidental takes” of polar bears and Pacific walrus in the Beaufort Sea by allowing oil and gas activity. While the case was pending, the Department of Interior listed polar bears as threatened under the Endangered Species Act, but stated that it intended to promulgate regulations that would “allow us to continue to develop our natural resources in the Arctic region in an environmentally sound way.”

The lawsuit is pending in Alaska, and the environmentalists have amended their petition to challenge those new regulations.

In *Comer v. Murphy Oil USA*, individuals sued coal, oil and gas producers for contributing to global warming. The plaintiffs were Mississippi property owners who suffered damage caused by Hurricane Katrina. They claimed global warming caused Hurricane Katrina, which in turn caused damage to their property. Oil and gas companies were named because

it was alleged they emitted methane into the environment during drilling operations. The court dismissed the lawsuit in August 2007 because the plaintiffs lacked standing.

### **Kivalina v. ExxonMobil**

In the most recent case, an Indian tribe, the native village of Kivalina, and the city of Kivalina, Ak., sued ExxonMobil, BP, Chevron, ConocoPhillips, Shell, Peabody, American Electric Power, Duke, Dynegy, Reliant and the Southern Energy Company.

The plaintiffs allege, “Global warming is destroying Kivalina (by) melting Arctic sea ice that formerly protected the village from winter storms,” and that the defendants, “many of the largest emitters of greenhouse gases in the United States . . . are responsible for a substantial portion of the greenhouse gases in the atmosphere that have caused global warming and Kivalina’s special injuries.”

Interestingly, the lawsuit relies in part on the GHG emissions programs created by many of the companies being sued. The lawsuit also relies on numerous statements made by the companies about global warming. In other words, the defendants’ actions and statements are being used against them.

For example, *Kivalina* quotes these statements made by the defendants themselves:

- “As one of the largest emitters of CO<sub>2</sub> in the world, (we) must continue to strive to economically stabilize greenhouse gas concentrations.

- “It is a moral imperative that we take steps to reduce CO<sub>2</sub> concentrations in the Earth’s atmosphere.

- The time to consider the policy dimensions of climate change is not when the link between greenhouse gases and climate change is conclusively proven, but when the possibility cannot be discounted and is taken seriously by the society of which we are part. We . . . have reached that point.

- “There is an emerging consensus that climate change is, at least in part, linked to the production and consumption of carbon based fuels.”

As has been noted, not all scientists agree with these statements. If anthropogenic climate change is proven to be incorrect as a matter of science, these companies may be in the position of having science on their side, but may be unable to effectively rely on it because of their own contrary statements.

There is also an allegation in *Kivalina* against ExxonMobil and some of the other defendants for suppressing information about global warming and en-

couraging others to challenge the anthropogenic warming theory. The lawsuit appears to suggest that anyone speaking out against the alleged consensus that humans' GHG emissions cause global warming is either a conspirator, a fool, or a paid hack.

One reading of the lawsuit is, then, if a company speaks on global warming, it could be sued regardless of what it says. It could be sued for admitting its contribution to global warming or sued for denying it. Saying nothing provides no immunity from suit, either.

None of the defendants in *Kivalina* is even alleged to have violated any air quality laws, regulations or permits. The alleged wrong is committing a common law "nuisance." In other words, the companies are being sued even though, as far as the lawsuit is concerned, they are operating in full compliance with all applicable statutes, regulations and permits regarding emissions to the atmosphere.

### 'Green' Disclosures

Aside from being accused of causing global warming, there are still other litigation risks. For example, companies may be sued for unfair trade practices by consumers or regulators (such as the Federal Trade Commission or its state counterparts) for not accurately describing how "green" they are in their advertising. The FTC has issued "green guides" to help companies with their green advertising.

Companies also may be sued by investors for improperly disclosing risks and liabilities related to climate change. For example, in what perhaps was a political move to promote the theory that humans caused global warming, the New York attorney general began an investigation of five major energy companies, questioning whether their disclosures were adequate regarding their risks and liabilities concerning climate change.

More transparently, activists are urging the Securities and Exchange Commission to require companies to disclose more information about climate change.

For a detailed discussion of these litigation risks, see "Corporate Marketing as 'Carbon Neutral'—Legal Issues," J. Civins and J. Braddock, 2008 Carbon and Climate Change Conference, UTCLE (April 24-25, 2008).

In light of such risks, companies would be well advised to view their climate change-related programs, advertising and other public statements through the litigation lens. The advice of consultants and the EPA to "seize the opportunities" presented by climate change, although probably not intended for plaintiffs' lawyers,

has clearly been taken up by them, as *Kivalina* proves.

The numerous references in *Kivalina* to "tobacco industry (efforts) to discredit health risks associated with tobacco use" suggest the *Kivalina* lawyers are following a blueprint used in the tobacco litigation that was brought on behalf of state governments to recover for health care benefits paid for tobacco-related medical injuries. In fact, two of *Kivalina's* lawyers played prominent roles in tobacco litigation.

### Regulation

Risks from climate change regulation could arise from both the passage of new regulations (e.g., a law limiting CO<sub>2</sub> emissions) as well as the application of existing regulations (e.g., activists opposing the issuance of air permits in Florida on the grounds that the impact on Arctic polar bears was not properly considered).

Environmentalists already have committed to opposing, on climate change grounds, all applications for permits to operate coal-fired power plants. "Every time a new coal-fired power plant is proposed anywhere in the United States, a lawyer from the Sierra Club or an allied environmental group is assigned to stop it, by any bureaucratic or legal means necessary," states an article in the April 14 *Los Angeles Times*.

The many proposed state and federal climate change regulations fall into two main categories: taxes on emissions and various cap-and-trade schemes whereby emissions above a certain level are prohibited, forcing companies to buy credits if they need to emit in excess of the cap.

Regardless of the type of legislation or what specific requirements may ultimately be passed, companies could do the following to prepare for some regulation:

- Identify and quantify greenhouse gas emissions by chemical;
- Identify available methods to reduce or capture these emissions;
- Identify available programs for trading emission credits; and
- Get involved in the rule making (directly or through an association).

This last recommendation leads to the question: Given that some legislation may be passed, is one uniform federal rule preferable to potentially different rules in each of the states?

### Value Of Uniformity

Some industry leaders are trying to decide whether to fight proposed federal legislation on the grounds that the theo-

ry of anthropogenic climate change is without merit (as well as on other grounds), or whether to instead work with lawmakers and regulators to create uniform legislation—however unwanted, unnecessary and harmful it may be—to avoid what they believe would be an even worse scenario: harmful legislation that differs from state to state.

The unstated suggestion is that some legislation will be passed (and that may not be the case, given the defeat of the Lieberman-Warner climate bill). The underlying assumption is that the importance of uniformity outweighs the possibility of defeating climate legislation.

But how important is uniformity? Industry fares well with state-by-state rules on other issues. Perhaps it should continue to oppose uniform federal climate change legislation at the risk of having to operate under different rules in each of the states (the passage of which also could be opposed locally).

For example, how states classify property interests in oil and gas varies from state to state. Alabama has adopted the nonownership theory of oil and gas, while Texas and Mississippi practice the ownership-in-place theory. This difference then impacts how abandonment and dormant oil and gas interests are handled. The result is a lack of uniformity on one of the most important and fundamental issues in the oil and gas industry: ownership of oil and gas.

Additionally, accommodation and surface damages are handled differently in various producing states. For example, in 2007, Colorado codified the accommodation doctrine while New Mexico passed a surface owner protection act. Companies already operate under a system of nonuniform laws.

Moreover, activists seeking to impose federal legislation on industry expect—even count on—a call for uniform federal legislation. One part of the organized No Dirty Oil and Gas campaign is to create state environmental rules and then call for uniform federal legislation as a model code of conduct. "According to this strategy," the NoDOG document reveals, "once a number of states have passed such laws, national groups will argue that the federal government should harmonize the statutes."

Accordingly, abandoning opposition to climate change legislation because a uniform federal law is preferable to various state laws plays right into the hands of activists who want to shut down the oil and gas industry. Perhaps, more importantly, there is no guarantee that whatever federal legislation is passed will pre-empt regional or state climate change rules. In fact, the Lieberman-Warner legislation did not con-

tain a pre-emption provision, and expressly allowed states to regulate carbon emissions in a stricter manner.

### Conclusion

Whether or not there is any truth to the theory of human-caused global warming, industry faces risks. There are risks from regulation and litigation that arise out a belief that humans are warming the planet, and there are risks to reputation that arise out of how companies respond to climate change. Companies need to assess these risks and assume some regulation and litigation will come.

Companies should ensure that their actions are consistent with their advertising and public statements. Companies that believe there is no truth to the an-

thropogenic warming theory should take care not to suggest otherwise in their advertising, public statements or conduct.

Furthermore, the importance of uniform legislation may be overstated. Companies already operate under numerous nonuniform laws. Moreover, passage of a uniform federal law is no guarantee that stricter regional and state rules will not also be passed.

For companies that do not believe in anthropogenic warming, any support for uniform legislation as the lesser of two evils should be conditioned on a clear declaration that support is being given only because one uniform but bad law is better than 50 nonuniform bad laws, and an insistence that regional and state rules be pre-empted. □



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