

A Change in the Climate for Cap and Trade Legislation

Nelson Johnson and Christopher Jaros

As confetti fell from the rafters in Scott Brown's election headquarters on the evening of January 19, 2010, securing a forty-first vote for Senate Republicans, whatever hope that remained for comprehensive climate change legislation may have fallen with it. Such legislation, which faced stiff opposition in the Senate even before the Massachusetts election, now faces a filibuster there. Carbon cap-and-trade, at least for this election cycle, appears to be at a standstill. Climate change regulation is far from dead, however. The U.S. Environmental Protection Agency (EPA) recently completed the groundwork for regulating carbon emissions under the Clean Air Act, an outcome whose burdens could be great and benefits unknown.



Much can change in a month. In December, President Obama took center stage at the UN Climate Change Conference in Copenhagen and pronounced his Administration's commitment to climate change.

He not only called for member nations to work in a unified effort to reduce global emissions, he showed his dedication by helping draft and agreeing to participate in the Copenhagen Accord. Although the three-page Accord does not place binding carbon targets upon participating nations, it expressly recognizes "the critical impacts of climate change," and states that significant reductions in global greenhouse gas emissions are necessary to limit rising global temperatures. Further, the Accord pledges \$30 billion in short-term funding by developed nations to provide new and additional carbon reduction resources to developing nations, as well as an additional \$100 billion annually starting in 2020 to fund long-term projects.

Under the terms of the Accord, participating countries were required to submit their carbon reduction goals to the UN by January 31, 2010. The US duly did so, giving notice that it will aim for a 17 percent reduction in emissions in carbon dioxide and other gases by 2020, from 2005 levels. Not surprisingly, these reduction goals mirror those contained in the Waxman-Markey bill, H.R. 2454, a bill that seeks to limit carbon emissions through a broad cap-and-trade system, and which narrowly passed the House by seven votes in June.

About Interraction

Interraction is a network of experts from Science, Engineering, Architecture, Communications, Management Consulting and Law, whose purpose is to bring a unique level of service to organizations in search of comprehensive expertise on climate change and sustainable practices.

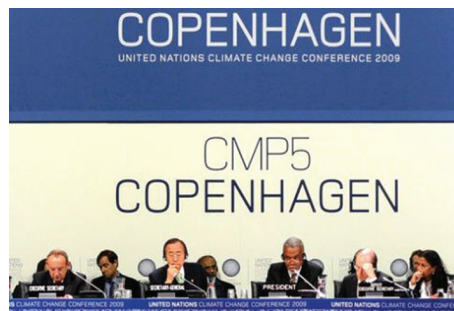
These reduction goals and President Obama's statements in Copenhagen showed optimism that comprehensive climate change legislation would make it to the Senate floor in 2010. Such optimism may have seemed appropriate at the time, but it now seems misplaced. The Senate was unable to draft a companion bill that could garner the 60 votes necessary to avoid a Republican filibuster even before Brown's election; after his election, such a task seems even more unlikely.

The U.S.'s reduction goals notwithstanding, Brown's victory in Massachusetts has made it unclear if any climate change legislation, whether cap-and-trade or otherwise, can make it through Congress. The electorate appears to be focusing on the economy rather than climate change, and recent polls find significant decreases in the number of people who consider climate change a top priority. Politicians might well be focusing elsewhere as well, since Brown's victory in Massachusetts has made some wonder whether the Republicans might repeat their successes in the 1994 Congressional elections, where they gained 54 seats in the House and 8 in the Senate. For now, the political will as well as the political reality for controversial, government-heavy legislation appears to have subsided.

As evidence, several Senators have moved to abandon the controversial aspects of the Waxman-Markey bill, and instead are concentrating on the drafting and passing of more-moderate climate change legislation this year. Thus far, the most work has been done by Senators Kerry, Graham and Lieberman, who have come together in an attempt to craft legislation with input from moderate Democrats and Republicans, the U.S. Chamber of Commerce, and other stakeholders. At this point, their joint legislation would likely be a hybrid bill coupling either cap and trade or another carbon reduction mechanism, expanded domestic oil and gas drilling and increases in federal aid for expanding nuclear power. Other moderates have suggested drafting legislation in the form of an energy bill, which would limit the cap-and-trade system solely to electric utilities, as opposed to an economy-wide system that many environmentalists believe is the heart of the legislation.

These alternative bills would not meet the emissions goals stated in Waxman-Markey or the Copenhagen Accord, of course, and they would come nowhere near the Copenhagen goals of the European Union. The Waxman-Markey and Accord goal is a 17 percent reduction from 2005, whereas the European Union has pledged to reduce emissions by 20 percent from 1990 levels by 2020, and to seek reductions of 30 percent if joined by other nations.

There is some indication that the Obama Administration might agree to these limited goals, however, as long as it might lead to legislation *this year*. For example, in his State of the Union address, President Obama omitted entirely the term “cap and trade;” instead, he talked about both nuclear power and offshore drilling. This omission is notable, and it demonstrates an acknowledgment of the significant difficulties that even compromise



legislation will face getting to the floor of the Senate.

If climate change legislation should prove politically infeasible, President Obama and the EPA have back-up plans. Most importantly, the EPA is planning to regulate greenhouse gases under the Clean Air Act. Spurred by the Supreme Court's decision in *Massachusetts v. EPA*, the EPA has issued a finding that greenhouse gas emissions cause or contribute to air pollution that endangers public health and welfare — the so-called “endangerment finding.” The endangerment finding is the foundation for Clean Air Act regulation, and the EPA is proposing to regulate under the Act's complex “prevention of significant deterioration” and “new source review” programs.

The EPA regulations are expected to take effect in 2011, and they would require all sources emitting greenhouse gases above a yet-to-be specified threshold to obtain permits for new construction and major modifications. These permits can be highly complex and mandate costly control equipment, and the EPA initially expected about 400 new permit applications each year. This number may seem small, but it would be an increase of 150% over current rates, and it would strain overtaxed agencies and delay the industrial projects for which the permits are sought. A barrage of litigation seems likely; indeed, a number of organizations and interest groups already have challenged the endangerment finding, and Senator Lisa Murkowski has introduced a resolution seeking to nullify it.

Another possibility is that the Administration may offer legislation with a climate-change purpose but a job-creation label. If such legislation were marketed skillfully enough, it would be hard to keep it from the Senate floor.

But whatever this year's climate change legislation might turn out to be, it likely will not be cap and trade. And without cap-and-trade, climate legislation may not meet even our modest Copenhagen goals, much less the goals of the European Union or more-stringent goals advocated by climate scientists. And if EPA goes through with its plan to regulate greenhouse gases via the Clean Air Act, even minor emitters may face a complicated and expensive regulatory program. Few would argue that this regulatory program is a more economical or even a more effective solution than comprehensive climate change legislation, but it may be the only one available.



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commentary

As federal legislators fumble through the climate crisis, city governments are delivering substantive progress towards the fight against climate change. City governments have direct authority over major energy consumption activities such as transportation planning, building codes, street lighting, water and sanitation; therefore much can be done without federal legislation. City governments also have strong policy tools such as tax incentives, mandates, speedy approval processes as well as awards and other recognition for outstanding voluntary performance.

Many cities have exerted their authority such that numerous new laws are being enacted that affect all types of business. In 2007, New York City released PlaNYC,¹ a comprehensive sustainability plan with 127 initiatives including a goal to reduce the carbon footprint of New York City 30% by 2030. To support this ambitious goal, the City Council recently passed four laws as part of the Greener, Greater Buildings Initiative.² One component of this legislation requires large commercial buildings to install highly efficient lighting, which will make significant reductions in lighting energy consumption (commercial building lighting currently consumes 12% of the city's total energy use). The second law requires *all* building renovations, even as small as a single window replacement, to meet energy code, not just renovations over 50% of the building as previously required. The two other bills require large buildings to have an energy efficiency audit every 10 years and to report energy consumption use annually to the Department of Buildings for benchmarking and inventory purposes. New York City building owners, commercial tenants, and anyone in the construction industry will be affected by these nationally ground-breaking laws.

The City of Austin has also been focused on reducing the city's carbon footprint through a more market-based approach. Austin

has created an incentive program which provides private property developers with increased height and development areas for new buildings that achieve green building certification through the LEED rating system. Austin also fast tracks these projects through the planning approvals process. Like New York City and Austin, hundreds of large and small cities across the US have been using both policy and incentives to reduce the carbon emissions of their buildings, cars, buses, water, and trash networks.

Another initiative that cities are undertaking with respect to climate change is comprehensive carbon emissions inventories, given that cities have high concentrations of people, businesses and emissions — and records can more easily be kept at the local level. Eleven US cities have joined the C40 initiative³, have tallied in great detail their carbon emissions across all sectors, and have made this data public. Nearly every major city across the country has set carbon reduction goals through annual "climate action plans," and communicating their lessons on which policies and incentives work best.

However, cities acting alone will not solve our climate problem. Global carbon reductions require partnering and trading across state and national boundaries. Major power generating facilities for renewable energy need to be instigated at a national scale. As well, investments and savings need to be shared across the entire country.

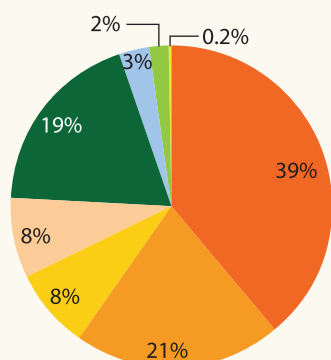
Until this happens however, cities will continue to be at the forefront in developing and implementing solutions to reduce our greenhouse gas emissions.

¹ <http://www.nyc.gov/planyc2030>.

² http://www.nyc.gov/html/planyc2030/html/plan/buildings_plan.shtml.

³ <http://www.c40cities.org>.

NEW YORK CITY GREENHOUSE GAS INVENTORY 2008 Citywide CO₂e Emissions by Sector



Total = 53.5 MMT

Buildings = 75%

■ Residential
■ Commercial
■ Industrial
■ Institutional

Transportation = 22%

■ On-road transportation
■ Transit

Fugitive and process = 2%

■ On-road transportation

Streetlights & traffic signals = 0.2%

■ Streetlights & traffic signals



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