

# Clean air jump-start

As the US political system finally gears up to address greenhouse gas emissions, **Michael Northrop** and **David Sassoon** argue that the basis for swift federal action is already in place: the Clean Air Act



Hill start – Congress has set the stage for federal action on carbon emissions

The urgency of the current situation cannot be over-emphasised: the latest scientific research tells us that global warming is accelerating at a rate beyond previous expectations, and that the window for timely response is shrinking quickly. Despite some political efforts to muddy the waters, there is growing scientific agreement that greenhouse gas (GHG) emissions must now be stabilised within seven years or the world will face unpredictable and devastating climate-related catastrophes – far beyond the serious impacts already in evidence globally<sup>1</sup>.

Climate action in the US – at a federal standstill for the past eight years – is expected

finally to move forward with the inauguration of a new president in 2009. What preparations can be made now to assure action within the first 100 days? Congress is expected to try to move cap-and-trade legislation again while also addressing related issues through other bills – energy, transportation, economic policy and conservation. But the key question remains – is there a leadership strategy that the next president can initiate to strengthen the likelihood of success?

The latest science demands a strategy that fulfills two requirements without fail: it must provide a policy pathway that will start to reduce emissions immediately; and it must also

provide a political pathway that avoids continued political gridlock.

Relying on a single piece of legislation runs the risk of failing to meet one, or both, of these non-negotiable requirements. It could easily take more than seven years to get a federal carbon trading mechanism up, running and working to stabilise emissions. It is also possible that Congressional compromise will water down cap-and-trade emissions targets and worse, undermine existing state and regional efforts.

There is a promising and important alternative strategy under discussion by legal experts that fulfills both requirements and opens the door to swift action. Details are still being worked out, but the fundamental idea is to apply the Clean Air Act – arguably the most cost-effective environmental law in the US. The legal basis for this strategy is strong – the Supreme Court's decision of April 2007 in *Massachusetts v Environmental Protection Agency*.

"The high court essentially said the United States currently has a law for regulating carbon dioxide emissions and it's called the Clean Air Act," says John Dernbach at Widener University Law School. Dernbach, who writes extensively on climate change, co-authored an amicus brief in the landmark case on behalf of 18 prominent climate scientists. "Further, under the standard established by the court, the science makes it clear that the law must be applied."

What this means is that two branches of government – Congress, which enacted the law, and the Supreme Court, which confirmed its applicability to carbon dioxide (CO<sub>2</sub>) – have already set the stage for an executive branch willing to implement the law. The next president can step into office and lay out a comprehensive strategy for a national climate plan that uses the Clean Air Act and identifies areas for Congressional action. The moment is ripe for executive leadership.

The EPA has asked for public comment on how best to apply the law to GHG regulation after offering its own preliminary analysis – the Advanced Notice of Proposed Rulemaking. In the document, EPA staff specifically asked for comment on whether a cap-and-trade mechanism can be used under the Clean Air Act and, if so, how it should be employed.

Robert McKinstry, a partner in the environmental group at the law firm of Ballard, Spahr, Andrews & Ingersoll in Philadelphia, who also co-authored the amicus brief with Dernbach, is one of many experts who are working to answer the EPA. He believes that the Act can offer a parallel, lower-cost and faster avenue for establishing a national carbon market than completely new legislation. He points to existing regional carbon trading efforts as mechanisms that offer a head start.

Three regional programmes are now already in development – the Regional Greenhouse Gas Initiative, the Western Climate Initiative and the Midwest Governors Greenhouse Gas Accord – with the first holding its initial auction this month. Taken together, these initiatives to combat global warming now cover

<sup>1</sup> *Confronting Climate Change: A Scientific Expert Panel Report*, NY Academy of Sciences. See [www.nyas.org/ebrief/miniEB.asp?ebriefID=618](http://www.nyas.org/ebrief/miniEB.asp?ebriefID=618)

half the US population, and state governments are already considering how to harmonise regional trading systems with each other, and with the EU's Emissions Trading Scheme under an effort called the International Carbon Action Partnership. In addition, 39 states, and most Canadian provinces and Mexican states, have established a Climate Registry to measure emissions, a key cornerstone of an eventual national market.

It is this already-evolving US carbon marketplace that provides the construct around which a national system can evolve from the bottom up, McKinstry believes, given a broad and full application of the law, that begins with an "endangerment finding." This finding would require the EPA to regulate CO<sub>2</sub> by triggering the application of the various interlocking provisions of the law – for example, establishing a National Ambient Air Quality Standard (NAAQS) and requiring states to develop State Implementation Plans (SIPs) for GHG mitigation. Since it is the EPA's job to establish specific requirements for what SIPs must contain, it is through this standard setting, McKinstry believes, that the EPA can harmonise state carbon trading markets into a national whole.

It is tricky legal terrain. Many experts do not believe the EPA can establish a carbon trading mechanism on its own authority, but they agree that states can, and that the EPA can play the role of regulator. Why not allow the best-equipped federal agency to oversee, harmonise and encourage the ongoing development of regional carbon markets, which are already way ahead of anything likely to emerge anytime soon from new federal legislation?

Other experts, who see the Clean Air Act as a jump-start too, do not advocate quite the same approach. They are concerned that the process for establishing a National Ambient Air Quality Standard could conceivably consume years – especially given the likelihood of litigation – with the process of drafting SIPs for each of 50 states adding another layer of precious time.

"EPA has the authority to regulate sources of pollution directly without waiting for the NAAQS/SIPs process to unfold," said Lisa Heinzerling, professor of law at Georgetown University Law Center, who wrote the petitioners' brief in *Massachusetts v EPA*. "For example, the agency could set emissions standards for new stationary sources of pollution – such as coal-fired power plants, oil refineries, and steel and concrete plants – in relatively short order. And I believe it might even be possible to allow carbon trading under the New Source Performance standards of Section 111."

This debate among experts, soon to be aired in public comments responding to the EPA's Advanced Notice of Proposed Rulemaking, will require the training of a Talmudic scholar to follow, and the wisdom of a sage to clarify. Nevertheless, expert minds are in agreement that the first step begins with an endangerment finding that opens action on two parallel pathways. One of them, some experts believe, could lead eventually to state-by-state

federal regulation of GHGs. Other experts prefer a second pathway, which could lead more immediately to federal standards that would stabilise emissions of the most carbon-intensive sources of pollution. There is also the possibility of strengthening the Clean Air Act itself.

"The Act deserves to be amended to provide a specific global climate focus, perhaps through a new title, as was done for Acid Rain in 1990," said Mary Nichols, chair of the California Air Resources Board and a former EPA assistant administrator. She believes the Clean Air Act provides a strong platform for a national climate programme. "There is no reason to abandon a legislative framework that has worked well."

California demonstrated to the nation how the law can be made to work to reduce greenhouse gases when it petitioned the EPA to allow it to impose more stringent GHG emissions standards for automobiles. By granting the long-delayed waiver – whose standards 17 other states are ready to adopt – the EPA could significantly accelerate GHG reductions from the transportation sector with the stroke of a pen. It provides one of the best examples of action that demonstrates both the potential speed and the abiding efficacy of the law. Further, the agency could also accept eight other petitions pending that would regulate emissions from other mobile sources – such as trucks, locomotives, boats, airplanes and off-road vehicles.

This kind of rule-making – not law-making – immediately shifts the *status quo* from argument to action by applying already available regulatory mechanisms.

"There are numerous advantages to this parallel executive branch approach. First and foremost, it capitalises upon the most advanced climate work in the nation now occurring at the state level," said Tom Peterson, who runs the Center for Climate Strategies and was formerly a staff economist for the EPA. Peterson has worked directly with both Republican and Democratic governors and in dozens of states on climate policy planning. Thirty states have developed, or are developing, comprehensive climate action plans, and most project net economic benefits driven by fuel cost savings, as well as job creation and overall economic development.

"What we ultimately need to develop is a partnership between all jurisdictional levels of government working together to create a national plan, with each level doing what it can do best," Peterson said. "We need to use the full set of available policy tools to ensure adoption of the lowest cost and most practical approaches. That's the comprehensive structure of action that the Clean Air Act strives to encourage."

Ross Macfarlane, a senior adviser for Climate Solutions, a Pacific Northwest group that works on climate policy development, sees a similar need for the convergence and coordination of currently disparate jurisdictional efforts.

"We saw state and regional effort as a way to spur federal action, which has been absent," he said. "What we are finding is that many of the actions needed to reduce greenhouse gas emissions lie in spheres that are more suitable for




**Mary Nichols, California Air Resources Board: "No reason to abandon legislative framework"**

state and local regulation: such as land-use, transportation policy, utility regulation, and driving energy efficiency in existing buildings. We now know that comprehensive solutions will only emerge from a partnership between federal, state and local government."

The Clean Air Act is already a mature, flexible and successful law designed to integrate the work of all economic sectors and all levels of government. Honed in three stages of effort – the original law-making and two major rounds of amendments – it is a functioning national regulatory structure that spans decades of deliberation, compromise and practice.

By applying the Clean Air Act, the next president can stand on the shoulders of legal and regulatory precedent. He can adopt an executive branch strategy to complement the next round of legislative efforts, now also in preparation. He can lead climate policy development through existing authority, and ensure that the US has a strong position going in to the next round of international climate negotiations. Action in the first hundred days can set the stage for genuine US re-engagement in the international climate effort in Copenhagen in 2009.

The EPA's request for public comment has provoked an expert discussion of new possibilities for swift climate action, and one audience will be paying it particular attention: the next president's transition team. An energy crisis, a climate crisis and an economic crisis have joined forces in a perfect storm requiring an immediate response based on new thinking. Continued exploration of this promising avenue of policy development is crucial to a sound and swift national response. There is no time to waste.  Michael Northrop is New York-based program director for sustainable development at the Rockefeller Brothers Fund. David Sassoon runs New York-based communications agency Science First. E-mails: [mnorthrop@rbf.org](mailto:mnorthrop@rbf.org), [dsassoon@sciencefirst.net](mailto:dsassoon@sciencefirst.net)