

Environmental Law



CHRISTINE JEGAN

California has passed the first state law designed to curb greenhouse-gas emissions and global warming. What will it mean for power producers and other emitters? We asked four practitioners to explain the process, as well as address other current issues, such as the renewable power industry. They are **Nicholas W. van Aelstyn of Beveridge & Diamond PC, Bruce Flushman of Stoel Rives LLP, Brian Haughton of Barg Coffin Lewis & Trapp LLP, Kevin Poloncarz of Farella Braun + Martel LLP.** Our discussion was moderated by freelance legal affairs writer Susan Kostal and reported by Cherie L. Lubash for Jan Brown & Associates.

MODERATOR: Nico, give us an introduction to AB 32, the state's Global Warming Solutions Act, the first state law designed to cut man-made greenhouse gas emissions.

VAN AELSTYN: The Global Warming Solutions Act, AB 32, established ambitious goals for reducing carbon dioxide emissions in California to 1990 levels by the year 2020, and 80 percent by the year 2050. It delegates sweeping authority to the California Air Resources Board, or CARB, to develop a program to achieve those goals. CARB has an aggressive set of deadlines to meet. The first milestone is June 30, 2007, by which CARB will publish an early-action list of greenhouse gas emission reduction measures. The full program is slated to be on line by 2012. The rule making process is now under way. Will there be an emission trading market? Will there be a carbon tax? Whose emissions will be regulated? How will

emissions be monitored and reported? These and many more issues are very much in play now in Sacramento.

MODERATOR: Is industry expected to work cooperatively with CARB in that process?

VAN AELSTYN: CARB is holding a series of workshops, which is where the real rule-making gets done. It's here that industry stakeholders and environmental groups can have a voice in the process. CARB has wide discretion in establishing programs to reduce emissions. First on its agenda are the monitoring and reporting regimes that are going to be implemented.

HAUGHTON: They're looking first at how to go about defining what the 1990 emission level was, and this will form the benchmark for the whole regime. At a December

2006 workshop, CARB staff said that because setting that benchmark is merely a scientific determination—rather than a question of policy—it would not be subject to formal rulemaking procedures. Nonetheless, I expect that NGOs, governmental agencies and industry will have opportunities to have significant input into the process of defining that 1990 benchmark.

MODERATOR: It sounds like we're trying to do a lot of data gathering in a very short period of time.

HAUGHTON: One of the concerns is can we really get our arms around a realistic reliable 1990 estimate within one year. It's a huge undertaking. And on top of that, can we get a rule in place for reporting, with all of the stakeholder

Early litigation suggests that vehicle emissions may be preempted by federal fuel efficiency laws. That means CARB will have to achieve those aggressive reduction goals by focusing on stationary sources, and that puts much more of the burden on other sectors of the economy.

— Nicholas van Aelstyn

involvement that's required. CARB hopes to have something out for public comment in September, and intends to hold many workshops before then.

POLONCARZ: The act says that they need to require mandatory reporting from the largest emitters first. Is CARB going to go after cement manufacturers, electric utilities and refineries first? Will they achieve reductions from large sources first, and then engage in the more protracted discussion of who else needs to be involved in this reporting scheme later on?

HAUGHTON: I think that's likely.

VAN AELSTYN: CARB is mandated to develop a bottom-up inventory based upon actual monitored emissions. It's a huge undertaking.

HAUGHTON: Who is supposed to pay for this? That might sound like a sideshow detail, but there's a lot of person-power needed to get this job done.

FLUSHMAN: There was no budget line item proposed to account for the impact of this legislation on state agencies.

VAN AELSTYN: Catherine Witherspoon, CARB's Executive Officer, has predicted a 10 percent increase in CARB's staffing for AB 32 implementation. When they submit their budget requests to the legislature in January, we'll get a better idea of how they plan to achieve this.

MODERATOR: Who are the stakeholders active in this process?

POLONCARZ: Industry has a major concern in understanding who's going to be affected by the mandatory reporting requirements as well as any early action measures and final measures. Stakeholders also include very active NGOs here in California, who have expressed their concerns regarding the use of market-based trading schemes as a way to achieve 1990 emission levels.

MODERATOR: And when we say industry, specifically whom are we talking about?

POLONCARZ: It is a broad spectrum. I have advised clients they shouldn't assume that they're not going to be subject to AB 32 and mandatory emissions reporting merely because they are a "clean tech" or a biopharmaceutical company. The act says that CARB shall first require reporting from the largest sources, but doesn't really provide any more substance as to who's eventually going to be within its scope.

VAN AELSTYN: CARB faces a major challenge. According to the California Energy Commission, 40 percent of the greenhouse gas emissions in California come from the transportation sector, largely automobiles and other vehicles, with another 20 percent from in-state and out-of-state electricity generators. The problem CARB faces is that 40 percent may be off the table. Early litigation suggests that carbon dioxide emissions by vehicles may be preempted by the federal law establishing the CAFE standards for fuel efficiency. If CARB is not able to limit CO₂ emissions by vehicles, they are going to have to achieve those aggressive reduction goals by imposing reductions on stationary sources. That's going to put that much more of the greenhouse gas reduction burden on other sectors of the economy.

FLUSHMAN: If there is a holding that CO₂ cannot be regulated because of the CAFE standard, then AB 1493 (regulating automobile emissions) and a large part of the Greenhouse Gas Initiative will just go by the boards. It will be a huge blow.

VAN AELSTYN: Litigating that could stretch out for years. Catherine Witherspoon, CARB's Executive Officer, has said they intend to go all the way to the U.S. Supreme Court. California has been regulating auto emissions long before the federal government. Witherspoon has indicated that if the federal EPA does not grant the waiver to enable California to regulate auto emissions more stringently than the federal government, the state will sue the federal EPA, which could be a way of shortcutting access to the Supreme Court, rather than waiting for the AB 1493 litigation to get there.



Nicholas van Aelstyn
Beveridge & Diamond PC

CHRISTINE JEGAN

ADVERTISING SECTION

Environmental Law

FLUSHMAN: What do you think about the responsibility of the state as the *parens patrie* and the standing of states to bring these kinds of actions?

VAN AELSTYN: There's a nuisance case that Attorney General Lockyer brought against the Big Six auto manufacturers, which is modeled on the case of electricity generators in New York City, and standing issues are front and center there. It's questionable, frankly as to whether states do have that kind of standing.

POLONCARZ: During oral arguments in December in *Massachusetts v. EPA*, the first global warming case to go to the U.S. Supreme Court, that seemed to be the crux of the matter for the justices—whether the states really had an interest in addressing the results of climate change with their own actions, when it might not affect the outcome.

HAUGHTON: It seemed from their comments that at least four of them were going to vote that there was no standing. We don't know right now whether we're even going to get a determination on the underlying substantive Clean Air Act issue.



Bruce Flushman
Stoel Rives LLP

CHRISTINE JEGAN

FLUSHMAN: The *parens patrie* doctrine has been upheld in the environmental area since at least the 1920s, when Georgia sued Tennessee Copper on behalf of its citizens over pollution generated in Tennessee. Another question is the authority of California to extend the effect of its legislation outside of its boundaries to out-of-state electrical generators.

MODERATOR: Let's talk about what safe harbors or incentives are available to industry.

HAUGHTON: Emitters that sign up with California Climate Action Registry's reporting regime by the end of 2006 are entitled to some qualified protection against CARB later changing reporting requirements. But it's still very vague.

POLONCARZ: AB 32 only provides protection regarding the reporting program, that is, companies already signed up will not be required to significantly alter their reporting programs. The larger question is will early reductions in emissions be credited to companies if they enroll. The legislation that created the Climate Action Registry made it clear that entities that stepped forward early and achieved reductions would receive credit if and when mandatory reductions were later required.

ited to companies if they enroll. The legislation that created the Climate Action Registry made it clear that entities that stepped forward early and achieved reductions would receive credit if and when mandatory reductions were later required.

VAN AELSTYN: Clearly there is an intent to establish the Climate Action Registry as the primary vehicle for verifying

those efforts, but I query whether you can rely upon the Registry alone.

POLONCARZ: Not under AB 32's provision. You can sign up with the registry and achieve reductions worthy of credit, but you could also go with the EPA's Climate Leaders program and still achieve reductions that are creditable under any future regime.

MODERATOR: Are you advising clients to sign up with either program?

VAN AELSTYN: I'm advising clients to look at all options, the Registry, the EPA program, and others, very carefully. If you can provide verifiable monitoring data that shows reduction

It seems to me that there's a substantial argument the legislation may unconstitutionally stretch California law beyond state borders to impair contracts with out-of-state power providers.

— Bruce Flushman

in greenhouse gas emissions through various measures back to 1990, you are supposed to get credit under AB 32. How that will be given is anybody's guess. It's all very much in play.

HAUGHTON: There are advantages to getting started early. Figuring out how you're going to monitor and report your emissions is a complicated process, and it's unique for each industry and even for each player within each industry. Companies that get down that learning curve sooner are going to have an advantage come compliance time.

MODERATOR: Do you have clients who have decided to sign up as well as clients who are sitting back?

POLONCARZ: I have clients that have been participating in the EPA's voluntary Climate Leaders Program, which sets nationwide goals for achieving reductions. In that program, there are no assurances that early reductions would be credited under any future regime. Those companies are wondering whether they should now duplicate those efforts with respect to their California emissions by registering with the Climate Action Registry, or by registering with the Climate Action Registry for nationwide emissions, which is one option for entities registering in California. One attractive feature of the Climate Action Registry is that you can begin by inventorying your facilities and emissions in one state and treat it as a pilot project as you work out what kind of information systems you'll need in place to establish those emissions levels.

VAN AELSTYN: As a result of a legislative compromise, it will be up to CARB to decide if there is a carbon tax, or a market-based trading scheme to achieve compliance.

POLONCARZ: AB 32 establishes some significant thresholds for CARB to meet in order to actually implement a market-based system. First of all, they need to address the concerns for communities that are disproportionately impacted by air pollution, which would be communities living near the ports; in Oakland, in Richmond, in Long Beach. In California, regional reductions of air pollution problems or ozone resulted in a concentration of more toxic emissions in areas of traditionally minority or low-income populations. Overcoming that hurdle is going to be a very significant step for CARB, particularly given the interest of various NGOs on those issues.

There are advantages to getting started early. Figuring out how you're going to monitor and report your emissions is a complicated process, and it's unique for each player within an industry. Companies that get down that learning curve sooner are going to have an advantage come compliance time.

— Brian Haughton

HAUGHTON: AB 32 mandates the creation of an environmental justice advisory committee of at least three members. We have seen this in countless environmental statutes, without significant effect. Is this time going to be different?

VAN AELSTYN: I think it will be. That said, carbon dioxide emissions are different from ozone. Carbon dioxide is emitted everywhere. I don't think that you're going to have the same hot spot problem. There should be a way for market-based compliance mechanisms to address the hot spot problem. Whether it can be done to the satisfaction of the environmental justice communities is another issue.

MODERATOR: How are you helping your clients think strategically about their participation?

HAUGHTON: Our message to clients is the bus is leaving the station, and it's better to get on the bus and perhaps help drive it than to stand in front of it. Many clients want to engage in rule-making so they can help shape a regime they can live with.

POLONCARZ: I'm not a scientist, but typically the types of reductions that entities achieve in order to reduce their greenhouse gas emissions result in cost savings, because it involves conservation efforts. Therefore, if you have some inclination to reduce your energy usage it might be good to also account for those reductions in a way that is clear and verifiable by participating in one of those registries. So participating in one of the registries seems like a non-issue to

me. But I don't sense much desire among my clients to influence the rule-making debate.

VAN AELSTYN: I do advise clients to get involved in the process to try to shape it. AB 32 could very well become the template not only for federal legislation but possibly even for a new post-Kyoto international plan. It's always better to deal with an issue through legislation than litigation. For example, the auto industry participated in the rule-making with regard AB 1493 and it has served them well in the subsequent litigation challenging AB 1493. Better to get involved and shape it the administrative record, either for potential litigation or to develop mechanisms you can live with.

FLUSHMAN: There are some constitutional problems with this legislation. You may have long-term contracts that utilities have entered into with out-of-state power purchasers to provide power based on carbon fuels. It seems to me that there's a substantial argument the legislation may unconstitutionally stretch California law beyond state borders to impair those contracts.

HAUGHTON: Is there any way that this might lead to people revisiting ratemaking processes at the CPUC?

FLUSHMAN: That's possible, because this is going to affect the rate of return.

MODERATOR: Renewable, non-emitting energy sources present their own complexities. Bruce, tell us a little bit about the field.

FLUSHMAN: The kinds of issues that arise with respect to renewables—wind, solar, biofuels, ethanol, ocean power—are mainly CEQA/land use issues. The regulatory scheme in California for development of new energy sources is so complex and expensive that it is not welcoming to new technologies or new kinds of generation. There have been unsuccessful attempts in the legislature to try to modify CEQA. At some point that's going to have to be done, but in a focused manner.

HAUGHTON: Some projects trigger a lot of other permit and discretionary approval regimes as well. I recently was asked to help with a tidal power project to place turbines on the sea floor beneath the Golden Gate Bridge. The list of approvals for just the governmental sector was pages and pages long. And for wind and ocean power there are species issues.

FLUSHMAN: FERC has thrown its hat in the ring to regulate these offshore energy projects, and is having hearings to determine what that process will be. In addition, it is not yet clear whether there will be, or, if so, how offset credits for building these plants will be treated.



CHRISTINE JEGAN

Brian Haughton
Barg Coffin Lewis & Trapp, LLP

ADVERTISING SECTION

Environmental Law

HAUGHTON: How much hassle it turns out to be is largely a function of how novel the technology is. You can count the number of operating tidal energy projects around the world on one hand. FERC, legitimately, doesn't know how to deal with them, and neither do any of the other regulators that have to be involved. Whereas with biodiesel, you can borrow regulatory expertise from other similar technologies.

VAN AELSTYN:: Not only is there an issue of agency expertise, but it's a question of which agency has jurisdiction to begin with.

that sophisticated investors with regulatory savvy will look more favorably to those projects that are in front of the curve with respect to these regulatory schemes.

VAN AELSTYN:: This ties into the topic of CSR, corporate social responsibility. Increasingly, climate change issues have become an easy way to measure CSR and sustainability. If your company is attuned to climate change issues and takes



Kevin Poloncarz
Farella Braun + Martel LLP

CHRISTINE JEGAN

HAUGHTON: It's a big barrier to entry. The first entrants are bearing a lot of the up-front capital expense of getting through this regulatory thicket. Are the regulators going to recognize that and come up with some regulatory way to reward the first one down the learning curve?

FLUSHMAN: Again, as you say, it's better to be driving the bus than to be in front of it. Early entrants are likely going to be considered by the agencies in a somewhat preferential way as compared to later projects, which will be subject to an already developed process. At least with the ocean power, a limitless source of energy, the process before FERC and the relationship and impact of that process to other federal and state regulatory regimes is in the very early stages of development.

VAN AELSTYN: The venture capital community has recognized this and is putting a lot of money there.

HAUGHTON: With good reason. Green investments outperform less green investments significantly. I think the numbers were something like a 13.5 percent return compared to 8.7 percent return. That's enough of a delta that capital markets really stand up and take notice.

FLUSHMAN: Another incentive driving renewables is sustainability initiatives that companies like Wal-Mart require their suppliers to adopt. Back to your point, Brian, the capital flight from high tech into renewables is astounding, but it may be too much money chasing after too few viable projects. You really have to be careful if you're an investor as to which project you are backing. That is just another way of saying

I have advised clients they shouldn't assume that they're not subject to AB 32 and mandatory emissions reporting because they are a "clean tech" or a biopharmaceutical company. We don't know who's eventually going to be within its scope.

— Kevin Poloncarz

those into account, that sends a message to investment partners, the marketplace and consumers that you get it.

HAUGHTON: My theory on corporate social responsibility is engage, engage, engage. Find the stakeholders and engage with them, whether they are customers, employees, unions, shareholders, regulators, or NGOs. Getting out in front on greenhouse gases, for example, affords you an easier access point for engagement in a lot of situations. If you are in a relicensing situation for a hydropower plant, and can show you are already engaged in these issues, it's a real benefit for the regulated sector.

VAN AELSTYN: Whether it's government regulation, public interest litigation, or simply the broader marketplace, there is real brand equity to be achieved if you can get out in front on these issues.

HAUGHTON: I'm seeing the same thing happening with environmental justice issues that happened with workplace safety and workforce diversity. Companies that I represent see value in making progress on all these fronts. Clients that are making good progress in this area have happier workforces, and happier workforces are more productive workforces. Your company is going to do better if the people who work for you feel good about you when they get up in the morning. Whatever is going on legally, in the regulatory arena, the legislative arena, or even in the courts, the public opinion train has pulled out of the station. And that drives the market.

NICHOLAS ("NICO") W. VAN AELSTYN is a Principal with Beveridge & Diamond, P.C.'s expanding San Francisco office. Nico has more than 15 years of environmental litigation and counseling experience. He has closely followed and written articles about developments in the area of climate change law, including California's AB 32. nvanaelstyn@bdlaw.com



BEVERIDGE & DIAMOND, P.C. was established in Washington, DC in 1974 by a small group of attorneys who practiced environmental and corporate law. Since that time, we have become the largest and oldest firm in the nation that concentrates its practice in all aspects of environmental law and civil and criminal litigation. www.bdlaw.com

BRUCE FLUSHMAN represents public and private interests in a wide variety of matters relating to renewable energy, including natural resources regulation, land title, water quality and land use litigation. Bruce advises public and private entities concerning compliance with environmental (wetland, water quality, hazardous and solid waste, forest practices, clean air and land use) law and regulations, Clean Water Act (sections 401, 402 and 404), and land use permits or entitlements. He is the co-author of "Siting and Permitting Ocean Power Projects," Natural Gas Electricity (December 2006). bflushman@stoel.com



STOEL RIVES has developed a leading legal practice committed to successfully balancing economic and regulatory issues in the allocation and preservation of land and natural resources. The firm also has been at the forefront of the incredible growth of renewable energy in recent years, representing many of the renewable energy developers throughout the United States. Our practice in these related areas includes more than 100 attorneys representing clients facing a broad range of challenges. www.stoel.com

BRIAN HAUGHTON is a partner at Barg Coffin Lewis & Trapp, LLP. His practice encompasses all areas of environmental law, including climate change, air quality, water quality, hazardous and solid waste, CEQA, NEPA, Proposition 65 and brownfield cleanup and redevelopment. Brian graduated from Boalt Hall School of Law in 1983. bsh@bcltlaw.com



Barg Coffin Lewis & Trapp, LLP provides nationally-recognized expertise in all aspects of environmental counseling and litigation. The firm's private sector clients span manufacturing, energy, transportation, real estate, waste management, agriculture, professional services, food processing, biotech, pharmaceuticals and chemicals, and public sector clients include cities, redevelopment agencies, utilities and universities. www.bcltlaw.com

KEVIN POLONCARZ is a partner in Farella Braun + Martel's Environmental Law Department and leads its Air Quality and Climate Change practice. He represents clients in front of a broad range of federal, state and local agencies in resolving complex environmental compliance and enforcement matters. In his Air Quality and Climate Change practice, he represents and advises clients, such as biopharmaceutical and telecommunications firms, wineries and electric generating facilities, concerning all aspects of relevant air quality regulations and climate change initiatives. kpoloncarz@fbm.com



FARELLA BRAUN + MARTEL represents clients throughout the United States and abroad in sophisticated business transactions and high-stakes litigation. We are known for our imaginative legal solutions and the dynamism and intellectual creativity of our lawyers. www.fbm.com



JAN BROWN & ASSOCIATES is a worldwide deposition reporting and legal video company. We offer the latest in technical expertise and the highest quality in the rendition of these services. Our services include realtime depositions, video conferencing, full service legal videography, document scanning, on-line repository, DVD or CD-ROM, case management services for large complex cases. We are Certified Livenote Providers and offer conference rooms. Our services are utilized by the top firms in the country and we are the court reporters and videographers of choice. www.janbrownassociates.com 800.522.7096