

Busy Summer for Climate Change

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Client Advisory

September 5, 2017 by Christopher Rizzo

In a report updated on August 30, 2017, the U.S. National Oceanic and Atmospheric Administration concluded that climate change is likely to increase the intensity of Atlantic Ocean hurricanes. The report states: "it is likely that climate warming will cause hurricanes in the coming century to be more intense globally and to have higher rainfall rates than present-day hurricanes." [1] The report, which NOAA describes as "conservative," declines to conclude that climate change has already changed the frequency and intensity of U.S. storms. Similarly, the draft Fourth National Climate Assessment released on June 28, 2017 expressed near-certainty that human activity has caused unprecedented and destructive global warming but reserved judgment on how climate change has already impacted extreme weather events. Hurricane Harvey has brought record-breaking rainfall and heart-breaking destruction to Texas. It is fitting then to address the important legal developments that have taken place in summer 2017 in U.S. climate law. Here is a summary.

- On August 23, the Regional Greenhouse Gas Initiative Inc. ("RGGI") announced a 30% reduction in 2020 greenhouse gas emissions by 2030. RGGI is an interstate compact of nine northeastern states that in 2009 agreed to jointly enact regulations creating a cap-and-trade system for power plants. All power plants with 25 megawatts or more of average generating capacity must purchase enough carbon dioxide allowances to offset their emissions. States agree to reduce available allowances each year, thus increasing pressure on power plants to modernize or close. Northeastern emissions have indeed fallen dramatically but there is some debate about whether that is a result of RGGI or independent modernizing efforts in the industry. New York State also beat back a major legal challenge to its climate change legal framework earlier in July. In *Coalition for Competitive Energy v. NYS Public Service Commission*, [2] a federal court dismissed a legal challenge by traditional energy generators to the State's Zero Emission Credit ("ZEC") program, which provides nuclear power plants state subsidies that are passed on to energy consumers. The Public Service Commission defended the program as a vital way to preserve nuclear power plants' contribution to the State's renewable energy commitments. The plaintiffs saw the program as an illegal subsidy to the unprofitable nuclear power industry. Either way, nuclear power provides 30% of the State's energy and is vital to meeting the Governor's goal of reducing greenhouse gas emissions 80% below 1990 levels by 2050.
 - On August 7, U.S. ambassador to the United Nations, Nikki Haley, sent a terse letter to the Secretary General stating the United States' intention to withdraw from the 2015 Paris Climate Accord as soon as possible. It states: "Unless the United States identifies suitable terms for reengagement, the United States will submit to the Secretary-General, in accordance [with the Agreement] formal written notification of its withdrawal as soon as it is eligible to do so." This sentence is significant in two respects. First, it leaves open the possibility of the nation's staying in the accord if better deal terms can be negotiated (other nations have already indicated that they are not open to renegotiation). Second, the letter acknowledges the reality that under the terms of the accord, the United States cannot legally withdraw from the accord until 2019. This legal detail doesn't matter much domestically as President Trump signed an executive order in March 2017 rescinding a host of climate-change related orders of former President Obama. The March
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2017 order also requires the U.S. Environmental Protection Agency to review and eventually rescind rules enacted under the “Clean Power Plan,” which is intended to phase out older and polluting power plants. [3]

- On July 26, two Democratic senators introduced legislation to impose a \$49/ton tax on greenhouse gas emissions. [4] The American Opportunity Carbon Free Act would impose a tax on industries contributing emissions but provide refunds for exported products to ensure U.S. competitiveness. It would also reduce the corporate tax rate from 35% to 29%—a bid to win over conservatives in Congress. This bill builds on a February 2017 proposal championed by a group of retired Republican officials that calls for a \$40/ton tax on greenhouse gas emissions to replace the Clean Power Plan. [5] The current administration has signaled that its next major legal initiative will be reformation of the IRS tax code and reduction in corporate income taxes.
- On July 25, California approved a law to extend the 2006 Global Warming Solutions Act from 2020 to 2030. [6] The law led to a variety of regulations to reduce the state’s carbon dioxide emissions 15% below 1990 levels by 2020. The most significant component of the Act is a cap-and-trade credit system for power plants. The 2017 extension will require the state to reduce greenhouse gas emissions 40% below 1990 levels by 2030. Since California is effectively the world’s sixth largest economy, the Act is very significant.

Like Hurricanes Katrina and Sandy, Harvey is likely to intensify the debate in the United States over federal efforts to control greenhouse gas emissions and mitigate against rising temperatures and sea levels. For two decades, however, most legal efforts to address climate change have taken place at the state and local level. If current trends continue, that will remain true for years to come.

For more information concerning the matters discussed in this publication, please contact the author **Christopher Rizzo** (212-238-8677, rizzo@clm.com), or your regular Carter Ledyard attorney.

[1] <https://www.gfdl.noaa.gov/global-warming-and-hurricanes/>

[2] 2017 WL 3172866 (SDNY July 25, 2017)

[3] The U.S. Supreme Court stayed implementation of the Clean Power Plan in early 2016 in light of numerous lawsuits filed against the Plan. In April 2017 the U.S. Court of Appeals for the District of Columbia, which is hearing the lawsuits, temporarily stayed the litigation in light of the President’s executive order.

[4] S. 1639 – 115th Congress (2017-2018)

[5] This proposal has not been introduced in Congress and to date has no legislative sponsors.

[6] California Assembly Bill No. 398 (2017).

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