

Climate Change and the Environment – Law Firms

Climate Change: The Future Is Upon Us

The Editor interviews Peter J. Fontaine, Co-Chair, Climate Change Practice Area, Cozen O'Connor.

Editor: Mr. Fontaine, would you tell us something about your professional experience?

Fontaine: I've been an environmental lawyer since 1990. I graduated from George Washington University School of Law that year and accepted an honors position at the EPA, where I worked in the enforcement program until 1995. Since that time I've been in private practice working on a variety of different environmental law matters, including environmental litigation, cleanup obligations, compliance counseling with respect to environmental regulatory requirements and, most recently, climate change counseling, which involves helping companies position themselves in the rapidly evolving climate change legal regime and address the risks and opportunities presented by climate change.

Editor: Please tell us about Cozen O'Connor's Climate Change Practice Area.

Fontaine: In the early 1990s the EPA adopted a market-based pollution trading program called the Acid Rain Program. This derived from amendments to the Federal Clean Air Act and constituted an economic approach to controlling pollution. It was highly successful and resulted in a major reduction of sulfur dioxide emissions from large coal burning power plants at only 40 percent of the costs originally anticipated. This program was then extended to sources of nitrogen oxides and was also successful. So when climate change emerged as a global environmental problem resulting in the Kyoto Protocol, I began to think that climate change was the next revolution in environmental law and that there would be great opportunities to work on issues that help both business and the planet. I started speaking and writing on climate change. Last year the firm decided to form a practice group which combined lawyers from various disciplines across the firm to address any aspect of climate change impacting business. My partner Bill Stewart is the other co-chair.

Editor: What are the biggest risks, including potential hotbeds of litigation, facing companies as the effects of climate change become more severe?

Fontaine: We are already seeing the emergence of litigation brought by parties that have been injured by the rapidly changing climate. Hurricane Katrina is a good example. Litigation was recently filed by an Alaskan indigenous population against various utilities that are large carbon dioxide emitters. I think we are going to see litigation against specific companies that fail to account for the risks posed by the changing climate, and we cite several in a white paper recently published by the firm, *The Business of Global Warming: Managing The Risks*

And Opportunities Of Climate Change.

We think we are going to see increasing efforts to use the courts as a tool to compensate victims of climate change – resulting from rising seas, enhanced drought conditions, and so on – and those companies that face exposure in this area are going to have to get a good handle on their carbon footprint and begin to determine what they can do to reduce carbon emissions.

Editor: How can companies combat such risks? Why is doing an emissions' inventory a critical first step?

Fontaine: Well, knowledge is power. For an organization to have a handle on its carbon dioxide emissions – and other greenhouse gases such as methane – an inventory is a necessary first step. It establishes the company's baseline, from which the initial efforts to reduce those emissions can proceed.

Companies that can decrease their emissions are better served in a variety of ways. First of all, anything that is good for the environment usually gains some excellent publicity for the company. It also serves to encourage others to get on board. Secondly, reducing carbon emissions is usually a way to reduce costs because excessive emissions often reflect inefficient ways of doing business. Telecommuting, videoconferencing and the like come to mind as a response to this type of inefficiency, among many other measures. Finally, a company that understands its carbon emissions status is in a position to develop a corporate policy and a plan to reduce those emissions.

Editor: What approach should organizations take in reducing their emissions?

Fontaine: The approach is as multifaceted as the problem itself. No single approach works for everyone or in every situation. A switch in fuel sources to less carbon-intensive forms, changing forms of transportation, modifying manufacturing processes, all require careful monitoring on an ongoing basis and are among a myriad of things to be addressed. What is absolutely certain to me is that companies that are early adopters of technologies designed to reduce emissions are going to stand a much better chance of qualifying as early reducers that receive CO2 credits when, inevitably, a mandated regulatory program is put into place. Conversely, those who have not acted are going to be scrambling to comply.

Editor: How can entities document their efforts to qualify as early reducers and be eligible for potential CO2 credits?

Fontaine: Well, the first thing for the company to do is establish its baseline.



Peter J. Fontaine

This is vitally important because the company must have an accurate baseline against which to measure its actions before any such actions are implemented. Next, the company must document the actions it is taking through the use of certified emissions auditors and creditors, entities certified to measure emissions, document reductions and report the results to the world.

Editor: What sectors contribute the most greenhouse gas emissions?

Fontaine: That's an interesting question. Roughly one-third of greenhouse gas emissions are from electricity generation, the combustion of fossil fuels, coal, natural gas and petroleum to produce electricity. Another third is from transportation: cars and trucks on the highway, railway transportation and, of course, the airlines. The final third is comprised of agriculture and industry. This includes petroleum refining, chemical manufacturing, commercial offices, and so on. It also includes the ways in which people use heating oil and gas to heat their homes. Agriculture covers a wide array of agribusinesses, including livestock – which is a source of methane, a very powerful greenhouse gas – and agricultural soil management.

Editor: I understand that emerging technologies could revolutionize the transportation sector and ultimately reduce greenhouse gas emissions. Tell us about them and the firm's involvement in this area.

Fontaine: The firm has been working with several technology companies that are trying to commercialize battery-driven vehicles. These are electric vehicles that have been developed over the last ten years to the point where they have the energy density and performance capabilities to enable them to be used on the highway. We see the first evidence of this development in the Toyota Prius and the Ford Escape SUV, which have a relatively small nickel metal hydride battery used to provide some power to the engine, resulting in much better fuel economy than a conventional gasoline vehicle. The next generation entails plug-in hybrid vehicles, a larger battery comprised of lithium ion as opposed to nickel metal hydride. These batteries were developed from the personal computer and electronics industry which uses lithium ion batteries to power cell phones and laptop computers. They have tremendous performance capability and will eventually, I believe, lead to the resurgence of the electric car. Electric transportation could be a massive market opportunity for electricity suppliers, particularly from renewable sources. Demonstration products are beginning to emerge.

Editor: Emerging technology aside, there are several legislative efforts underway which could provide guidance to companies and help protect them in the long run. To start, why is it important for the SEC to promulgate a

rule identifying climate change as among the topics for material risk disclosure under rule SK?

Fontaine: Many people believe that it's important to have a standard to measure the obligations of a company when it comes to disclosing risk, particularly where disclosing risk is a means of effectuating a change in behavior. A company that assesses its risk of climate change – both its emissions and how the company is at risk as a result of physical changes and potential legislative and regulatory changes that impact on its business – is going to be more likely to modify its behavior. Disclosure, accordingly, is perceived as a way of inducing change. That is why we see strong advocacy by public institutional investors who are urging the SEC to issue guidance for companies struggling with this issue.

Editor: Speaking of legal reform, what could federal legislation, reflecting and implementing U.S. climate change goals, look like?

Fontaine: Well, I think the most likely outcome is that we will see, in 2008 or 2009, a federal climate change law that creates a cap and trade program for greenhouse gas emissions. Such a program would cap emissions of carbon dioxide and other greenhouse gases like methane at a certain specified level across most sectors of the economy. The proposals range from 60 percent of the economy all the way up to 80 percent. From such a level the cap would be ratcheted down over time and eventually get to the point where we have decarbonized our economy, i.e. switched to alternative ways of propulsion and of producing electricity that takes out the carbon equation. The consequent promotion of solar energy and wind power will permit extensive exploration of alternatives that can be exploited in a carbon-constrained economy.

Editor: Is cap and trade or a carbon tax the better solution?

Fontaine: Both are tools that should be considered. Many people believe that carbon taxes are a much more equitable way to attack the problem of carbon emissions because they are simple and would be more widely distributed throughout the economy. One difficulty with a cap and trade program is there are so many different sources of carbon dioxide that administratively it would be difficult to implement. And unless it is applied across the world, there is great potential for leakage – the concept of polluting operations moving to other parts of the world unconstrained by the regulations. In addition, there are high transaction costs, and no doubt opportunities for fraud and abuse. The alternative is to simply impose a tax on sources of carbon, i.e., a tax on electricity produced from fossil fuels. Now, the imposition of taxes in the U.S. is not popular, but tax policy can be a very effective tool to change behavior. For that reason, a carbon tax deserves consideration.

Please email the interviewee at pfontaine@cozen.com with questions about this interview.